Washington University Law Review

Volume 88 | Issue 1

2010

In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making

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Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 Wash. U. L. Rev. 1 (2010).
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Washington University
Law Review

VOLUME 88 NUMBER 1 2010

IN SEARCH OF A THEORY OF DEFERENCE: THE EIGHTH AMENDMENT, DEMOCRATIC PEDIGREE, AND CONSTITUTIONAL DECISION MAKING

ERIC BERGER*

The Supreme Court's recent Eighth Amendment death penalty case law is in disarray, and the confusion is symptomatic of a larger problem in constitutional doctrine. In Baze v. Rees *and* Kennedy v. Louisiana*, the Court approached the challenged state policies with vastly different levels of deference. Though the Court purported to apply longstanding Eighth Amendment tests in both cases,* Baze *was highly deferential to state policy, and* Kennedy *was not deferential at all. Remarkably, neither the Court nor legal scholars have acknowledged, let alone justified, these contrasting approaches.*

This Article proposes a theory of deference to address this discrepancy. Courts often premise deference in constitutional cases on political authority and epistemic authority. While these rationales make sense in theory, courts sometimes mechanically repeat them without asking whether the responsible institution enjoys either kind of authority in

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reality. Courts should engage in such inquiries before summarily granting or denying deference.

In light of these principles, the Court approached the problems of deference in Baze *and* Kennedy *carelessly. Whereas* Baze *assumed (without explanation) that the state possessed political and epistemic authority worthy of deference,* Kennedy *assumed (also without explanation) the exact opposite. Attention to these issues in the Eighth Amendment and other constitutional contexts would encourage more transparent, deliberative policymaking and more careful, candid judicial constitutional decision making.*

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INTRODUCTION

The United States Supreme Court recently announced two high-profile Eighth Amendment death penalty decisions. In *Baze v. Rees*,[1] the Court upheld Kentucky's lethal injection procedure against a challenge that it created an unconstitutional risk of excruciating pain. Less than three months later, in *Kennedy v. Louisiana*,[2] the Court struck down Louisiana's statute permitting the imposition of the death penalty for child rape. The Court in both cases purported to apply longstanding Eighth Amendment tests to determine whether a state practice is "cruel and unusual."[3] Both cases, for instance, discussed other states' practices, "evolving standards of decency," and the vague concept of "dignity." In other words, even though one case challenged a method of execution and the other challenged a death sentence as disproportionate to the crime, the Court posed similar questions in both cases.

Despite these ostensible similarities, the Court approached its own questions very differently. *Baze* was highly deferential to the state policy; *Kennedy* was not deferential at all.[4] *Baze* ignored details increasing the risk of excruciating pain and, in a far-reaching opinion, not only rejected the challenge to Kentucky's lethal injection procedure but also ostensibly protected other states' procedures. By contrast, *Kennedy* went out of its way to question the penological efficacy of Louisiana's policy. Nowhere, though, did the Court explain why it was properly positioned to overrule the Louisiana legislature's determination that capital punishment served

1. 128 S. Ct. 1520 (2008).
2. 128 S. Ct. 2641 (2008).
3. U.S. CONST. amend. VIII.
4. *See infra* Part I.B.2.

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retributive and deterrent purposes in this context or why its view of the facts was superior to the State's. In short, *Baze* gave all benefit of the doubt to the State, whereas *Kennedy* gave none.[5]

There are ways of explaining the Court's different approaches.[6] Perhaps the Court cares more about policing "who" will be executed than "how" he will be executed. It might believe, for instance, that invalidating a method of execution would require intrusive judicial oversight of the replacement method. The Court, however, does not articulate or justify that preference. Nor is such a preference justifiable; alternative methods of execution are easily implemented without substantial judicial involvement.[7] Nor did the Court embrace any of the other potential explanations for the discrepancy. Moreover, such explanations are ultimately just that—explanations, not adequate justifications. The Court, of course, need not decide all Eighth Amendment cases the same way, but when it approaches cases arising under the same constitutional provision so differently, it ought to explain what triggers such different levels of review. The Court needs a theory of deference.

This Article explores the long-ignored problem of constitutional deference that is highlighted by these contrasting decisions. The levels of deference—judicial respect for the political branches' policy judgments and factual determinations[8]—are often outcome determinative in constitutional cases, yet there is often no roadmap for the level selected. The Court, of course, uses the familiar tiers of scrutiny (rational basis, intermediate scrutiny, and strict scrutiny) in, *inter alia*, equal protection and First Amendment doctrine, but it applies those tiers inconsistently and has not imported them to all constitutional doctrine. Similarly, the Court sometimes defers to legislative facts but offers little guidance to lower courts and litigants as to when such deference is appropriate.[9] Scholars, for their part, have focused little on the issue of deference outside the obvious context of the tiers of scrutiny.[10]

Judicial and scholarly silence, however, is misleading. The degree of deference often dictates the result in constitutional cases.[11] And whether it

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5. *See infra* Part I.B.

6. *See infra* Part II.

7. *See* Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259, 315–23 (2009) (discussing easily implemented remedies); *infra* Part II.A.

8. *See infra* Parts I.A, III.A.

9. *See infra* Parts I.A, I.B.3.

10. *See* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1061 (2008) ("Deference . . . has received surprisingly little . . . attention in constitutional scholarship.").

11. *See* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of*

admits it or not, the Court approaches cases with widely varying degrees of deference.[12] Though the Court typically does not articulate a level of deference in Eighth Amendment cases, it is quite clear that it applied something resembling strict scrutiny in *Kennedy* and, essentially, rational basis review in *Baze*.[13] In neither case, though, did the Court explain what triggers rigorous or lax review on either policy or factual questions. This Article examines the Court's stealth, outcome-determinative judgments and proposes more transparent factors that the Court should consider when selecting a level of deference in Eighth Amendment and other constitutional cases, particularly those currently lacking doctrinal approaches to deference.

This examination begins with what often drives judicial deference in constitutional cases in the first place: political authority and epistemic authority.[14] With regards to political authority, the Constitution separates power into three branches of government,[15] and political branch officials—who are often elected by and answerable to "the people"—usually possess more authority to make policy decisions than unaccountable judges.[16] As for epistemic authority, the political branches also often have a technical expertise that exceeds judges' in many substantive areas, so courts frequently stay away from fact-laden debates.[17] There are, of course, other reasons for judges to defer, but these two are often paramount in constitutional cases.

While these rationales in theory seem reasonable, courts in practice sometimes cite them without regard to whether they actually make sense in a given case. For example, to the extent that political authority concerns militate in favor of judicial restraint, lest courts interfere with the will of

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Rights, 84 IOWA L. REV. 941, 953 (1999) ("The practice of deference has drastic effects on the outcomes of cases . . . .").

12. *Cf.* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 254 (1994) ("The question . . . is what . . . causes the variation in the judicial role.").

13. I use terms like "strict scrutiny" and "rational basis" in the Eighth Amendment context as shorthand to generally indicate the Court's level of deference. In using those terms, I am not suggesting that the Court has imported or should import the formulaic tiers of scrutiny from equal protection and other doctrines to the Eighth Amendment context.

14. *See* Horwitz, *supra* note 10, at 1078 (explaining that courts defer typically for reasons of "legal authority" and "epistemic authority") (emphasis omitted); *infra* Parts I.A, III.A.

15. *See* U.S. CONST. arts. I–III.

16. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18 (2d ed. 1986) (questioning the legitimacy of judicial review by unelected judges who overturn actions of elected, accountable government officials).

17. *See* Horwitz, *supra* note 10, at 1085–86 (explaining that courts defer on epistemic grounds when they believe another institution will be better than the judiciary at evaluating relevant facts).

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the people, application of deference on these grounds assumes that the challenged governmental policy roughly reflects democratic preferences.[18] But not all governmental policies are products of an equally democratic genesis. In some cases, elected legislators pass a bill, and it is signed into law by the elected executive. Other times, low-level bureaucrats craft policies in secret with no legislative guidance or oversight.[19] In such cases, the political authority of the policy should not be taken for granted. Similarly, to the extent that deference rests on epistemic authority, that deference is less warranted when the political branches, in fact, lack any real understanding of the relevant subject.

Deference should therefore turn in part on the actual (rather than theoretical) political authority and epistemic authority behind a policy's enactment. In other words, deference should turn on the applicability of the very reasons courts typically cite when they defer. Collectively, a policy's political authority and epistemic authority comprise what I call that policy's "democratic pedigree." (I am therefore using the phrase "democratic pedigree" as a shorthand for the political and epistemic authority underlying a challenged policy.) Inquiries into democratic pedigree—that is, into political and epistemic authority—should help courts determine the extent to which governmental policy and factual determinations result from properly functioning governmental processes that help "ensur[e] broad participation in the processes and [benefits] of government."[20]

To ascertain a policy's political authority, courts should first consider the political authority of the governmental institution creating that policy. Courts often treat legislative policies as presumptively democratic,[21] but the political authority of administrative agencies, by contrast, turns more on context. To gauge this authority, courts can look at the nature of the administrative processes used to adopt a challenged policy (such as a lethal injection procedure). Specifically, courts, drawing on administrative

18. *Cf.* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 128–32 (1996) (explaining that democratic theory does not pretend that representatives represent constituents perfectly).

19. *See infra* Parts III.B.1.b, III.C.1.

20. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980); *see also* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 15 (2005) [hereinafter BREYER, ACTIVE LIBERTY] (arguing that policy should be traceable to the people themselves).

21. Of course, it is debatable whether legislative action should be treated as presumptively democratic, but the Court has indicated that it should be. *See, e.g.*, Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 n.9 (1983) (discussing the "presumption of constitutionality afforded legislation drafted by Congress"); *infra* Part III.B.1.a.

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law principles, should consider (1) the specificity of the legislative delegation; (2) the extent to which the legislature intended to grant the agency lawmaking authority; (3) the extent to which the agency adopted its policy using formalized administrative procedures and weighing constitutional constraints; (4) the amount of oversight over the delegated policy; and (5) the transparency with which the officials adopted and implemented the policy.[22] Collectively, these inquiries can help courts ascertain whether the enacting agency possesses genuine political authority and accountability worthy of judicial deference. Deference under this inquiry, then, should exist on a sliding scale—the more political authority, the more deference the agency presumptively deserves. In other words, if an agency has adopted a policy *without* legislative guidance, lawmaking authority, formalized procedures, oversight, or transparency, the political authority of the resulting policy is weak.

Another component of political authority draws on the famous *Carolene Products* footnote.[23] This inquiry asks whether the challenged policy (whether legislative or administrative) uniquely burdens unpopular minorities incapable of protecting themselves through the usual political processes.[24] Policies that burden only select portions of the population and not, as John Hart Ely put it, "people like us" are inherently suspect because they deny classes of people broad participation in government.[25] When a policy denies segments of the population access to the process, distributions, and benefits of government, the political authority undermining that policy is compromised.[26] Courts should therefore view with suspicion policies burdening such select groups.[27]

In addition to political authority, deference should also turn in part on the epistemic authority of the responsible officials. Courts often assume that the other branches possess superior expertise over policy matters and that they bring that expertise to bear on their policy decisions.[28] This

22. *See infra* Part III.B.1.b.

23. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

24. *See id.* ("[P]rejudice against discrete and insular minorities . . . call[s] for a . . . more searching judicial inquiry."); ELY, *supra* note 20, at 135–80 (discussing ways to facilitate the representation of minorities); *infra* Part III.B.1.c.

25. ELY, *supra* note 20, at 173–75.

26. *See id*.

27. For more thorough critiques and elaborations of Ely's theory, see generally Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 742 (1985) (discussing which minorities deserve judicial protection); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065–67 (1980) (criticizing process-based theories); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045–57 (1980) (critiquing Ely's theory); *infra* Part III.B.1.c.

28. *See infra* Part III.B.2.

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assumption is often correct, but not always. When it is wrong, judicial deference on the basis of the other branches' supposed epistemic authority is undeserved, particularly when the political actor is an administrative agency whose political legitimacy is premised in substantial part on its supposed expertise.

Given that judicial deference so often rests on the unconsidered assumption that the challenged practice has been crafted with suitable political authority and expertise, these considerations help determine whether those assumptions are well founded in a particular case. If well founded, then deference may, in fact, be appropriate. If not, then courts should not defer simply because the policy emanates from the political branches. Indeed, when courts defer to administrative actors lacking political and epistemic authority, they effectively let such actors shape the meaning of the Constitution, sometimes in profound ways. Some administrative actors may never have considered the constitutionality of their actions, yet deference to their judgments can have a "portentous aftermath."[29] Unconsidered judicial deference, in other words, lets policies with weak democratic pedigree "establish[] themselves without any formal sanction at all from anybody authorized to state or establish the law of the land."[30] As Charles Black put it, courts should be more careful about deferring where "what is actually involved is a confrontation between the Court and some official to whose judgment on constitutionality none of the piously repeated rules of deference and restraint have anything like the application they might be thought to have to [the legislature]."[31]

Of course, democratic pedigree is difficult to assess, and these factors can cut different ways in different cases. Political and epistemic authority are complicated themselves, and they may sometimes even clash with each other.[32] This Article does not propose an overarching theory instructing courts how always to approach these difficult questions. Instead, it argues that courts should be more attuned to these factors, particularly given that

29. BICKEL, *supra* note 16, at 131–32; *see also* Korematsu v. United States, 323 U.S. 214, 245–46 (1944) (Jackson, J., dissenting) (arguing that once a court reviews and approves governmental action, it creates a constitutional rule with its own "generative power").

30. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 89 (1969).

31. *Id*. at 77.

32. *See, e.g.*, Tummino v. Torti, 603 F. Supp. 2d 519, 544 (E.D.N.Y. 2009) (discussing conflicts between the FDA's scientific findings and political pressure from the White House regarding the availability of Plan B contraception); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54 (discussing "suggestions of widespread tampering by the Bush administration with the global warming data reported by numerous federal agencies, including EPA," for political reasons).

they frequently justify deference on precisely these grounds. To that extent, this Article's objective is to identify important questions that courts have been shortchanging, not to propose a code for courts to resolve those issues in all difficult cases.[33]

Indeed, though significant, democratic pedigree is not all that should determine the deference that a court offers a government practice under constitutional attack. Deference, after all, is not the substantive inquiry, but the lens through which courts conduct the substantive inquiry. Substantive concerns, then, might militate for heightened scrutiny, independent of a democratic-pedigree analysis. Legislatively enacted content-based speech restrictions, for instance, would trigger heightened scrutiny, notwithstanding their strong democratic pedigree.[34] However, in determining the level of deference, courts should pay greater attention to democratic pedigree, especially when there is good reason to believe, as in *Baze*, that the government is acting entirely out of public view.

In light of these principles, the Court approached the problem of deference carelessly in *Baze* and *Kennedy*. *Baze* looks especially bad under the democratic-pedigree inquiry because the Kentucky lethal injection procedure was designed in secret by nonexperts without legislative guidance or oversight, and yet the Court applied extremely deferential review. Had the Court considered the administrative processes underlying the challenged procedure, it would have realized that both its political and epistemic authority were extremely shaky.

As for *Kennedy*, the Court also ignored questions of political and epistemic authority in striking down the Louisiana statute. The Court treated the question of whether capital punishment for child rape is "cruel and unusual" as largely a factual one, considering whether national consensus disfavors capital punishment for that crime and whether capital punishment serves deterrent or retributive purposes.[35] For each inquiry, the Court concluded that the facts weighed against the constitutionality of the Louisiana policy, and, accordingly, it ruled the statute unconstitutional. But the Court nowhere explained why (or if) Louisiana's political and epistemic authority were lacking, simply assuming that the judiciary's facts were superior to the state legislature's.

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33. *Cf.* BREYER, ACTIVE LIBERTY, *supra* note 20, at 19 (arguing that the democratic tradition of the Constitution should inform an "attitude" with which courts approach concrete cases).

34. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 412 (1989) (applying strict scrutiny to flag-desecration statute because it was content based); *see also infra* note 232 and accompanying text.

35. One might contend that the question of retribution is not so much factual as moral, but the Court appeared to measure retribution with factual inquiries. *See infra* Parts I.B.3, III.C.2.

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Thus, whereas *Baze* assumed (without explanation) that the State possessed political and epistemic authority worthy of deference, *Kennedy* assumed (also without explanation) the exact opposite. Attention to democratic pedigree would not necessarily have resulted in different outcomes, but it would have required more careful analyses and greater judicial transparency about the factors really driving the decision. Such analysis would, in turn, encourage the political branches to engage in more deliberative and transparent policymaking.

The Article proceeds as follows. Part I opens by defining "deference." After briefly summarizing *Baze* and *Kennedy*, it then compares them, arguing that while the two cases ostensibly track each other with similar language, they treat that language and the factual records very differently. Indeed, some language used to defer to the State in *Baze* is used in *Kennedy* to rigorously review the challenged policy.

Part II considers potential explanations for this divergence, including the different natures of the questions presented, precedent, potential interference with the death penalty, litigation costs, and the justices' personal preferences. Ultimately, however, this Part concludes that while these factors help explain the Court's decisions, none adequately justifies the discrepancy. The Court therefore needs a justification—a theory of deference.

Part III proposes that theory of deference, focusing on the democratic pedigree of the challenged policies. It argues that the courts should not mechanically rely on the traditional justificiations for judicial deference used in many constitutional cases: political and epistemic authority. Instead, courts should ask whether these bases for deference actually apply—that is, whether the challenged policy was adopted by a governmental actor with genuine, rather than illusory, political authority and epistemic authority. Applying this theory of deference, the Court then could begin to be more straightforward about the factors guiding its review of criminal punishments and other constitutional issues lacking preexisting approaches to deference. This theory would also help promote transparent, deliberative government, while only modestly revising current doctrine. It is therefore both normatively desirable and practically achievable.

I. JUDICIAL DEFERENCE AND THE EIGHTH AMENDMENT

A. Deference (Briefly) Defined

Judicial deference generally requires a court to follow another governmental branch's decision, which the court may not have reached

independently.[36] Courts generally defer to the political branches, either because of their political authority, epistemic authority, or both.[37] In reviewing the political branches' actions, courts then consider both legislative policy and factual determinations.

For better or worse, courts often conflate deference to policy judgments with deference to factual determinations.[38] Strictly speaking, these are different kinds of judicial restraint; the familiar constitutional tiers of review are not necessarily an appropriate guide for judicial deference to legislative fact finding.[39] Nor is judicial deference for one category necessarily predictive of whether courts will defer in the other. A court, for instance, could apply strict scrutiny to review of a governmental policy, while simultaneously deferring to the legislature's fact finding.[40] Similarly, a court could defer to a legislature's policy judgment regarding the importance of a governmental interest, while simultaneously viewing its factual findings with skepticism.[41]

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36. *See, e.g.*, Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 665 (2000) ("Judicial deference acknowledges that, based on the interpretation of another branch of government, a court might arrive at a conclusion different from one it would otherwise reach.").

37. *See, e.g.*, Baze v. Rees, 128 S. Ct. 1520, 1531 (2008) (plurality opinion) (deferring so as not to "intrude" on state legislature's political authority and so that courts avoid "ongoing scientific controversies beyond their expertise"); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441–42 (1985) ("[T]he courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued."); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863–65 (1984) (explaining that "policy arguments are more properly addressed to legislators or administrators, not to judges," in part because administrators "with great expertise" are in a "better position" to make policy determinations); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations . . . ."); Horwitz, *supra* note 10, at 1068 (explaining that judicial deference is often premised on legal or epistemic authority); *infra* Part III.A. Other kinds of deference, such as appellate court deference to trial court fact finding, are beyond the scope of this Article. *See generally* Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233 (2009) (discussing standards of review generally).

38. *See* Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 12 (2009) ("Courts and commentators often conflate strict scrutiny . . . with judicial skepticism of legislative fact-finding . . . ."); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 151–52 (2001) (arguing that judicial deference to Congress typically includes both deference to Congress's "choice of means to implement the Constitution's grants of power" and to its "factual conclusions").

39. *See* Borgmann, *supra* note 38, at 8–10 (arguing that judicial review of legislative policies and facts should be treated as related, but distinct, inquiries).

40. *Id*. at 12; *see also* Grutter v. Bollinger, 539 U.S. 306, 326–33 (2003) (applying strict scrutiny but deferring to law school's factual judgment that diversity is important to its educational mission).

41. Borgmann, *supra* note 38, at 12; *see also City of Cleburne*, 473 U.S. at 450 (applying rational basis but finding that ordinance rested on "irrational prejudice against the mentally retarded").

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That being said, these formulations of deference have more, rather than less, in common with each other. The line between policy judgment and factual finding is not always clear, and, ultimately, deference in the name of either restrains the Court from rigorously reviewing the actions of the political branches. Despite important exceptions, courts tend to approach policy and factual judgments in a given case with similar degrees of deference, especially when their reasons for granting or not granting deference are unclear.[42] This Article therefore defines "deference" broadly to encompass judicial respect for both the political branches' policies and factual assumptions.

B. Deference in Baze *and* Kennedy

1. Brief Doctrinal Overview

Two Kentucky death row inmates brought *Baze v. Rees* in state court against state officials, contending that Kentucky's lethal injection procedure created a substantial risk of excruciating pain in violation of the Eighth Amendment.[43] Kentucky's execution protocol consisted of three drugs: an anesthetic, a paralytic, and a fatal heart stopper.[44] The plaintiffs argued that if the anesthetic failed to take effect, the paralytic would conceal excruciating pain caused by the third drug burning through the inmate's veins on the way to stop his heart.[45] And because many states employ incompetent personnel to prepare and administer the drugs, the petitioners contended, the risk of error was, in fact, substantial.[46]

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42. *See, e.g.*, Kennedy v. Louisiana, 128 S. Ct. 2641, 2661–64 (2008) (appearing to apply heightened scrutiny and to make factual determinations against state); Baze v. Rees, 128 S. Ct. 1520, 1531 (2008) (appearing to apply rational basis review and cautioning against embroiling courts in factual "scientific controversies"); Gonzales v. Carhart, 127 S. Ct. 1610, 1636 (2007) (appearing to relax scrutiny for review of laws restricting abortions and giving "state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty"); Emp't Div. v. Smith, 494 U.S. 872, 882–90 (1990) (applying rational basis review to generally applicable, neutral laws burdening religion and assuming the fact that permitting religious exemptions to such laws would "court[] anarchy").

43. Baze, 128 S. Ct. at 1529. Though *Baze* originated in state court, most lethal injection challenges are actions brought in federal court under 42 U.S.C. § 1983. *Baze*'s analysis unquestionably applies to those § 1983 actions. *See, e.g.*, Jackson v. Danberg, 594 F.3d 210, 212 (3d Cir. 2010) (applying *Baze* to federal court § 1983 lethal injection challenge); Emmett v. Johnson, 532 F.3d 291, 298–301 (4th Cir. 2008) (same).

44. *See generally* Berger, *supra* note 7, at 263–73 (discussing three-drug protocol); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 56–58 (2007) [hereinafter Denno, *Quandary*] (discussing problems with three-drug protocol).

45. *Baze*, 128 S. Ct. at 1530.

46. *See* Brief for Petitioners at 12–24, Baze v. Rees, 128 S. Ct. 1520 (2008) (No. 07-5439).

Seven justices voted to reject the plaintiffs' challenge, but only Justices Kennedy and Alito joined Chief Justice Roberts's plurality opinion.[47] The Chief Justice struck a highly deferential tone, emphasizing that judicial involvement in lethal injection "would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures."[48] Articulating the new legal standard, he required that plaintiffs establish both that the current lethal injection procedure poses "a substantial risk of serious harm" and that the state has refused to adopt a "feasible, readily implemented" alternative "significantly" reducing that risk.[49] Deprived of much discovery, the Kentucky plaintiffs failed on both counts.[50] But rather than remand for more facts, the plurality not only upheld the Kentucky procedure but also sought to insulate other states' procedures from legal challenges. Specifically, it held that a "[s]tate with a lethal injection protocol substantially similar to the protocol we uphold today would" pass constitutional muster.[51] It then indicated that other states' procedures would meet this test.[52] *Baze* thus tried to offer a kind of preemptive deference to states with three-drug protocols, even though the record in Kentucky was sparse and other states had encountered serious problems with their procedures.[53]

Kennedy v. Louisiana reached the Supreme Court on direct appeal from the petitioner's trial, which culminated in his death sentence for the rape of his eight-year-old stepdaughter.[54] Petitioner argued that his death sentence was unconstitutionally disproportionate to his crime, which had not resulted in the death of his victim.[55] The Court agreed by a 5–4 vote, proceeding through several analyses to bolster its conclusion that capital

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47. Consistent with Court precedent, this Article treats Chief Justice Roberts's plurality opinion as the Court's holding. *See, e.g.*, Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotation marks and citations omitted). *But see* Justin F. Marceau, *Lifting the Haze of* Baze*: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 217 (2009) (discussing difficulties of determining the "narrowest" opinion in *Baze*).

48. *Baze*, 128 S. Ct. at 1531 (plurality opinion).

49. *Id.* at 1532.

50. *See* Berger, *supra* note 7, at 273–77 (discussing *Baze* plurality opinion).

51. *Baze*, 128 S. Ct. at 1537 (plurality opinion).

52. *Id.* (explaining that "the standard we set forth here resolves more challenges than [Justice Stevens] acknowledges").

53. *See* Berger, *supra* note 7, at 268–73 (discussing problems with lethal injection procedures in California and Missouri).

54. Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008).

55. *Id.*

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punishment was disproportionate to the crime of child rape. First, the Court surveyed state practices and found that national consensus was against the death penalty for this offense.[56] The Court then looked beyond state practices to its "own judgment" and again found the punishment disproportionate.[57] But while the Court did recognize the distinction between homicide and other violent crimes and "the necessity to constrain the use of the death penalty,"[58] it opted not to rely primarily on these general, moral concerns.[59] Instead, it engaged in ostensibly factual inquiries about the penalty's retributive and deterrent effects in this context.[60] Drawing significantly on amicus briefs and social science research, the Court concluded that capital punishment did not effectively further either of these goals.[61] In light of these factual findings, the Court found unconstitutional the application of the death penalty for child rape.

2. *Ostensible Similarities*

Both *Baze* and *Kennedy* asked whether particular state punitive practices violated the Eighth Amendment's prohibition of cruel and unusual punishments as incorporated against the states by the Fourteenth Amendment. In places, the Court engaged in similar analyses and quoted similar doctrinal language, discussing state counting, evolving standards of decency, and dignity. These ostensible similarities are significant because they create the illusion that the Court is consistently applying preexisting Eighth Amendment doctrine. On closer inspection, however, these similarities are only superficial. Indeed, the Court uses the language and doctrine in very different ways, resulting in heightened scrutiny in *Kennedy* and relaxed review in *Baze*.

a. *State Counting*

In both *Baze* and *Kennedy*, the Supreme Court engaged in "state counting"—surveying state practices to see how many states permit the challenged practice. At first glance, this survey seems to be a common

56. *Id.* at 2653.
57. *Id.* at 2658.
58. *Id.* at 2660.
59. Interestingly, a subsequent case construing *Kennedy* articulated the rule against capital punishment for nonhomicide crimes more firmly and categorically than *Kennedy* itself did. *See* Graham v. Florida, 130 S. Ct. 2011, 2022 (2010) ("[T]he Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals." (citing *Kennedy*, 128 S. Ct. at 2660)).
60. *Kennedy*, 128 S. Ct. at 2661–64.
61. *See id.* at 2662–64.

inquiry lending some consistency across the different lines of Eighth Amendment doctrine. On closer inspection, though, the Court's use of state counting in the two lines of cases is very different (and problematic, for different reasons). These differences both reflect and contribute to the dramatically different levels of deference.

State counting is common in Eighth Amendment proportionality cases.[62] Eighth Amendment doctrine looks to "the evolving standards of decency that mark the progress of a maturing society."[63] In identifying these "evolving standards of decency," the Court has indicated at times that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[64] Accordingly, recent capital proportionality cases like *Atkins v. Virginia*,[65] *Roper v. Simmons*,[66] and *Kennedy* all devote significant space to surveying state practices, identifying "objective indicia of consensus against" capital punishment for, respectively, the mentally retarded, juveniles, and child rapists.[67] For example, in *Kennedy*, the majority noted that forty-four states had not made child rape a capital offense; that the last individual executed for rape of a child was in 1964; and that only six of the thirty-seven death penalty jurisdictions authorized capital punishment for child rape.[68] Thus, explained the Court, the evidence tipped in favor of a national consensus against the death penalty for child rapists.[69]

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62. *See generally* Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1091 (2006) (arguing that the Supreme Court has consistently looked to state legislation to determine a national consensus in cases articulating the constitutional boundaries for application of the death penalty). For ease of presentation, I sometimes refer to capital proportionality cases as "proportionality" cases, even though there is a separate doctrinal line of noncapital proportionality cases. *See, e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1146–47 (2009) [hereinafter Barkow, *Two Tracks*]. When discussing both sorts of proportionality cases, I distinguish them appropriately.

63. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)) (internal quotation marks omitted).

64. Penry v. Lynaugh, 492 U.S. 302, 331 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002). *But see infra* Part I.B.2.b.

65. 536 U.S. 304 (2002).

66. 543 U.S. 551 (2005).

67. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2651 (2008) (counting states permitting death penalty for child rape); *Roper*, 543 U.S. at 564 (surveying state statutes and noting "evidence of national consensus against the death penalty for juveniles"); *Atkins*, 536 U.S. at 315 (surveying states exempting the mentally retarded from capital punishment). A recent noncapital proportionality case also surveyed state practices. *See* Graham v. Florida, 130 S. Ct. 2011, 2023–25 (2010) (surveying states permitting life sentences without parole for juvenile offenders).

68. *Kennedy*, 128 S. Ct. at 2651–52.

69. *Id.*

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This analysis might seem straightforward, but it is subject to manipulation. As an initial matter, given that the Court had already struck down the death penalty for the rape of an adult woman, state practices may not reflect national consensus so much as state legislatures' (correct) assumptions that capital punishment for any rape would rest on shaky constitutional ground.[70] Assuming arguendo that state practices might reflect national consensus, the Court's approach to state counting in *Atkins*, *Roper*, and *Kennedy* is nevertheless methodologically inconsistent. In *Atkins* and *Roper*, the survey revealed that many states still engaged in the challenged practice. In *Roper*, twenty states lacked a formal prohibition on executing juveniles.[71] In *Atkins*, twenty states permitted execution of the mentally retarded—and only eighteen death penalty states forbade it.[72] Faced with survey results that arguably counseled against the outcome that the Court apparently desired, the majority in both cases noted that regardless of the straight numbers, it would also consider "the consistency of the direction of change."[73] The Court also argued that even in states permitting the execution of juveniles, "the practice [was] infrequent."[74]

These additional analyses give the Court great flexibility to find an approach that disfavors the state.[75] If a straight count of states does not support the Court's desired conclusion, then perhaps related inquiries will. Indeed, in *Kennedy*, the Court found unpersuasive the trend *toward* making child rape a capital offense because relatively few states had made child rape a capital offense.[76] The Court thus manipulates its state counting to highlight consensus against the challenged practice, even when consensus one way or another is not so clear.[77]

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70. *See id*. at 2665 (Alito, J., dissenting) (arguing that precedent "stunted legislative consideration of the question").

71. *Roper*, 543 U.S. at 564.

72. *Atkins*, 536 U.S. at 321–22 (Rehnquist, C.J., dissenting).

73. *Roper*, 543 U.S. at 566; *see also Atkins*, 536 U.S. at 315.

74. *Roper*, 543 U.S. at 564.

75. *But see* Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 18 (2009) (arguing that the Court is "casual about . . . how it counts states" because "state-counting [is] a mechanism of judicial self-limitation").

76. Kennedy v. Louisiana, 128 S. Ct. 2641, 2656–57 (2008).

77. Justice Scalia, in particular, has argued that the Court's state counting is window-dressing, which the majority uses to conceal the fact that it is simply imposing its own values. Thus, when it came to light that the Court's survey of national practices in *Kennedy* had omitted the military law that *does* authorize death for child rape, Justice Scalia agreed with the majority that the case need not be reheard "because the views of the American people on the death penalty for child rape were, to tell the truth, irrelevant to the majority's decision in this case." Kennedy v. Louisiana, 129 S. Ct. 1, 3 (2008) (Scalia, J., opinion respecting denial of petition for rehearing).

http://openscholarship.wustl.edu/law_lawreview/vol88/iss1/1

By contrast, *Baze*'s use of state counting is exceedingly deferential. The *Baze* plurality opened by noting "at the outset" that it would be difficult to strike down a method of execution that is so widely used.[78] Thirty-six states and the federal government, the plurality noted, have adopted lethal injection as the preferred method of execution, and most or all of those jurisdictions use the three-drug protocol.[79] Given the prevalence of this protocol and the absence of any competing protocol, the plurality emphasized that it could not find Kentucky's method "objectively intolerable."[80]

At first glance, one could argue that state counting proves to be deferential in *Baze* simply because the survey of states clearly demonstrates a common practice. However, just as the Court's use of state counting in proportionality cases is questionable because it is so easily manipulated, so too is the state counting in *Baze* problematic because it is so unexamined. State counting is supposedly constitutionally relevant because it reflects national consensus. When courts striking down a challenged policy can point to evidence that it has been elsewhere rejected, they arguably mitigate the countermajoritarian problem.[81] But in identifying the widespread use of the three-drug procedure, *Baze* offered no theory for why state practices should be probative. Legislatures often play little role in designing execution procedures, passing broad laws that punt authority to unelected Department of Corrections (DOC) officials, who usually operate in secrecy.[82] As a result, neither the legislators themselves nor the public at large know anything about the procedure.[83] It would therefore be odd to think that the number of states using the procedure is any indication of democratic consensus. Indeed, given that many state DOCs have blindly copied the procedure from each other

78. Baze v. Rees, 128 S. Ct. 1520, 1532 (2008) (plurality opinion).

79. *Id.* at 1532.

80. *Id.* at 1534–35.

81. *See* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 369 (2009) (arguing that state counting in a variety of constitutional contexts demonstrates that the "Court is an inherently majoritarian institution").

82. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-704 (2009) ("The penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections."); GA. CODE ANN. § 17-10-38 (2008) (proscribing similar guidelines); Berger, *supra* note 7, at 303 (discussing vague state statutes that "punt authority" to state DOCs).

83. *See, e.g.*, Katie Roth Heilman, Comment, *Contemplating "Cruel and Unusual": A Critical Analysis of* Baze v. Rees *in the Context of the Supreme Court's Eighth Amendment "Proportionality" Jurisprudence*, 58 AM. U. L. REV. 633, 653 (2009) (arguing that the plurality's assertion regarding lethal injection's ubiquity is not especially relevant given that the public knows very little about the procedure).

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without assessing its dangers, state counting creates a perverse rule that rewards states for copying a procedure without assessing its risks.[84]

The plurality's use of state counting also misconstrued the issue presented. Plaintiffs in lethal injection actions like *Baze* did not challenge lethal injection or even the three-drug protocol *per se*. Rather, they challenged the procedure's details. Properly implemented, the three-drug protocol is presumably painless; improperly implemented, it is excruciating.[85] Accordingly, the safety—and, hence, constitutionality—of the procedure rides on the details of each state's implementation. But state DOCs implement the protocols in dramatically different ways.[86] Therefore, the fact that many other states have adopted the three-drug protocol, as *Baze* emphasized, is probative of very little, given the terrific variation among those states' practices and the constitutional relevance of those variations. Accordingly, just as proportionality cases like *Kennedy* suspiciously manipulate state counting to help justify striking down state practices, so too did the *Baze* plurality find state counting probative to justify judicial deference, when closer examination would have seriously called into question its relevance.[87]

b. Evolving Standards of Decency

Under contemporary doctrine, the Eighth Amendment's meaning must be consistent with "'evolving standards of decency.'"[88] As we have seen,

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84. *See, e.g.*, Harbison v. Little, 511 F. Supp. 2d 872, 895–98 (M.D. Tenn. 2007), *vacated*, 571 F.3d 531 (6th Cir. 2009) (recounting Tennessee's decision to follow other states' practices despite significant evidence that alternative methods were far safer); Teresa A. Zimmers & Leonidas G. Koniaris, *Peer-Reviewed Studies Identifying Problems in the Design and Implementation of Lethal Injection for Execution*, 35 FORDHAM URB. L.J. 919, 921 (2008) (arguing that states performed no research "whatsoever" to determine risks of lethal injection when they adopted the procedure).

85. *See, e.g.*, Berger, *supra* note 7, at 265–66 (describing three-drug protocol).

86. *Compare* Morales v. Hickman, 415 F. Supp. 2d 1037, 1039–45 (N.D. Cal. 2006) (describing the risks of California lethal injection protocol, including data from execution logs indicating that executions did not proceed as intended), *with Harbison*, 511 F. Supp. 2d at 882–92 (describing the risks of Tennessee's lethal injection protocol, including failure to check consciousness, failure to select adequately trained executioners, and failure to monitor administration of drugs), *and* Taylor v. Crawford, No. 05-4173, 2006 WL 1779035, at *3–6 (W.D. Mo. June 26, 2006) (describing the risks of Missouri's lethal injection protocol, including dyslexic doctor mixing drugs).

87. *Cf.* Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 25–36 (2007) [hereinafter Lain, *Deciding Death*] (discussing the use of state counting and statistics in *Atkins* and *Roper* and determining that the Justices' views, not the legitimate use of statistics, accounted for the outcomes); Joshua L. Shapiro, *And Unusual: Examining the Forgotten Prong of the Eighth Amendment*, 38 U. MEM. L. REV. 465, 477–80 (2008) (arguing that in capital punishment cases, the Court has used statistics in a "results-oriented and undisciplined manner").

88. *E.g.*, Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)). This inquiry typically operates as an "irreversible ratchet," forbidding states from reversing

state counting has long been considered an important component of the "evolving standards" inquiry,[89] but courts have applied the principle inconsistently. Indeed, despite the conventional wisdom that the evolving standards inquiry is largely determined by state counting, the Court in *Kennedy* actually discussed the two separately. When the Court surveyed the states' child rape laws in Part III of its opinion, it did not once mention "evolving standards of decency."[90] Instead, in Part IV, where the Court explored its "own judgment," it explained that "[e]volving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty."[91] In other words, the Court apparently treated the "evolving standards" requirement as an invitation, not only to look for objective indicia of a national consensus in Part III, but also to ascertain its own independent judgment in Part IV as to the propriety of the death penalty in particular circumstances. Thus, the *Kennedy* Court reasoned that "[i]t is an established principle that [evolving standards of] decency, in [their] essence, presume[] respect for the individual and thus moderation or restraint in the application of capital punishment."[92]

Far from limiting the Court to an (arguably) objective survey of contemporary practices, the "evolving standards of decency" inquiry, then, invited the Court to make its own judgment as to the propriety of the death penalty—that is, to substitute Louisiana's legislative judgments with its own. As part of its own inquiry, the Court "insist[ed] upon confining the instances in which capital punishment may be imposed."[93] It also explained that "[c]onsistent with evolving standards of decency . . . there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, including child rape, on the other."[94] In other words, the Court used "evolving standards" to make its own judgment that the death penalty should be limited and that

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the Court's determinations. Jacobi, *supra* note 62, at 1119–23.

89. *See* Atkins v. Virginia, 536 U.S. 304, 312 (2002) (explaining that proportionality review under "evolving standards" should be informed by "objective factors" and that the most reliable evidence is "legislation enacted by the country's legislatures" (quoting Harmelin v. Michigan, 501 U.S. 957, 1000 (1991))); Penry v. Lynaugh, 492 U.S. 279, 331 (1987) (internal quotation marks omitted)); Jacobi, *supra* note 62, at 1091 (explaining that the Court has indicated that the clearest evidence of contemporary values to ascertain evolving standards is state legislation); *supra* notes 63–64 and accompanying text.

90. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2651–58 (2008) (surveying state penalties for child rape but not mentioning "evolving standards of decency").

91. *Id.* at 2658.

92. *Id*.

93. *Id.* at 2659.

94. *Id.* at 2660.

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there was a moral difference between murder and nonhomicide crimes. This use of "evolving standards" may go beyond other proportionality cases' reliance on that concept as an invitation to count states, but the approach nevertheless fits more generally with the Court's rigorous review in proportionality cases.

By contrast, *Baze*'s consideration of evolving standards counsels for deference. The plurality explained that "[o]ur society has . . . steadily moved to more humane methods of carrying out capital punishment."[95] It then recounted the evolution of methods of execution: "firing squad, hanging, the electric chair, . . . the gas chamber, [and, finally,] lethal injection."[96] But rather than suggesting that these evolving practices gave the Court license to intrude on the states' judgment, the plurality argued that the states themselves, without judicial interference, have progressed "toward more humane methods of execution."[97] "[O]ur approval of a particular method in the past," the plurality concluded, "has not precluded legislatures from taking the steps they deem appropriate, in light of new developments, to ensure humane capital punishment."[98] Thus, whereas *Kennedy* cited "evolving standards" to empower the Court to constrain the death penalty by striking down a state's practice, *Baze* essentially said that courts should leave states alone to evolve as they wish.[99] The Court's contradictory approaches to evolving practices reflect, once again, opposing views of judicial deference.

c. Dignity

Both *Baze* and *Kennedy* also reference "dignity," but they use that word very differently. In proportionality cases, "dignity" bolsters the individual's Eighth Amendment protection and invites the Court to engage in rigorous review of the state's policy. In *Kennedy*, the Court emphasized that law must "express respect for the dignity of the person, and the punishment of criminals must conform to that rule."[100] *Kennedy* thus made clear that it would focus primarily on the interests of the condemned. This view of "dignity" is consistent with earlier proportionality cases. *Roper*, for instance, noted that "[b]y protecting even those convicted of heinous

95. Baze v. Rees, 128 S. Ct. 1520, 1538 (2008) (plurality opinion).
96. *Id.*
97. *Id.*
98. *Id.*
99. *See id.* at 1527 (arguing that states have been "motivated by a desire to find a more humane alternative to then-existing methods").
100. Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008).

crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[101] The Court in proportionality cases thus conceives of the condemned as the Eighth Amendment-right holder and focused on *his* dignity interest, contributing further to its heightened scrutiny.[102]

By contrast, *Baze*'s attention to "dignity" focuses not on the condemned but on "[t]he [state's] interest in preserving *the dignity of the procedure*, especially where convulsions or seizures could be misperceived as signs of consciousness or distress."[103] Petitioners had argued that Kentucky should eliminate the paralytic "because it serves no therapeutic purpose while suppressing muscle movements that could reveal an inadequate administration of the first drug."[104] The plurality responded, however, that the paralytic "prevents involuntary physical movements during unconsciousness that may accompany the injection of potassium chloride" and that Kentucky's interest in the "dignity of the procedure" outweighed the risk that the paralytic would conceal excruciating pain.[105] Remarkably, this analysis suggests that the *State's* aesthetic interest in a peaceful-looking procedure trumps the inmate's interest in a transparent procedure that would more easily reveal errors of administration and intense pain. In other words, under *Baze*, the "dignity" inquiry apparently prioritizes the State's interest in the witnesses' experiences (i.e., whether they are viewing an execution that looks peaceful) over the inmate's experience (i.e., whether he feels pain). Appearances are more important than reality. *Baze* and *Kennedy*'s conflicting uses of the word "dignity" highlight, once again, internal contradictions within the Eighth Amendment doctrine. *Baze* and *Kennedy* not only come to opposite outcomes, but rest on different theories of whose interests—whose "dignity"—is primary here.

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101. Roper v. Simmons, 543 U.S. 551, 560 (2005).

102. *Cf.* Judith Resnik, *Law as Affiliation: "Foreign" Law, Democratic Federalism, and the Sovereigntism of the Nation-State*, 6 INT'L J. CONST. L. 33, 52 (2008) (arguing that since World War II and the Universal Declaration of Human Rights, the United States Supreme Court has relied on the term "'dignity' to enhance constitutional protections for individuals and [has] embed[ded] the concept into . . . the Bill of Rights," including the Eighth Amendment).

103. Baze v. Rees, 128 S. Ct. 1520, 1535 (2008) (plurality opinion) (emphasis added).

104. *Id.*

105. *Id.*

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3. *Doctrinal Divergence and the Treatment of Facts*

Another crucial difference between *Kennedy* and *Baze* is the Court's approach to the facts. As Judge Jerome Frank once noted, "[i]f you scrutinize a legal rule, you will see that it is a conditional statement referring to facts."[106] Legal rules, then, are operative only to the extent that they are applied to facts. As a result, deference involves not just the doctrinal test courts articulate but also the way they approach the relevant facts.[107]

The Court adopted nearly opposite attitudes toward the background facts in *Baze* and *Kennedy*. Whereas *Kennedy* drew liberally from amicus briefs and social science research, *Baze* downplayed such sources, especially those suggesting serious problems with the three-drug procedure in other states.[108] In *Baze*, the Court crafted a far-reaching, deferential legal standard, despite the dearth of evidence in that case. The factual record in *Baze* was sparse, a point the petitioners emphasized in their briefs.[109] The plaintiffs had been denied important discovery, including depositions, which prevented them from learning about the execution team's responsibilities and competence.[110] Given that the safety of the procedure hinges significantly on the competence of the people executing it, this denial obscured key information about how the procedure actually worked in practice.[111] Additionally, only one Kentucky prisoner

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106. JEROME FRANK, COURTS ON TRIAL 14 (1949).

107. *See* Turner v. Safley, 482 U.S. 78, 100 (1987) (Stevens, J., concurring in part and dissenting in part) ("How a court describes its standard of review when a prison regulation infringes fundamental constitutional rights often has far less consequence for the inmates than the actual showing that the court demands of the State in order to uphold the regulation."); *supra* Part I.A (explaining the connection between standards of review and judicial attitudes towards legislative fact-finding); *infra* Part III.C.

108. *See* Brief for Michael Morales et al. as Amici Curiae Supporting Petitioners at 8–28, Baze v. Rees, 128 S. Ct. 1520 (2008) (No. 07-5439) [hereinafter Morales Amicus Brief] (arguing that "public, undisputed facts from multiple jurisdictions reveal a pervasive lack of professionalism in the development of protocols and the selection, training, and oversight of execution team members") (internal quotation marks omitted).

109. *See* Brief for Petitioners at 20, 43–46, 59–60, Baze v. Rees, 128 S. Ct. 1520 (2008) (No. 07-5439) (discussing Kentucky's lack of a track record with lethal injection, and the Kentucky courts' failure to address issues in the record, and contending that because the record was created under an erroneous legal standard, the lower courts should reevaluate it).

110. *See* Reply Brief for Petitioners at 16 n.2, *Baze*, 128 S. Ct. 1520 (No. 07-5439) (discussing trial court's denial of depositions).

111. For example, in Missouri, crucial evidence regarding the execution team leader's incompetence and departures from the State's stated procedure was discovered through a deposition. *See* Deposition of John Doe No. 1 at 20, Taylor v. Crawford, No. 05-4173, 2006 WL 1779035 (W.D. Mo. June 5, 2006) [hereinafter Doe Deposition]; Berger, *supra* note 7, at 268–70 (discussing Doe

had ever been executed by lethal injection,[112] so there were few execution records shedding light on the procedure.[113]

The plurality was untroubled by these gaps in the record. It explained that, whatever the facts, courts should not embroil themselves "in ongoing scientific controversies beyond their expertise . . . ."[114] The plurality also refused to look at well-established outside facts presented in amicus briefs shedding light on problems with lethal injection in other states.[115]

In light of these limitations, the plurality might have written a narrow opinion either remanding the case for more fact finding or rejecting the plaintiffs' Eighth Amendment action on the basis of the sparse record. Or the Court might have granted certiorari in a different case with a more developed record.[116] Instead, the *Baze* plurality framed its analysis broadly, focusing on the written protocol instead of the details of implementation. The plurality praised the protocol's call for an IV team to establish both primary and backup lines, its inclusion of a phlebotomist, and the presence of officials in the execution chamber to watch for signs of IV problems.[117] While this attention is understandable, complete focus on the written protocol creates the false impression that the procedure's safety can be discerned within the four corners of the document.[118] The protocol's safeguards do weigh in favor of constitutionality, but the plurality nowhere explained that a written protocol has little value if it is

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Deposition). Thus, the denial of the deposition in *Baze* quite possibly obscured similar important information about Kentucky's lethal injection procedure.

112. *Baze*, 128 S. Ct. at 1528.

113. By comparison, other states' execution records sometimes reveal serious problems. In Missouri, for instance, the record revealed that the State had varied the amount of anesthetic prepared for some executions. *See* Letter from Defendants to Judge Fernando Gaitan (May 17, 2006), Taylor v. Crawford, No. 05-4173 (apologizing for the State's misstatements to the court about anesthetic dose).

114. *Baze*, 128 S. Ct at 1531 (plurality opinion).

115. *See* Morales Amicus Brief, *supra* note 108, at 8–35 (recounting problems in various states' lethal injection procedures).

116. Had the Court wanted to decide a method-of-execution case with a substantially more developed record, it could have granted certiorari in *Taylor v. Crawford*, a Missouri lethal injection challenge with a much more thorough trial record. *See* Taylor v. Crawford, No. 05-4173, 2006 WL 1779035, at *3–8 (W.D. Mo. June 26, 2006) (recounting problems with Missouri procedure). That it chose not to do so suggests that some justices preferred articulating an Eighth Amendment standard *without* the benefit of factual background. *See* Berger, *supra* note 7, at 279 n.102.

117. *Baze*, 128 S. Ct. at 1533–34.

118. Mere qualifications are inadequate to ensure that execution team members will competently perform their duties. In Missouri, for example, a surgeon failed to mix the drugs properly and perform other tasks crucial to humane lethal injection. *See Taylor*, 2006 WL 1779035, at *4–7 (discussing surgeon's mistakes in lethal injection). Moreover, *Baze* only addressed IV access, not the skills needed for other steps of the procedure, such as mixing the drugs, injecting the drugs, and monitoring anesthetic depth. *See* Berger, *supra* note 7, at 263–73 (discussing protocol's steps).

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not faithfully and competently carried out. Nor did the plurality concede that other states have deviated substantially from their own protocols.[119]

The plurality further minimized the importance of implementation in its discussion of accidents. Relying on the Court's 1947 decision in *Louisiana ex rel. Francis v. Resweber*,[120] the plurality explained that "accidents happen for which no man is to blame"[121] and that, "while regrettable," such an "isolated mishap . . . does not [violate] the Eighth Amendment" because it does not "give[] rise to a 'substantial risk of serious harm.'"[122] This attention to *Resweber* is significant because it further downplays implementation. More precisely, the plurality's use of *Resweber* apparently assumes that the Court will be able to distinguish between "an innocent misadventure,"[123] which would not create an Eighth Amendment problem, and an "'objectively intolerable risk of harm' that officials may not ignore."[124] In some circumstances, this assumption may be correct; a problem might arise that is so unforeseeable that it can be fairly termed an accident "for which no man is to blame."[125] But method-of-execution challenges are primarily about risk,[126] and the plaintiffs' main contention is that the states' procedures create too much risk—that is, too great a possibility of accident. And because much of the risk stems from unqualified personnel, it is impossible to know exactly what will go wrong. Incompetent personnel can make numerous kinds of errors, some unpredictable. The plurality seems to suggest that unexpected errors might be excusable, a position that would absolve the State of responsibility over unexpected harms caused by incompetent personnel, even though it was very predictable that such personnel would cause *some* error. By emphasizing that "isolated mishap[s]" do not violate the Eighth Amendment and by then proceeding to examine Kentucky's written

119. *See* Morales v. Tilton, 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006) ("[I]mplementation of California's lethal-injection protocol lacks both reliability and transparency."); *Taylor*, 2006 WL 1779035, at *4–7 (explaining that Missouri execution team leader *sua sponte* "modified the protocol on several occasions in the past").

120. 329 U.S. 459 (1947) (plurality opinion).

121. *Baze*, 128 S. Ct. at 1531 (quoting *Resweber*, 329 U.S. at 462) (internal quotation marks omitted).

122. *Id.* (quoting Farmer v. Brennan, 511 U.S. 825, 842 (1994)).

123. *Id.* (quoting *Resweber*, 329 U.S. at 470 (Frankfurter, J., concurring)) (internal quotation marks omitted).

124. *Id.* (quoting *Farmer*, 511 U.S. at 846).

125. *Id.* (quoting *Resweber*, 329 U.S. at 462).

126. *See, e.g.*, *Baze*, 128 S. Ct. at 1531–32 (requiring, *inter alia*, a substantial risk of harm for an Eighth Amendment violation); *see also* Evans v. Saar, 412 F. Supp. 2d 519, 524 (D. Md. 2006) (asking "whether an inmate facing execution has shown that he is subject to an unnecessary risk of unconstitutional pain or suffering") (internal quotation marks omitted).

protocol (but not its actual practices), the plurality ignored the facts on which the plaintiffs' case turned.[127]

Far from being troubled by the limited record, then, the *Baze* plurality exploited the factual gaps to create a standard deferential to the state. It even emphasized that that standard was not tethered to the facts of the Kentucky protocol, holding that a state protocol "substantially similar" to Kentucky's would pass constitutional muster.[128] It further insisted that this standard would apply broadly and resolve other lethal injection challenges.[129] All of this amounted to a preemptive deference, a wide-reaching deferential standard that not only ignored gaps in the record to defer to the State in the instant case but also insisted on applying that deference to other cases, with insufficient regard to factual differences.

By sharp contrast, following cases like *Atkins* and *Roper*, the Court in *Kennedy* relied heavily on facts provided by amici or social science research to strike down the challenged state practice. Whereas *Baze* cautioned that courts should not interfere with the political branches' scientific judgment and ignored some important supplemental amicus briefs, *Kennedy* saw no problem with reviewing extensive social science data and using it to second guess the political branches' judgment. Indeed, the Court repeatedly looked outside the case for crucial evidence about existing state laws;[130] pending state legislation;[131] jury practices;[132] the hardships that testimony imposes on rape victims;[133] the annual number of incidents of child rape compared to the annual number of murders;[134] the percentage of first-degree murderers sentenced to death;[135] the permanent psychological effect rape has on a child;[136] the infrequency of the death

127. As Professor Denno argues, the *Baze* plurality's use of *Resweber* is also problematic because it quotes *Resweber*'s discussion of due process and double jeopardy issues to articulate the substantive Eighth Amendment standard. *See* Deborah W. Denno, *When Willie Francis Died: The "Disturbing" Story Behind One of the Eighth Amendment's Most Enduring Standards of Risk*, *in* DEATH PENALTY STORIES 17, 91 (John H. Blume & Jordan M. Steiker eds., 2009) (criticizing Chief Justice Roberts's use of *Resweber* in *Baze*).

128. *Baze*, 128 S. Ct. at 1537.

129. *See id.* ("[T]he standard we set forth here resolves more challenges than [Justice Stevens] acknowledges.").

130. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2651–52 (2008) (discussing state child rape laws).

131. *See id*. at 2656–57 (discussing pending legislation).

132. *See id.* at 2651–58 (surveying state laws, jury practices, and other relevant information to assess state practices).

133. *See id.* at 2662 (noting hardship imposed by testimony and citing amicus brief).

134. *See id.* at 2660 (citing social science research).

135. *See id.* (citing empirical study).

136. *See id.* at 2658 (citing several studies).

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penalty for child rape and other nonhomicide crimes;[137] systemic concerns related to the "unreliable, induced, and even imagined child testimony";[138] the problem of underreporting with respect to child sexual abuse;[139] the fear of negative consequences for the perpetrator as a reason for nondisclosure;[140] and the death penalty's removal of a "strong incentive for the rapist not to kill the victim."[141] These factors were clearly central to the majority's argument that the Louisiana policy did not comport with "evolving standards of decency" and did not further legitimate penological interests of retribution and deterrence.

Kennedy's treatment of the deterrence question in particular highlights the contrast with *Baze*. The Court questioned whether capital punishment for child rape actually was a deterrent. Specifically, it contended that capital punishment's deterrent effects in this context were questionable because it "adds to the risk of non-reporting" and "may remove a strong incentive for the rapist not to kill the victim."[142] But the Court's factual suppositions rested on extremely shaky ground. With regards to nonreporting, the Court itself conceded that "we know little about what differentiates those who report from those who do not report."[143] As for the potential murder of the victim, the Court's conclusion was similarly tentative, positing only that capital punishment "may remove . . . incentive . . . not to kill the victim."[144] The Court, then, had precious little to support its factual conclusions, and yet it still relied on them to conclude that "punishment by death *may* not result in more deterrence."[145]

Kennedy's approach to facts, then, was strikingly undeferential. In addition to striking down Louisiana's statute on the basis of shaky conclusions drawn from uncertain data, the Court never explained why its factual determinations should override the legislature's moral and factual judgments that capital punishment was appropriate here. Of course, there may be good reasons for the Court to distrust democracy in this context and to prioritize its own epistemic concerns over the legislature's political

137. *See id.* at 2657–58 (discussing statistics).
138. *See id.* at 2663 (citing several studies and amicus brief).
139. *See id.* (citing several studies).
140. *See id.* at 2663–64 (citing several studies).
141. *Id.* at 2664 (citing law review article).
142. *Id.* at 2663–64.
143. *Id.*
144. *Id.* at 2664.
145. *Id*. (emphasis added).

authority. But the Court's failure to acknowledge or justify its undeferential approach to the facts is striking.[146]

II. DRIVING THE DISJOINTED DOCTRINE

A. "Who" vs. "How"

Before attempting to resolve the vastly different levels of deference in *Baze* and *Kennedy*, we should first try to understand why the Court approaches these Eighth Amendment cases so differently. The easiest explanation is that these cases are just about different subjects. The proportionality cases look at *whom* the penalty targets. The method-of-execution cases ask *how* punishment is imposed. The Court may afford different levels of deference, then, simply because it cares more about "who" than "how."

This bias against method-of-execution claims may be driven partially by the fact that states usually adopt new execution methods to make executions more humane.[147] Given that lethal injection looks humane from a distance—and, as *Baze* points out, was actually adopted "to find a more humane alternative to then-existing methods"[148]—a common reaction is that this litigation is frivolous.[149] Of course, upon closer review, this reaction dissipates, especially when observers realize that states paralyze inmates to conceal potential problems. Nevertheless, initial reactions often shape judges' approaches toward these cases and deter a hard look at the details of lethal injection.[150] By contrast, it is far easier to quickly recognize (if not necessarily agree with) the moral difficulty with executing someone who did not take a life; the punishment, to many, may look harsher than the crime. To this extent, the level of deference might be explained less by legal distinctions and more by the intuitive reactions that

146. *See infra* Part III.C.2.

147. Baze v. Rees, 128 S. Ct. 1520, 1538 (2008) (plurality opinion) ("The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today's consensus on lethal injection.").

148. *Id.* at 1527 n.1.

149. *See, e.g.*, Jeremy Fogel, *In the Eye of the Storm: A Judge's Experience in Lethal-Injection Litigation*, 35 FORDHAM URB. L.J. 735, 736 (2008) (recounting by the judge that his initial reaction to lethal injection claim was "extremely skeptical").

150. *See id.*; Fernando J. Gaitan, Jr., *Challenges Facing Society in the Implementation of the Death Penalty*, 35 FORDHAM URB. L.J. 763, 765 (2008) (explaining that, as a judge, he had assumed incorrectly upon being assigned a lethal injection case that the lethal injection procedure was designed and implemented with due diligence and trained personnel).

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people (including judges) experience when they first confront questions of this sort.

Judges may also worry that involvement in method-of-execution cases would be too onerous.[151] Drawing on remedial concerns, *Baze* emphasized that "the wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government."[152] The *Baze* plurality apparently feared that striking down a lethal injection procedure would require courts to oversee the design of future procedures, and it did not want judges to wade into such territory.[153] By contrast, striking down the application of the death penalty to a narrow class of offenders does not require much further judicial administration.[154]

The Court, however, never explicitly stated that it cared more about "who" than "how," either due to merits or remedial concerns. Indeed, the preference seems contrary to recent constitutional methodology. To the extent that the Court has looked to originalism in recent constitutional cases (particularly in cases of near-first impression[155]), the original understanding of the Eighth Amendment would likely cut against the Court's preference. It is doubtful that the original understanding of the Eighth Amendment prioritized the "who" over the "how"—or, in fact, cared much about the "who" at all.[156] To the contrary, banning certain tortures was likely the primary motivation behind the Amendment.[157]

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151. To this extent, the Court's reluctance might be rooted in skepticism about judicial remedies in civil rights litigation more generally. *See generally* Rizzo v. Goode, 423 U.S. 362 (1976) (denying equitable relief against city police officers); Procunier v. Martinez, 416 U.S. 396, 404–05 (1974) ("[F]ederal courts have adopted a broad hands-off attitude toward problems of prison administration."); Berger, *supra* note 7, at 280–301 (arguing that remedial concerns significantly shape courts' approaches to lethal injection).

152. Baze v. Rees, 128 S. Ct. 1520, 1531–32 (2008) (plurality opinion) (quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979)).

153. *See id.* at 1531–32 (warning that judiciary should not "intrude on the role of state legislatures in implementing their execution procedures").

154. *See infra* Part II.C.

155. *See, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (relying on original understanding of Second Amendment to hold that Second Amendment protects individual right to bear arms independent of service in militia).

156. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 334–35 (1972) (noting that English law at the time of America's founding included numerous capital crimes and that while capital crimes were less numerous in the colonies, in the 18th century, the average colony still had 12 capital crimes); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008) (discussing original understanding of Eighth Amendment).

157. *See, e.g.*, Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 666 (2004) (arguing that among the Eighth Amendment's original purposes was to prohibit "the use of torture for the purpose of eliciting confessions" (quoting

Similarly, the Court might have justified the discrepancy by concluding that the *Baze* policy better served "legitimate penological interests" than the *Kennedy* policy.[158] *Kennedy*, after all, offered no deference, in part because it concluded that imposing the death penalty for child rape did not serve the penological interests of retribution or deterrence.[159] *Baze*, however, did not examine whether potentially painful executions serve a more legitimate penological interest, such as reflecting society's disdain for the condemned's crime or deterring more crime, than painless executions. To the contrary, *Baze*'s analysis seems to take for granted that civilized societies do not inflict gratuitous pain even on those sentenced to death.[160] In other words, "legitimate penological interests" cannot justify the doctrinal discrepancy here because *Baze* did not engage in that analysis.[161]

As for the remedial concerns, the Court overstates the intrusiveness of lethal injection remedies. Contrary to the Court's arguments, modest remedies could have greatly reduced the risk of pain without intruding on the State's prerogative.[162] For example, a one-drug protocol greatly reduces the risk of pain, but the plurality summarily rejected this option as unworkable, even though the record was silent on the issue and extensive evidence indicates that it is safer than the three-drug procedure.[163] Indeed, Ohio and Washington recently each adopted the one-drug approach *sua sponte*, a development that strongly suggests that the plurality did not take

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Furman v. Georgia, 408 U.S. 238, 260 n.2 (1972) (internal quotation marks omitted))); Stinneford, *supra* note 156, at 1809 (arguing that the Eighth Amendment originally prohibited innovation in punishment because of its potential to lead to torture).

158. *See* Sara Colón, *Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment*, 97 CALIF. L. REV. 1377, 1383–85 (2009) (arguing that capital punishment in California is no more retributive or deterrent than a life-without-parole sentence and thus violates the Eighth Amendment because there must be penological justification to implement one method of punishment over another); Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1375–79 (2008) (emphasizing that the state's "[p]enological purposes . . . are central to the Eighth Amendment proportionality analysis").

159. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2662–64 (2008); *supra* Part I.B.3; *infra* Part III.C.2.

160. *See* Baze v. Rees, 128 S. Ct. 1520, 1530–37 (2008) (discussing risk of pain and assuming that too high a risk would trigger a constitutional problem).

161. Moreover, to the extent that the concept did play a role in *Kennedy*, the Court's analysis is idiosyncratic enough that it would appear to apply only in that case. *See infra* Part III.C.2.

162. Berger, *supra* note 7, at 314–26; *see also* Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11, 19–49 (2009) (arguing that physician participation is a workable remedy).

163. *See Baze*, 128 S. Ct. at 1534, 1538 (concluding that the one-drug protocol has "problems of its own" even though the record was undeveloped on this point); Berger, *supra* note 7, at 315–18 (discussing advantages of the one-drug protocol).

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this option seriously enough.[164] In other words, the Court's reluctance to examine the "how" rested partially on incorrect assumptions about the remedial options.

B. Precedent

A related attempted explanation of the doctrinal discrepancy focuses on the different lines of precedent. The Court has never found a method of execution to violate the Eighth Amendment.[165] By contrast, in proportionality cases, the Court has frequently invalidated the application of the death penalty to certain classes of crimes and criminals.[166] To this extent, *Baze* and *Kennedy* are not outliers but examples of an ongoing discrepancy in Eighth Amendment doctrine.

Precedent, however, is an insufficient justification for the discrepancy. For one, the doctrinal lines are not insular. As noted above, even *Baze* and *Kennedy* use similar language and tests.[167] Furthermore, *Baze* did not limit its discussion of precedent to other method-of-execution cases (*Louisiana ex rel. Francis v. Resweber*, *In re Kemmler*, and *Wilkerson v. Utah*) but also discussed prison condition cases, as well as state counting and evolving standards—inquiries more typically associated with proportionality cases.[168] Thus, even if the precedential lines are somewhat

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164. *See* Respondents' Motion to Dismiss as Moot the Claims that the Three Drug Protocol is Unconstitutional, Stenson v. Vail, No. 83828-3 (Wash. Mar. 2, 2010) (moving to dismiss suit as moot because the State replaced three-drug procedure with safer one-drug procedure); Defendants' Second Motion for Summary Judgment, Cooey v. Strickland, No. 04-1156 (S.D. Ohio Nov. 13, 2009) (moving for summary judgment because the State replaced three-drug procedure with safer one-drug procedure).

165. *Baze*, 128 S. Ct. at 1530 (plurality opinion); *see also* Louisiana *ex rel*. Francis v. Resweber, 329 U.S. 459, 464 (1947) (permitting the State to electrocute inmate after initial attempt at electrocution failed); *In re* Kemmler, 136 U.S. 436, 447 (1890) (upholding execution by electrocution); Wilkerson v. Utah, 99 U.S. 130, 134–37 (1878) (upholding constitutionality of execution by firing squad).

166. *See* Roper v. Simmons, 543 U.S. 551, 555–60 (2005) (invalidating death penalty for individuals who were under eighteen when they committed capital crimes); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (invalidating death penalty for mentally retarded individuals); Enmund v. Florida, 458 U.S. 782, 789–93 (1982) (invalidating death penalty for one aider and abettor of felony who "did not take life, attempt to take [life], or intend to take life"); Coker v. Georgia, 433 U.S. 584, 593–96 (1977) (invalidating death penalty for rape of adult woman).

167. *See supra* Part I.B.2.

168. Another potential explanation for *Baze*'s deference is that the Court views method-of-execution challenges as roughly analogous to prison condition cases, in which the judiciary has historically afforded the political branches great deference. *See Baze*, 128 S. Ct. at 1531–32, 1537 (citing Farmer v. Brennan, 511 U.S. 825, 842 (1994); Helling v. McKinney, 509 U.S. 25, 33–35 (1993)); Berger, *supra* note 7, at 284–85, 296–301 (discussing lethal injection cases in light of prison condition precedent). After all, like method-of-execution claims, prison condition actions challenge not the fact of the sentence, but the way in which the sentence is carried out, and therefore fall within

distinct,[169] the Court does not treat them as wholly separate.

Moreover, the Court arguably has not even followed its own precedent, at least in the proportionality context. When the Court in *Roper* forbade execution of murderers who had committed their capital crime while minors, it essentially overruled its 1989 decision in *Stanford v. Kentucky*, which had held that the execution of minors who had committed murder was not *per se* "cruel and unusual."[170] Similarly, *Atkins* basically overruled *Penry v. Lynaugh*'s holding that the execution of the mentally retarded did not violate the Eighth Amendment.[171] Of course, one could argue that evolving standards mandated new outcomes in *Roper* and *Atkins*.[172] But, as Justice Scalia countered, the meaning of the Eighth Amendment itself changed with these new decisions, in part because the Court did *not* follow well-established methodologies.[173] For instance, *Roper* departed from *Stanford* and other earlier cases in counting not just death-penalty states excluding juveniles from capital punishment but also states abandoning the death penalty altogether.[174] Regardless of the propriety of these different approaches to state counting, the discrepancy belies doctrinal consistency. To this extent, the outcomes in proportionality cases can be

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the scope of 42 U.S.C. § 1983. *See, e.g.*, Hill v. McDonough, 547 U.S. 573, 580 (2006); Nelson v. Campbell, 541 U.S. 637, 647 (2004). However, this explanation inadequately justifies the Court's different approaches in *Baze* and *Kennedy*. Though method-of-execution and prison condition claims can both be properly filed under § 1983, courts typically defer in prison condition cases because prison officials, unlike judges, understand issues of prison security. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 362 (1981) ("[C]ourts have been especially deferential to prison authorities in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979))). By contrast, many officials carrying out lethal injection enjoy no such expertise. *See infra* Part III.C.1. Moreover, given the logic of *Hill* and *Nelson*, it would be odd for the Court to grant more deference in cases challenging the *fact* of one's sentence than in cases merely challenging *how* that sentence can be carried out. To be sure, *Hill* and *Nelson* only determined the line between habeas and § 1983—not the substantive standards for cases brought under either procedural vehicle—but their analyses seem to presuppose that challenges to the legitimacy of the sentence itself are somehow more intrusive on state prerogatives. *See, e.g.*, *Nelson*, 541 U.S. at 643 (explaining that civil rights suits under § 1983 do not extend "where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence").

169. *Compare Helling*, 509 U.S. at 33 (requiring deliberate indifference in prison health challenge), *with Baze*, 128 S. Ct. at 1525–38 (not requiring finding of deliberate indifference).

170. Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

171. Penry v. Lynaugh, 492 U.S. 302, 340 (1989).

172. For example, the Court in *Atkins* explained that when it decided *Penry* in 1989, only two death-penalty states prohibited execution of the mentally retarded, whereas by 2002, sixteen more death-penalty states had adopted such measures. Atkins v. Virginia, 536 U.S. 304, 314–15 (2002).

173. *See* Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) ("[T]he meaning of our Constitution has changed over the past 15 years . . . .").

174. *See id.* at 610 (criticizing majority's new method of counting states).

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traced not only to changing societal norms but also to changed methodology.

Stare decisis, then, cannot wholly explain the Court's approaches in *Baze* and *Kennedy*. But even if it could, the Court would need to justify why it takes such different approaches when determining what is "cruel and unusual." In short, even if the Court treated the doctrinal lines more distinctly, it would need to provide some reason why it defers so readily to the state's policy and facts in one set of cases and not the other.

C. Interfering with the Death Penalty

Another potential explanation is that the Court interfered in the case less likely to obstruct the death penalty more generally. *Kennedy* indicated a "necessity to constrain the use of the death penalty,"[175] but, in reality, child rape on its own is so rarely punished by death that the Court's decision will likely prevent very few executions in this country. The Court, in fact, noted that no one has been executed for rape in the United States since 1964.[176] *Kennedy*'s holding, then, does little to alter the actual number of executions. If anything, cases like *Kennedy*, *Roper*, and *Atkins* might even strengthen support for the death penalty by eliminating some of the death penalty's more objectionable applications.

By contrast, the Court apparently feared that striking down Kentucky's execution procedure in *Baze* would have interfered far more significantly with the death penalty nationwide. Even though lethal injection actions, by definition, challenge not the death sentence but rather the manner in which that sentence will be executed,[177] the Court seems to have worried that invalidating Kentucky's lethal injection procedure even on narrow grounds might have perpetuated a nationwide moratorium on executions, which began when the Court granted certiorari in *Baze*.[178] The plurality even emphasized that capital punishment is constitutional and that, therefore, "there must be a means of carrying it out."[179] *Baze* thus

175. Kennedy v. Louisiana, 128 S. Ct. 2641, 2660 (2008).

176. *Id.* at 2657.

177. *See* Hill v. McDonough, 547 U.S. 573, 580 (2006); Nelson v. Campbell, 541 U.S. 637, 647 (2004).

178. *See, e.g.*, Linda Greenhouse, *Justices Stay Execution, A Signal to Lower Courts*, N.Y. TIMES, Oct. 31, 2007, at A1. Justice Scalia at oral argument explained, "I'm very reluctant to send it back to the trial court so we can have a nationwide cessation of all executions [which] . . . could take years." Transcript of Oral Argument at 17, Baze v. Rees, 128 S. Ct. 1520 (2008) (No. 07-5349).

179. Baze v. Rees, 128 S. Ct. 1520, 1529 (2008) (plurality opinion) (citing Gregg v. Georgia, 428 U.S. 153, 177 (1976) (plurality opinion)).

http://openscholarship.wustl.edu/law_lawreview/vol88/iss1/1

emphasized that litigation must not "frustrate the State's legitimate interest in carrying out a sentence of death in a timely manner."[180]

The Court, of course, did not explicitly premise the level of deference on the practical implications of the case. And, of course, some justices would have deferred to the State in both cases, regardless of the implications.[181] But the Court was more willing to step in when widespread interference with capital punishment was less likely.

D. Litigation Costs

The Court's approaches here also reflect the Rehnquist and Roberts Courts' concerns about constitutional litigation more generally.[182] To provide a famous example, the Court in *Ashcroft v. Iqbal*[183] recently ratcheted up the well-known *Conley* pleading standard.[184] *Iqbal* held that "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[185] "[B]are assertions . . . amount[ing] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim" would not do.[186] *Iqbal* thus created a potential sea change in civil rights litigation.[187] Some civil rights plaintiffs know they have been wronged by government officials, but because the relevant facts are uniquely in the possession of the government, they do not know precisely what policies or which officials caused the injury. *Iqbal*'s requirements arguably invite lower courts to dismiss litigation before discovery that could uncover evidence corroborating the plaintiffs' claims. Such dismissals will likely doom some meritorious civil rights actions because many plaintiffs need

180. *Id.* at 1537.

181. *See infra* Part II.E.

182. *See, e.g.*, Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1107 (2006) (arguing that the Rehnquist Court "worked assiduously to limit the power of courts to adjudicate run-of-the-mill civil disputes").

183. 129 S. Ct. 1937 (2009).

184. *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

185. *Iqbal*, 129 S. Ct. at 1949 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2006)).

186. *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 555).

187. *See id.* at 1959 (Souter, J., dissenting) (arguing that *Iqbal* improperly "require[s] . . . court[s] at the motion-to-dismiss stage to consider whether the factual allegations are probably true"). *Iqbal* was surely significant, but one should also not overstate its importance. *See, e.g.*, Randall v. Scott, No. 09-12862, 2010 WL 2595585, at *8 (11th Cir. June 30, 2010) ("After *Iqbal* it is clear that there is no 'heightened pleading standard' as it relates to cases governed by Rule 8(a)(2), including civil rights complaints. All that remains is the Rule 9 heightened pleading standard.").

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discovery to gain access to the facts to establish that their allegations are, indeed, rooted in fact.

Baze seems to view civil rights litigation similarly—as a drain on judicial and governmental time and resources.[188] Lethal injection challenges involve substantial discovery into the details of a state's execution procedure.[189] Recognizing the threat of these costs nationwide, the plurality provided lower courts a roadmap to dismiss lethal injection claims,[190] thus potentially cutting off discovery that could uncover dangers of the sort that arose in Missouri and California.[191] Like *Iqbal*, then, *Baze* arguably allows lower courts to dismiss cases before the plaintiff has had an opportunity to gather evidence supporting his claims, thus rewarding government secrecy.

By contrast, *Kennedy*'s potential for clogging courts with future litigation is limited. Because Eighth Amendment proportionality doctrine treats capital and noncapital sentences so differently,[192] the Court had little reason to fear that its decision in *Kennedy* would extend to noncapital sentences, which, of course, make up the vast bulk of sentences nationwide. The remedy in *Kennedy*, in other words, appeared to be a one-time announcement, unlikely to require any future judicial administration.

Of course, courts do shape doctrine according to the costs of litigation.[193] But while such concerns may justify doctrinal differences on the margins, they do not justify fashioning a broad rule that may shut down all future efforts to understand execution procedures. Furthermore, even though litigation costs are real, the Court never argues that they are so great as to command entirely different approaches to the same constitutional provision in different contexts. *Iqbal* helps demonstrate that *Baze*'s concerns about litigation costs are hardly anomalous, but if those costs are to be constitutionally decisive, the Court needs to explain why.

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188. Of course, other recent decisions likely engender more new litigation. *See, e.g.*, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (inviting certain types of employment litigation); District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (inviting future challenges to gun regulations).

189. Berger, *supra* note 7, at 277.

190. *See* Baze v. Rees, 128 S. Ct. 1520, 1537 (2008) (holding that lethal injection procedures "substantially similar" to Kentucky's would pass constitutional muster); *supra* notes 51, 128–29 and accompanying text.

191. *See supra* note 86.

192. *See generally* Barkow, *Two Tracks*, *supra* note 62, at 1148–49 (arguing that the Court reviews capital and noncapital sentencing very differently).

193. *See, e.g.*, Siegel, *supra* note 182, at 1144 (discussing the Court's "concerns about the cost of litigation").

E. Justices' Personal Preferences

While the Supreme Court treats itself as a single entity, the obvious fact remains that each case boils down to particular justices' votes. From this perspective, *Baze* and *Kennedy* are best reconciled perhaps not by some unifying constitutional theory but by the fact that certain justices were more offended by the death penalty for child rapists than by Kentucky's lethal injection procedure. Four justices—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—voted in the state's favor in both cases.[194] Two justices—Souter and Ginsburg—voted against the state in both cases.[195] The three remaining justices—Stevens, Kennedy, and Breyer—voted in favor of the state in *Baze* (albeit in three separate opinions) and against it in *Kennedy*.[196] Of these three, however, only Justice Kennedy joined the Chief Justice's *Baze* plurality opinion.[197] By contrast, Justice Breyer explicitly agreed with the dissent's less deferential standard for lethal injection challenges.[198] Justice Stevens did not articulate his own legal standard but also emphasized that he thought the state should be entitled to considerably less deference than the plurality afforded it.[199] In this regard, though Justices Stevens and Breyer found no constitutional violation in *Baze*, they would both, consistent with their votes in *Kennedy*, apply less deference in reviewing the state's practice than the plurality opinion.

This leaves us with Justice Kennedy. It has been often remarked that the key to close cases lies with Justice Kennedy, and this area is no different.[200] *Kennedy* presented a typical 5–4 split, with the four more

194. *See Baze*, 128 S. Ct. at 1525–38 (plurality opinion) (written by Chief Justice Roberts and joined by Justices Kennedy and Alito); *id.* at 1538–42 (Alito, J., concurring); *id.* at 1552–56 (Scalia, J., concurring) (joined by Justice Thomas); *id.* at 1556–1563 (Thomas, J., concurring) (joined by Justice Scalia); Kennedy v. Louisiana, 128 S. Ct. 2641, 2665–78 (2008) (Alito, J., dissenting) (joined by Chief Justice Roberts and Justices Scalia and Thomas).

195. *See Baze*, 128 S. Ct. at 1567–72 (Ginsburg, J., dissenting) (joined by Justice Souter); *Kennedy*, 128 S. Ct. at 2645–65 (majority opinion) (written by Justice Kennedy and joined by Justices Stevens, Souter, Ginsburg, and Breyer).

196. *See Baze*, 128 S. Ct. at 1542–52 (Stevens, J., concurring); *id.* at 1563–67 (Breyer, J., concurring); *supra* notes 194–95.

197. *See Baze*, 128 S. Ct. at 1525 (plurality opinion).

198. *See id.* at 1563 (Breyer, J., concurring) (agreeing with dissent's standard); *id.* at 1568 (Ginsburg, J., dissenting) (considering degree of risk, magnitude of pain, and availability of alternatives on sliding scale).

199. *Id.* at 1545 (Stevens, J., concurring) (arguing 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").

200. Remarkably, during the Court's October 2006 term, Justice Kennedy voted with the minority only twice and with the majority in every single 5–4 decision. Jason Harrow, *Justice Kennedy's*

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"liberal" justices voting to strike down the death penalty for child rape and the four more "conservative" justices disagreeing. Justice Kennedy voted with the more "liberal" justices.[201] In *Baze*, seven justices voted to uphold Kentucky's lethal injection procedure, but, as we have seen, two of those (Stevens and Breyer) would have applied a less deferential standard. On the question of deference, then, we see a similar 5–4 split, but with Justice Kennedy this time joining the conservatives. From this perspective, Justice Kennedy's idiosyncratic views perhaps best explain the discrepancy between *Baze* and *Kennedy*.[202]

Though this explanation certainly contains some truth, it also ignores the extent to which *Kennedy* and *Baze* reflect a larger doctrinal divide.[203] Proportionality cases have frequently struck down particular applications of the death penalty.[204] Indeed, before reaching the child-rape issue, the Court had already ruled years ago—before Justice Kennedy joined the Court—that capital punishment could not be imposed for rape of an adult woman without death of the victim.[205] Similarly, though *Baze* was the first lethal injection challenge to reach the Supreme Court, it was largely consistent with lower court decisions applying essentially heightened scrutiny to such challenges.[206] To this extent, though Justice Kennedy's

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Remarkable OT06, SCOTUSBLOG, http://www.scotusblog.com/2007/06/justice-kennedys-remarkable-ot06/ (June 28, 2007, 5:20 PM); *see also* Eric J. Segall, *Reconceptualizing Judicial Activism as Judicial Responsibility: A Tale of Two Justice Kennedys*, 41 ARIZ ST. L.J. 709, 739–53 (2009) (discussing Justice Kennedy's constitutional jurisprudence).

201. The labels "liberal" and "conservative" are obviously oversimplifications, but, that being said, several other recent high-profile cases have broken down along these same lines with Justice Kennedy casting the deciding vote. In some cases, he voted with the "liberals." *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (habeas for Guantanamo detainees); Massachusetts v. EPA, 549 U.S. 497 (2007) (environmental standing). In others, he voted with the "conservatives." *See, e.g.*, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (racial preferences in promotions); Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (pleading standards); District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (guns); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (race-based preferences in schools); Gonzalez v. Carhart, 127 S. Ct. 1610 (2007) (abortion).

202. *See* Atkins v. Virginia, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting) ("Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members."); Lain, *Deciding Death*, *supra* note 87, at 5–6 ("The Justices decide death the way they want to, not the way they have to [so] doctrine does little, if anything, to keep the Justices from ruling however they are a priori inclined to rule.").

203. *See supra* Part II.B.

204. *See* Roper v. Simmons, 543 U.S. 551, 555–60 (2005) (invalidating death penalty for individuals who were under eighteen when they committed capital crimes); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (invalidating death penalty for mentally retarded individuals).

205. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) ("We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.").

206. *See* Emmett v. Johnson, 532 F.3d 291, 299–300 (4th Cir. 2008) (summarily rejecting Eighth Amendment claim); Taylor v. Crawford, 487 F.3d 1072, 1082–85 (8th Cir. 2007) (ignoring evidence

views certainly do disproportionately shape constitutional doctrine, his votes here actually follow more substantial doctrinal rifts.

F. Summary

The foregoing may be plausible explanations for the varying levels of deference, but they are not adequate justifications. They are certainly not justifications the Court itself openly embraces to defend the discrepancy. One might be tempted to conclude that *Baze* and *Kennedy* are different cases about different issues, except they involve challenges to state death penalty practices under the same constitutional amendment and invoke similar language and tests. Those tests, however, offer no guidelines on the rigor of judicial review of either policy or facts. The Court need not approach each Eighth Amendment case the same way, but it ought to explain why different Eighth Amendment challenges trigger such different levels of review. Indeed, without such guidelines, the Court is more likely to be derailed by considerations discussed in this Part. The Court needs a theory of deference.

III. DEFERENCE AND DEMOCRATIC PEDIGREE

To arrive at a theory of deference, we initially must consider what drives judicial deference in the first place. Section A of this Part therefore discusses current justifications for deference in constitutional cases. With these justifications in mind, Section B proposes a new theory of deference based on a challenged policy's "democratic pedigree." Section C applies the proposed theory to *Baze* and *Kennedy*. Section D discusses the normative and practical advantages of this theory.

A. Justifications for Judicial Deference

Before articulating a theory of deference, we should start with what often drives judicial deference in constitutional cases. Judicial deference is "not a well-defined concept,"[207] but, generally speaking, it encourages courts to follow another governmental branch's decisions, which the court may not have reached itself.[208] As noted above, courts generally defer on

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about procedure's dangers and reversing finding that Missouri procedure violated Constitution); Lightborne v. McCollum, 969 So. 2d 326, 351 (Fla. 2007) ("[T]his Court's role is not to micromanage the executive branch in fulfilling its own duties relating to executions.").

207. Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 4 (1983).

208. Schapiro, *supra* note 36, at 665.

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the basis of either the political or epistemic authority of the deferred-to institution.[209] With regards to "political authority," courts often cite separation-of-powers concerns militating against judicial overreaching into the political branches' policies.[210] The Court recognizes that ours is a democratic government and that elected officials answerable to "the people" should make controversial policy decisions, rather than unelected judges.[211] As Justice Frankfurter famously and repeatedly argued, judges should not lightly override the policy determinations of officials who are elected by and accountable to the people.[212] More recently in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, the Court explained, "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[213]

Courts also sometimes defer on factual issues when another actor possesses more expertise than judges.[214] Courts therefore defer to institutions attributed with particular experience, often noting that judges—in comparison to other decisionmakers—lack the time, resources, and skills to make particular factual determinations about uncertain or ambiguous data.[215] As Professor Solove puts it, deference on these grounds "depends upon certain assumptions about the superior ability of government institutions, officials, and experts to make factual judgments within their areas of specialty."[216]

Political and epistemic authority are sensible reasons for courts to defer to other institutions, but courts sometimes invoke them carelessly. Indeed, for all of the times that the Court invokes principles of deference, neither courts themselves nor scholars have paid much attention to whether judicial deference in practice follows the theoretical justifications for it.[217] As *Kennedy* and *Baze* illustrate, the Court defers when it wants to. But, if

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209. *See* Horwitz, *supra* note 10, at 1068; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1278–79 (1996); *supra* note 37 and accompanying text.

210. Horwitz, *supra* note 10, at 1079.

211. *See* BICKEL, *supra* note 29, at 16–17 (discussing the countermajoritarian problem).

212. *See, e.g.*, Am. Fed. of Labor v. Am. Sash & Door Co., 335 U.S. 538, 553 (1949) (Frankfurter, J., concurring) ("Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government.").

213. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

214. Horwitz, *supra* note 10, at 1086.

215. *See* Solove, *supra* note 11, at 1004–08 (summarizing some justifications for judicial deference).

216. *Id.* at 1011; *see also Chevron*, 467 U.S. at 865 (arguing that "[j]udges are not experts in this field" and therefore should defer).

217. *See* Solove, *supra* note 11, at 969 ("[T]heories of judicial review have failed to adequately confront deference.").

http://openscholarship.wustl.edu/law_lawreview/vol88/iss1/1

we are to take seriously the Court's stated rationales for deference, then the Court's deference determinations should be linked more directly to the challenged institution's political and epistemic authority, particularly in areas like the Eighth Amendment, where there is not already a doctrinal formula for deference.

B. Proposing a New Theory: Deference and Democratic Pedigree

There is a significant body of scholarship hashing out penological theories to try to bring both greater order and depth to the Court's current Eighth Amendment doctrine.[218] Many of these are excellent, thought-provoking pieces about penological theory. However, given the Court's own explicit avoidance of an overarching penological theory, they are unlikely to sway the Court.[219]

As an alternative to these substantive approaches, this Part develops a process-based theory of deference based on what I call the policy's "democratic pedigree," which encompasses both the political authority and epistemic authority underlying the policy. Collectively, these inquiries can help courts determine the extent to which the policy results from properly functioning democratic and administrative processes helping to "ensure[] broad participation in the processes[,] . . . distributions," and benefits of government.[220] Under this theory, courts should only presumptively defer when the policy has a strong democratic pedigree.

As we have seen, deference to other institutions' political authority is rooted in courts' conceptions that other institutions are more politically accountable than the judiciary and that policy decisions therefore should be made by these nonjudicial institutions.[221] But governmental policies are

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218. *See, e.g.*, Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 681 (2005) (considering "conceptual confusion over the meaning of proportionality"); Julian Davis Mortenson, *Earning the Right to Be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, 88 IOWA L. REV. 1099, 1106 (2003) (arguing that under basic principles of culpability theory, botched executions violate the Eighth Amendment); Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit From Proportionality Theory?*, 36 FORDHAM URB. L.J. 53, 86–87 (2009) (arguing that proportionality jurisprudence can shed light on prison condition cases).

219. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2659 (2008) (conceding that the Court's Eighth Amendment doctrine is "still in search of a unifying principle"); Ewing v. California, 538 U.S. 11, 25 (2003) (stating that the Constitution "does not mandate adoption of any one penological theory" (quoting Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (internal quotation marks omitted)); Ristroph, *supra* note 158, at 1402 (arguing that the Supreme Court seems "to reject the claim that penological theories have intrinsic moral relevance that would require the Eighth Amendment to be understood in terms of one or another specific punishment theory").

220. *See* ELY, *supra* note 20, at 87.

221. *See* BICKEL, *supra* note 29, at 16–17 ("[W]hen the Supreme Court declares unconstitutional a

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not all equally democratic.[222] Thus, to the extent that judicial deference is grounded in political authority, courts should consider whether the challenged policy, in fact, enjoys such democratic status, focusing especially on the nature of the administrative processes underlying the policy and whether the policy burdens unpopular minorities who cannot protect themselves through usual political channels.[223]

To the extent that judicial deference also sometimes rests on the political branches' epistemic authority, courts should consider whether such expertise in fact exists in a given case. Though epistemic authority seems to implicate "democracy" less than political authority, it is nevertheless relevant to democratic pedigree writ large, especially given that many constituents expect their representatives to delegate complex matters to agencies with the requisite expertise.[224] Lawmakers delegating to agencies, then, have an implicit obligation to delegate to people who understand the area. When lawmakers don't, they undermine constituents' assumptions about the process and weaken the democratic pedigree of the resulting policy.

These inquiries are not themselves determinative, but, collectively, they will reveal much about a challenged policy's democratic pedigree. Courts ultimately could apply heightened scrutiny for another substantive reason,[225] but the inquiries presented here force them to consider whether their oft-stated reasons for deferring apply in a given case. This proposal, then, encourages courts to be straightforward about why they choose to apply a particular level of deference.

Before proceeding, it is worth briefly addressing three potential objections to the theory proposed here. First, critics might contend that democratic pedigree is notoriously difficult to assess. Reasonable people can disagree, for instance, about whether the legislature or administrative agencies possess more political authority.[226] Similarly, they can disagree

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legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people . . . .").

222. *See infra* Parts III.B.1, III.C.

223. *Cf.* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 717 (2005) [hereinafter Barkow, *Administering Crime*] (arguing that scholars overlook how agencies responsible for criminal justice policies, such as sentencing commissions, parole boards, and corrections departments, "perform as agencies").

224. *See* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 400–01 (2002) ("[C]itizens often expect government officials to act based on superior, expert knowledge . . . . Sometimes this delegation is explicit . . . . More commonly, the delegation is implicit; citizens expect government agencies, legislative committees with expert staffs, and even judges to pay substantial attention to expert advice.").

225. *See supra* note 34 and accompanying text.

226. *See infra* Part III.B.1.a. It is beyond the scope of this Article to determine whether policies

about what do to when political and epistemic authority clash, such as when politicians overrule agencies' expert determinations for political reasons.[227] My goal is not to resolve these difficult debates in constitutional theory, but instead to identify important issues that have been overlooked in some constitutional contexts, including the Eighth Amendment. It is especially important that courts explore political and epistemic authority because they themselves identify them as reasons to defer in the first place.[228] To this extent, my goal is less to develop an all-encompassing constitutional theory, and more to push courts toward actually engaging in the analyses they purport to value.

Second, critics might contend that multi-factored inquiries to determine levels of deference are subject to judicial manipulation. The conventional tiers of scrutiny are themselves arguably passing out of vogue for that reason.[229] With this concern in mind, it is important to emphasize that my theory does not seek rigid adherence to preexisting tiers of scrutiny but rather greater acknowledgement of the fact that courts—whether they admit it or not—review governmental policies with rigorous or forgiving review (or something in between), and the amount of deference they select may well determine the outcome of many cases. It is true that courts will enjoy flexibility under the theory proposed here, but they do today anyway.[230] There is significant value in encouraging courts to articulate a

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resulting from referenda, which presumably enjoy heightened political authority, deserve special treatment.

227. *See, e.g.*, Tummino v. Torti, 603 F. Supp. 2d 519, 544 (E.D.N.Y. 2009) (finding that the FDA's decision to only make Plan B contraception available to women over seventeen emanated from White House pressure and lacked usual, good faith agency procedures and reasoned decision making); Freeman & Vermeule, *supra* note 32, at 108 ("[T]he Court is concerned at the moment to insulate expert agencies from political influence.").

228. *See supra* Parts I.A, III.A.

229. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 575–78 (2003) (failing to articulate standard of review); Transcript of Oral Argument at 44–45, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290) (Roberts, C.J., suggesting that the Court need not decide upon a level of scrutiny); Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, *in* THE CONSTITUTION IN 2020, at 93, 103 (Jack M. Balkin & Reva B. Siegel eds., 2009) (discussing "unworkable doctrinal structure" resulting from tiers of review).

230. The tiers of scrutiny employed in equal protection and other constitutional areas are often criticized because they can be easily manipulated or altogether ignored. *See, e.g.*, Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 623 (1992) (recounting argument that "multifactor tests that [can bear] the stamp of subjectivity and arbitrariness"); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1298–1300 (2007) (arguing that the development of intermediate scrutiny undermined the Court's self-discipline that the tiers of scrutiny were supposed to impose); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 237–46 (2002) (describing a "proliferation" of standards of review from three to seven and analyzing the problems associated with expanding the available standards of review); Calvin

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level of deference based on more careful consideration of the factors they typically cite when they defer, even if that articulation is only an approximation.

A third, more normative, objection is that in the individual rights setting, courts should not focus on democratic pedigree because the very purpose of the Bill of Rights is to check majoritarian impulses.[231] But I am only suggesting that democratic pedigree should be one important constitutional inquiry—not the only one. Drawing and quartering would be an unconstitutional method of execution even if democratically enacted by a transparent legislature because it would pose a "substantial risk of serious harm" and could be easily replaced with a less painful alternative.[232] Moreover, this objection does not address the Court's inconsistent approaches to deference. Bickel's concern that judicial review is countermajoritarian is often reflexively repeated without admission that not all judicial interference is equally antidemocratic.[233] When courts strike down a well-publicized, legislatively enacted, carefully debated, generally applicable statute that burdens no particular minority disproportionately, its action (though sometimes justifiable) is countermajoritarian. When courts strike down an agency policy adopted in secret with no legislative guidance or oversight, the countermajoritarian concern sharply decreases. By assuming that judicial intervention is necessarily countermajoritarian, courts ignore context and misconstrue precisely why some judicial intervention is potentially problematic.[234]

Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 980–91 (2004) (arguing that the current "artificial" system of tiered scrutiny has been brought to near death by the decisions in *Lawrence* and *Grutter*).

231. *See, e.g.*, Tribe, *supra* note 27, at 1065–67 (arguing that the Constitution protects substantive values).

232. *See* Baze v. Rees, 128 S. Ct. 1520, 1532 (2008) (articulating Eighth Amendment test for method-of-execution claims); *supra* note 34 and accompanying text.

233. *See Baze*, 128 S. Ct. at 1531 (introducing deferential standard to prevent courts from intruding on the role of state legislatures); BICKEL, *supra* note 29, at 16–23 (discussing "deviant" and "counter-majoritarian" nature of judicial review).

234. *But see* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 215–16 (2002) (arguing that Bickel and others overstated the countermajoritarian forces and that those concerns reflect a unique set of historical circumstances).

1. Political Authority

a. The Legislative Conundrum

To the extent that judicial deference is premised on political authority, the traditional view is that courts owe greater deference to legislatures than to administrative agencies. As Professor Ely famously explained, legislative action is presumptively more democratic than agency action and therefore should enjoy greater judicial deference.[235] While delegation serves an important role in our system of government, legislators can also use it to *avoid* crafting policy and thereby cynically enhance their reelection chances. As Ely puts it, "the 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."[236] On this view, legislative enactments often better reflect the will of the democratic majority, having (usually) been enacted by majority vote of two separate legislative houses and by executive signature.[237] Accordingly, because the hurdles for enacting legislation are high, policies reflected in statutes emerging from these rigorous strict processes deserve special respect.[238]

An alternative scholarly view questions whether legislatively enacted statutes are actually more democratic than agency actions. Agencies, in fact, can be more deliberative, transparent, and accountable than Ely suggests.[239] As the Court explained in *Chevron*,

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235. ELY, *supra* note 20, at 130–31.

236. *Id. See generally* THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 125–26 (1969) (arguing that a legislature's failure to legislate results in bad government).

237. *See, e.g.*, U.S. CONST. art. I, § 7, cl. 2 (requiring bicameralism and presentment).

238. *See* WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 66–67 (4th ed. 2007) (describing "vetogates" in the legislative process where a bill can get defeated); JEREMY WALDRON, THE DIGNITY OF LEGISLATION 2–6 (1999) (discussing the process of legislation as "the representatives of the community com[ing] together to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all . . . and . . . do[ing] so in a way that openly acknowledges and respects (rather than conceals) the inevitable differences of opinion and principle among them").

239. *See* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1954 (2008) ("Agency proceedings are more transparent than intuition might suggest."); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 781–90 (1999) (arguing that agencies can be better venues for accountability); 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).

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> [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. 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—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[240]

Additionally, some recent scholarship contends that legislatures are less accountable than the traditional view acknowledges. Because voters are often poorly informed, the legislature is far less accountable than we might think.[241] Elections, on this view, cannot deliver accountability as well as scholars like Bickel assume, in part because of the large gap between voters' real preferences and their representatives' votes.[242] Moreover, legislatures cannot feasibly be expected to prescribe in adequate detail the rules governing every facet of all regulated activity.[243]

It is beyond the scope of this Article to determine whether legislatures or agencies, as a theoretical matter, possess more political authority.[244]

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240. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984); *see also* Galle & Seidenfeld, *supra* note 239, at 1980 (arguing that the "political branches of government sufficiently constrain agencies that their decisions generally do not deviate greatly from the postdeliberation preferences of the polity"); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 505 (2005) (arguing that agencies "are the executors of the President's constitutional responsibility" to faithfully execute the laws).

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

242. *Id.* at 48.

243. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928) ("The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution . . . .").

244. *See generally* CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 1 (1960) (arguing that government is "too complex and delicate . . . for the rough template of schematization"); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152–56 (1997) [hereinafter MASHAW, GREED] (arguing that delegating political authority to administrative agencies is "a device for improving the responsiveness of government to the desires of the general electorate"); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 674 (1992) (arguing that the involvement of the judiciary and executive branches in agency decisions seriously

Courts do not resolve theoretical questions of political accountability but real cases with real facts. The relative "democratic pedigree" of legislative or agency action, then, should turn not on the abstract virtues of legislative versus administrative action, but rather on the context of a particular case.

Courts searching for a level of deference based on political authority do not have much to guide them in the legislative context. Whereas administrative law provides courts with a series of inquiries to assess the relative propriety of agency action,[245] no such manageable judicial standards exist for assessing the inner workings of our legislatures.[246] Indeed, courts tend to resist measuring the political authority of legislative action, except in extreme circumstances. It is true, of course, that some statutory provisions emerge from open debate about policy issues and that other provisions are snuck into omnibus legislation by lobbyists, sometimes without the knowledge of many lawmakers voting on the bill.[247] Clearly, legislation is problematic when it is consistently misrepresented in Congress, or when Congress never deliberated about its constitutionality or policy effects. But while openly debated legislation theoretically enjoys stronger political authority than stealth bills, the spectrum between these extremes is wide, and courts typically lack manageable standards to assess a provision's political authority. Of course, courts sometimes require a clear statement of congressional intent, thus prioritizing deliberative and consensual lawmaking.[248] These presumptions, however, only apply in certain contexts, such as judicial interpretation of statutes arguably encroaching on state sovereignty.[249] More typically, when the Court reviews the constitutionality of legislation,

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undermines Congress's efforts to design procedural, substantive, and structural rules to control agency behavior).

245. *See* 5 U.S.C. §§ 551–559, §§ 701–706 (2006); *infra* Part III.B.1.b.

246. *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . ."); Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 509–11 (1997) (arguing that appropriation riders subvert the integrity of the legislative process but are typically not susceptible to judicial challenge).

247. *See* William A. Fletcher, *Atomic Bomb Testing and the Warner Amendment: A Violation of the Separation of Powers*, 65 WASH. L. REV. 285, 307, 309–20 (1990) (discussing legislative amendment that "was consistently misrepresented as it made its way through the legislative process" and suggesting that this is a separation of powers problem); Richard Murphy, *The* Brand X *Constitution*, 2007 BYU L. REV. 1247, 1300 (2007) (arguing that much legislation "does not receive serious, broad-based scrutiny" from legislators).

248. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (requiring clear statement rule for legislation applying to state policymaking appointees); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239–40 (1985) (requiring clear statement rule for legislation abrogating state sovereign immunity).

249. *See, e.g.*, ESKRIDGE ET AL., *supra* note 238, at 922–41 (discussing "new federalism canons"); *supra* note 248.

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it gives scant attention to the nature of the democratic deliberation. Indeed, regular judicial inquiries into the quality of legislative deliberation would likely be messy and unpredictable.[250]

Courts therefore typically assume that lawfully enacted statutes enjoy sufficient (if not ideal) political authority. The Constitution confers upon Congress lawmaking authority, and judicial deference sometimes rests on such express constitutional designation.[251] As the Court explained in *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Company*, legislation drafted by Congress enjoys a "presumption of constitutionality"—and, in that regard, is presumptively different from agency action.[252] Of course, courts may determine whether statutes have been properly enacted under constitutionally prescribed procedures because the Constitution implicitly promises minimum due process for all legislation.[253] However, no such constitutional mandates or manageable standards justify varying deference on the basis of whether a legislature has acted responsibly or even knowledgeably when enacting legislation.[254] Accordingly, whether deserved or not, legislative action presumptively enjoys considerable political authority.[255]

b. The Administrative Inquiry

When legislatures *have* delegated lawmaking functions and the resulting policy is subject to constitutional challenge, courts determining the political authority underlying that policy ought to inquire into the details of the administrative action.[256] Courts and scholars have been

250. *See* Murphy, *supra* note 247, at 1300–01 ("The last thing anyone should want is the Supreme Court checking whether a statute was scrutinized enough in committee or if enough members of Congress thought hard enough about it.").

251. *See, e.g.*, U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."); McCulloch v. Maryland, 17 U.S. 316, 401–02 (1819) (indicating that Court should defer to Congress's view of its own power); WALDRON, *supra* note 238, at 2–6.

252. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 n.9 (1983).

253. *See* ESKRIDGE ET AL., *supra* note 238, at 409–20 (discussing due process of lawmaking).

254. *But see* Murphy, *supra* note 247, at 1301–03 (arguing that the case for judicial deference to Congress turns partially on legislative deliberations used to adopt policy).

255. Of course, the Court does not always defer to Congress in constitutional cases. *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (refusing to defer to congressional findings regarding abrogation of state sovereign immunity); United States v. Morrison, 529 U.S. 598, 608–19 (2000) (refusing to defer to congressional findings linking violence against women to interstate commerce); City of Boerne v. Flores, 521 U.S. 507, 531–32 (1997) (striking down RFRA as neither congruent nor proportional). When the Court does not defer, however, it typically is not articulating a theory of deference but instead is policing some other substantive value, such as federalism.

256. *Cf. State Farm*, 463 U.S. at 43 (empowering courts to look closely at processes behind

strangely inattentive to ordinary administrative law's relevance to the question of constitutional deference, especially in the individual rights context.[257] It is true, of course, that administrative law principles often are enforced not through constitutional litigation, but pursuant to the Administrative Procedure Act (APA) or an agency's organic statute.[258] But some agency action is exempted from administrative procedure acts or otherwise escapes administrative challenge.[259] And yet, because the political authority of agency actions hinges on an array of factors, presumptive deference to administrative action in constitutional cases is inappropriate. While it is true that a decision to exempt a particular agency from the APA is itself a democratic determination worthy of some respect, the resulting policy cannot be said to have strong political authority, particularly if the public was largely uninformed about the relevant issues and the legislature washed its hands of the issue after delegation. In other words, legislative decisions to punt policy issues to agencies are not worthy of the same respect as legislative decisions taking ownership of a problem.[260] Indeed, such legislative abdication and administrative haphazardness not only create political accountability problems but also heighten the danger of agency arbitrariness, which itself provides good reason for more searching judicial review.[261]

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making and rescinding rules).

257. One commentator has recognized that administrative law principles can help inform the level of deference appropriate in Eighth Amendment cases in the prison condition context. *See* Reinert, *supra* note 218, at 78 ("Teasing out the appropriate amount of deference would require a more expansive discussion of administrative law principles than there is room for here . . . ."). Outside the Eighth Amendment context, see generally Gillian Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 483 (2010) [hereinafter Metzger, *Ordinary Administrative Law*] (describing administrative principles as constitutional common law); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2047–72 (2008) (discussing administrative law as a federalism vehicle); Murphy, *supra* note 247, at 1285–315 (explaining how administrative cases may shed light on constitutional issues). In a future Article, I will explore in greater detail the role that ordinary administrative law norms might play in constitutional individual rights cases.

258. *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 527–28 (2003) [hereinafter Bressman, *Beyond Accountability*] (discussing "ordinary" administrative law and noting that many important principles, like "arbitrary and capricious" review, come from the APA).

259. For example, some states explicitly exempt correctional departments from administrative procedure requirements. *See infra* notes 302, 334.

260. *See* ELY, *supra* note 20, at 131 ("[T]he most effective way to get our representatives to be clearer about what they are up to in their legislation is to get them to legislate.").

261. *See* Bressman, *Beyond Accountability*, *supra* note 258, at 466 (arguing that "the risk of arbitrary administrative decisionmaking" is a concern of "paramount constitutional significance" that the standard focus on majoritarianism fails to acknowledge).

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Predicating deference on how agencies behave is, in fact, consistent with current administrative law principles. In *United States v. Mead*,[262] the Court made clear that judicial deference on the basis of agencies' political authority should not be applied blindly. The Court explained, "[a]lthough 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."[263] Agencies, then, should get deference when they act in ways deserving of deference.[264]

I should emphasize a few points here. First, the fact that a policy is administrative should not in and of itself trigger much higher scrutiny than a legislative policy. As noted above, the decision to delegate a particular matter to an agency is usually a democratic decision. Indeed, given that our democracy has implicitly accepted that agencies make many important lawmaking decisions, it would be hard to contend that "the people" at some level have not blessed agencies as decisonmakers.[265] Rather, the degree of deference to an administrative policy should be predicated on whether the policy is consistent with ordinary administrative law principles. Second, each of the administrative inquiries should help guide a sliding scale of deference; none is itself determinative.[266] Courts owe more deference to policies satisfying more of these administrative inquiries. Third, to be clear, these "administrative law" tests should not be used to revive the nondelegation doctrine, under which courts can limit Congress's authority to delegate to administrative agencies.[267] Instead,

262. 533 U.S. 218 (2001).

263. *Mead*, 533 U.S. at 236; *see also* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (holding that agency interpretation of statute trumps prior judicial ruling, provided that court did not deem its interpretation the only permissible one); Smiley v. Citibank, 517 U.S. 735, 740–41 (1996) (explaining *Chevron* presumption that statutory ambiguities would be resolved by agencies rather than courts); Murphy, *supra* note 247, at 1309 (discussing constitutional deference and *Brand X*).

264. It is beyond the scope of this Article to explore the extent to which agencies are subject to agency capture. *See, e.g.*, Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J. L. & LIBERTY 491, 492–93 (2008) (arguing that the risk of political capture by interest groups is an underappreciated vice of the administrative state).

265. *See, e.g.*, MASHAW, GREED, *supra* note 244, at 10 (arguing that our government has increasingly been administered through agencies); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2074 (2005) (arguing that strenuous criticism of the administrative state "distracts our attention from the government we actually possess").

266. While it is true that multifactor tests lend themselves to judicial discretion and confusion, judicial deference currently exists on an unannounced sliding scale anyway. Even the familiar standards of review fall along a spectrum rather than rigid categories. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 673 (3d ed. 2006) (noting that many critics think "in reality there is a spectrum of standards of review").

267. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (summarizing nondelegation principles requiring that Congress delegate with an intelligible principle).

where legislatures have delegated significant authority to agencies, courts should not review deferentially without inquiring first into the nature of the delegation and the agency action.[268] Finally, though these administrative inquiries generally indicate an agency policy's political authority, particular circumstances might militate in favor of deferring even where political authority is comparatively weak. In other words, the administrative factors discussed here, while important, need not be binding when there are other persuasive considerations, such as perhaps national security concerns.[269] To this extent, the theory proposed here aims to identify inquiries courts should consider in constitutional cases.[270] It does not seek to provide a strict code that courts should always apply.

i. Intelligible Principles

As we have seen, judicial deference to the political branches often rests on the widespread understanding that in a constitutional democracy, policy decisions should be made by elected officials accountable to "the people." When legislatures delegate policies to administrative agencies, the resulting policies are less the handiwork of elected and accountable officials, especially if the legislature offers little guidance to the people who actually put the policy in place.[271] The "democratic pedigree" of the resulting policy, then, diminishes as the degree of legislative guidance to the agency lessens.[272]

Consequently, courts should look at the specificity of the delegation. The more specific the delegation, the closer the tie is between the

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268. *Cf.* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201–02 (suggesting that Congress necessarily will give authority to "lower-level agency officials" to fill statutory gaps, but arguing that courts should "distinguish among exercises of this authority").

269. *See, e.g.*, *infra* note 303 and accompanying text.

270. For ease of presentation, I do not distinguish here between federal court review of federal and state agency actions. In certain contexts, federalism concerns might be a reason for federal courts to approach these issues differently in cases involving state agencies, but the principles discussed in this section generally apply similarly in both contexts.

271. Courts already recognize these principles in other contexts. *See* Cass R. Sunstein, *Nondelegation Principles*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 139, 148–50 (Richard W. Bauman & Tsvi Kahana eds., 2006) [hereinafter Sunstein, *Nondelegation Principles*] (identifying "nondelegation canons" that are "not recognized as such, but [are] central to the operation of modern public law and designed to ensure clear legislative authorization for certain decisions"); *cf.* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 68 (9th ed. 1995) (noting political accountability strand of nondelegation doctrine); *infra* Part III.D.2.

272. *Cf.* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223–24 (2000) (arguing that by construing statutes to avoid nondelegation problems, the Court encourages "legislative responsibility for society's basic policy choices").

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bureaucrat's exercise of discretion and "the people themselves."[273] Broad delegation requires very little work or thought from elected officials, who can simply tell an agency, "go take care of this."[274] Indeed, 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."[275] Accordingly, delegations lacking intelligible principles are often less deserving of judicial deference because the resulting policies lack the political authority that typically underlies the rationale for the deference in the first place. More specific delegation, by contrast, at least gives the agency some policy guidance from the legislature and, through it, "the people."

ii. Rules Carrying the Force of Law

Relatedly, courts should consider whether the legislature intended to delegate to the agency the authority to issue regulations with the force of law. In the administrative law context, courts ask if the legislature intends agency rules to have legal force. The Supreme Court famously held in *Chevron* that courts should defer to reasonable agency interpretations of ambiguous statutes that the agency administers.[276] *Mead* clarified that *Chevron* deference is predicated on a delegation of interpretive powers to agencies.[277] With this predicate in mind, *Mead* distinguished between delegations that authorize regulation with "legal norms" and those that do not.[278] In *Mead* itself, the Court found a meaningful distinction between Customs decisions classifying goods in the first instance and legislative-type agency activity that would bind more than the parties to a ruling even after classified goods had been admitted into the country.[279] The lines between these categories can be fuzzy, but *Mead* makes clear that there is

273. *See* BREYER, ACTIVE LIBERTY, *supra* note 20, at 15.

274. *See* ELY, *supra* note 20, at 133 (noting that "policy direction" is what should be required of legislatures); HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 21–22 (1962) ("[E]ven if a statute telling an agency 'Here is the problem: deal with it' be deemed to comply with the letter of [the Constitution], it hardly does with the spirit.").

275. ELY, *supra* note 20, at 132.

276. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

277. *See* United States v. Mead Corp., 533 U.S. 218, 231–32 (2001) (refusing to give agency *Chevron* deference because "the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law").

278. *See Mead*, 533 U.S. at 232 (citing United States v. Haggar Apparel Co., 526 U.S. 380, 391 (1999)).

279. *Id.*

a difference between mere agency action and agency lawmaking.[280] Agencies deserve more deference when the delegating legislature intends to give them the authority to make law.[281]

iii. Formalized Procedures

Along similar lines, courts should consider the rigor of the administrative procedures used to adopt the challenged policy. Oftentimes, agencies adopt new policies through relatively formalized notice-and-comment rulemaking procedures.[282] As *Mead* observed, policies resulting from such formalized procedures simultaneously tend "to foster the fairness and deliberation that should underlie a pronouncement" with force of law.[283] Such procedures, which usually also include reasoned explanation requirements, therefore help "reinforce rule-of-law values."[284]

Formalized procedures can also help courts consider whether the relevant agency itself ever considered the constitutional implications of its actions. As Professor Metzger argues, "[f]ew [would] deny that agencies . . . have a legally enforceable duty to avoid violating the Constitution."[285] But agencies, perhaps particularly in the prison context, are sometimes so consumed with their own institutional concerns that they do not necessarily weigh constitutional issues properly.[286] Agencies enacting

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280. It is beyond the scope of this Article to explore whether *Mead* was in fact correct, but, given *Mead*, its principles should not be wholly ignored in other contexts. *See generally* Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 563–65 (2009) [hereinafter Bressman, *Chevron's Mistake*] (arguing that *Mead* does not go far enough to guide courts in determining agencies' interpretive authority when answering questions about statutory meaning, and thus courts "are unlikely to grant agencies their delegated interpretive authority as often as Congress intends").

281. *See id*. at 554–55 (arguing that instead of focusing on statutory language, courts should determine deference to agencies by looking to a variety of factors to determine "legislative intent to delegate interpretive issues to agencies"); *see also* Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

282. Even "informal rulemaking" entails relatively formalized procedures. *See, e.g.*, 5 U.S.C. § 553(b) (2006) (requiring notice and comment for informal rulemaking).

283. *Mead*, 533 U.S. at 229–31.

284. Bressman, *Chevron's Mistake*, *supra* note 280, at 604; *see also* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 425–440 (discussing the requirement that agencies provide adequate reasons for their decisions). *But see* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) (likening notice-and-comment rulemaking to Kabuki theater in that each is "a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues").

285. Metzger, *Ordinary Administrative Law*, *supra* note 257, at 524.

286. *See* 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 "bureaucrac[ies']

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policies through formalized procedures are more likely to consider constitutional values, in part because the notice-and-comment period gives the agency an opportunity to reflect on external concerns that might not have occurred to the agency itself and, in part, because agencies know that formalized procedures are more easily scrutinized.[287] Thus, under the logic of *Mead*, policies resulting from formalized procedures deserve more deference than policies haphazardly thrown together.

iv. Oversight

Courts should also consider whether anyone oversees the agents to whom the policy has been delegated. By oversight, I refer broadly to legislative, executive, and intra-agency oversight. Typically, legislatures delegate particular tasks to agency heads, who, in turn, delegate it to subordinates. (In the case of lethal injection, the delegation generally flows from the legislature to DOC directors, and then to independent contractors and prison employees.[288]) This subdelegation itself is arguably problematic in any event,[289] but whatever problems intra-agency delegation may create are greatly heightened without adequate oversight.

While oversight exists on a spectrum, there is a clear difference between the political branches checking to see how an agency has implemented a policy, on the one hand, and forever turning its head, on the other. The former approach attempts, however imperfectly, to supervise what the agency is doing, and recognizes that monitoring at least increases the probability that the agents will implement a constitutional policy resembling what the elected officials envisioned. The latter approach, by contrast, abandons all pretenses of accountability or responsibility. Even though there are admittedly many shades of gray in between, a court can roughly determine whether agency leaders review the

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mission[s] tend[] to dwarf competing values" so that bureaucrats are unlikely to discuss constitutional issues thoroughly); Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 816–20 (1990) (arguing that the prison guards prioritize the pursuit of order at the expense of all other institutional goals, including constitutional norms).

287. *See* Metzger, *Ordinary Administrative Law*, *supra* note 257, at 497 (encouraging agencies to take constitutional values into account in their decision making).

288. *See generally* Berger, *supra* note 7, at 266–72 (discussing several states' lethal injection procedures).

289. *See* Barron & Kagan, *supra* note 268, at 237 (arguing that actions taken by the statutory delegatee deserve *Chevron* deference, but actions taken by subordinate officials to whom responsibilities were subdelegated do not deserve such deference).

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actions below them, and whether either the legislature or executive generally is responsive to problems that might arise.[290]

Legislative oversight of agencies can also help legislatures understand and correct problems and untenable policies resulting from delegation.[291] Similarly, intra-agency oversight can help ensure that low-level bureaucrats entrusted with problems beyond or outside their competence will get some guidance or assistance before doing anything too damaging. Oversight is, thus, an important way of making delegation work. Indeed, even scholars who argue that agencies are generally more accountable than legislatures concede that this is only true when legislatures hold agencies accountable.[292] An agency's political authority, then, depends partially on the degree of oversight over the challenged policy.

v. Transparency

Finally, courts assessing an agency policy's political authority should look to whether the policy is transparent. If most people do not know what their government is doing, there can hardly be said to be democratic support for the policies that the government enacts.[293] As Ely puts it, "popular choice will mean relatively little if we don't know what our representatives are up to."[294] If an agency acts openly, then even if the legislature has delegated the matter to an unelected body, the people themselves can at least theoretically keep an eye on the agency's actions and hold the legislature or executive accountable if they do not like what they see.[295]

Legal structures currently do exist to keep agency policymaking in the public view. Before adopting a rule, federal agencies must announce their

290. *See generally* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751 (2007) (arguing that courts use administrative law to ensure that agency action roughly tracks "legislative preferences").

291. *See id*. at 1777 (arguing that administrative law "ensures that Congress has the information that it needs to perform fire-alarm oversight").

292. *See* Galle & Seidenfeld, *supra* note 239, at 1939–40 ("[P]olitical oversight creates strong incentives for agencies to avoid actions that are at odds with popular sentiment.").

293. *See, e.g.*, Jeremy Waldron, *Principles of Legislation*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 15, 22 (Richard W. Bauman & Tsvi Kahana eds., 2006) ("[P]ublicity is important for the whole community, [because] it indicates what is being done in [the public's] name and gives them information [about] the appropriate deployment of [] political energies.").

294. ELY, *supra* note 20, at 125.

295. Admittedly, it may not always be easy for the public to know whether it should blame poor policy on the legislature delegating the policy or the executive appointing the agency head, but improved transparency should help the public make that determination, as well.

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intent to do so in the *Federal Register*.[296] An equivalent requirement applies in many states.[297] Notice-and-comment rulemaking, for all its imperfections, gives the public a chance to evaluate proposed policies and observe the agency's decision-making process.[298] And both state and federal agencies usually are subject to Freedom of Information Act requests requiring the disclosure of requested information, unless an exception applies.[299]

These safeguards tell us that our government is generally sensitive to the issue of transparency and has tried to put in place structures to promote sunshine. Ideally, agencies will meet this objective most of the time. When they do, agency action is not particularly opaque.[300] But there are exceptions. In particular, not all state administrative laws provide for as much transparency as the federal APA.[301] Additionally, some agency actions, often including those associated with prisons, are explicitly exempted from state APAs, thus casting a veil of secrecy over whole areas of state action.[302]

To the extent that agency transparency can differ significantly, deference to agency policies in constitutional cases should hinge, in part, on the openness of the relevant agency. Of course, transparency (like

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296. *See* 5 U.S.C. § 553(b) (2006) ("General notice of proposed rule making shall be published in the Federal Register.").

297. *See, e.g.*, MICH. COMP. LAWS § 24.201 (2007) (providing for publication of "state agency rules, determinations, and other matters" in Michigan register); CAL. GOV'T CODE § 11344.1 (West 2007) (requiring the Office of Administrative Law to publish the California Regulatory Notice Register).

298. CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 54 (1994) (describing "information, participation, and accountability" as key elements of rulemaking); Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. 391, 415 (2009) ("[T]he APA's notice-and-comment requirements . . . work to democratize agencies by increasing public involvement in the rulemaking process . . . .").

299. *See* 5 U.S.C. § 552 (2006) (providing for agencies to make information public); MODEL STATE ADMIN. PROC. ACT §§ 2-104(1) (1981) ("In addition to other rule-making requirements imposed by law, each agency shall . . . adopt as a rule a description of the organization of the agency which states the general course and method of its operations and where and how the public may obtain information or make submissions or requests").

300. *See* Galle & Seidenfeld, *supra* note 239, at 1954–61 (arguing that agency proceedings are more transparent than many assume).

301. *See, e.g.*, Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 303–34 (1986) (recounting "many differences" between federal and state administrative laws); Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1175–84 (1993) (arguing that many state sunshine laws do not effectively serve their purpose of promoting open government).

302. *See, e.g.*, MO. ANN. STAT. § 536.010(6)(k) (West 2009) (exempting "statement concerning only inmates of an institution under the control of the department of corrections" from the APA's definition of a "rule"); TENN. CODE ANN. § 4-5-102(10)(G) (2009) (exempting from APA "[s]tatements concerning inmates of a correctional facility").

oversight) exists on a spectrum, from complete openness to complete secrecy, and courts should therefore adjust the degree of deference they provide agencies based on where the challenged policy falls on that spectrum. Secrecy may also be desirable (and therefore more justifiable) in certain contexts, such as national security.[303] Similarly, when legislatures delegate to agencies with instructions to design policies in secret, the resulting policy has greater democratic pedigree than when the agency operates in secret on its own accord. But given that accountability usually requires transparency, the political authority of even these delegations would be compromised and entitled to decreased judicial deference absent compelling reasons for the secrecy.[304]

c. Protecting Unpopular Minorities

Policies uniquely burdening an unpopular minority can also undermine such policies' political authority. As the famous *Carolene Products* footnote four argued, "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[305] Like the administrative inquiries discussed above, this inquiry might also be considered a component of political authority. As Professor Ely puts it, policies that burden only select portions of the population and not "people like us" are inherently suspect because they can deny classes of people access to political procedures that help ensure broad participation in government.[306] This denial can happen in either of two ways. First, the people in power can choke the channels of political change to ensure that they will remain in power and keep the "outs" out of power.[307] Second, even if no one is literally denied the vote, sometimes representatives beholden to the majority can systematically disadvantage some minority, thereby denying that minority the protections of the laws

303. Of course, even in the national security context, complete secrecy is problematic (particularly when its purpose is to conceal government wrongdoing), but the balances should be struck differently than with more typical domestic regulatory schemes.

304. *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 connection between transparency and accountability); Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 755 (2004) (arguing that "accountability requires transparency").

305. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

306. ELY, *supra* note 20, at 173.

307. *Id.* at 103.

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enjoyed by other groups and people.[308] In either instance, judicial intervention is warranted to assure the proper functioning of the political process so that constitutional law protects "groups that find it hard or impossible to protect themselves through the political process."[309]

It is, of course, very difficult to define whom we should be protecting. *Carolene Products* referred to "discrete and insular" minorities, but, as Professor Ackerman points out, "many other groups . . . fail to achieve influence remotely proportionate to their numbers [such as] . . . discrete and diffuse [groups] (like women), or anonymous and somewhat insular [groups] (like homosexuals), or both diffuse and anonymous [groups] (like the victims of poverty)."[310] The key issue, then, may not so much be a particular minority's "discreteness" or "insularity," but rather its ability to protect itself through the usual political channels, particularly against both overt and covert hostility.[311] There will, of course, always be winners and losers in the political system, but when the system systematically disadvantages certain minorities—particularly those especially vulnerable to treatment that "people like us" would neither want nor expect for ourselves—the political authority of the resulting policy is lessened.[312] Courts, of course, do not treat policies burdening unpopular groups as necessarily unconstitutional, but such policies should be subject to less presumptive deference.

2. *Epistemic Authority*

In addition to political authority, courts also defer due to other institutions' superior epistemic authority.[313] The assumption courts usually make is that nonjudicial political institutions will almost necessarily possess superior information, skills, and experience to evaluate relevant

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308. *Id.*

309. William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 20 (1996) [hereinafter Stuntz, *Civil-Criminal Line*].

310. Ackerman, *supra* note 27, at 742 (emphasis omitted).

311. *Id*. It is beyond the scope of this Article to define precisely which unpopular groups should be covered or what methodologies should be employed to make such determinations. *See, e.g.*, Tushnet, *supra* note 27, at 1052 ("[T]he definition of 'we' and 'they' is very likely to be arbitrary."). Nevertheless, courts should at least give more careful consideration to these questions, especially in the Eighth Amendment context. *See infra* notes 340–54 and accompanying text.

312. This analysis applies beyond those groups identified as "suspect classes" under Fourteenth Amendment doctrine, though suspect classes, such as race, enjoy heightened protection in equal protection cases. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (subjecting racial classifications to "the most rigid scrutiny" (quoting Korematsu v. United States, 323 U.S. 214, 216 (1994) (internal quotation marks omitted))).

313. *See supra* Parts I.A, III.A.

factual evidence and assess the given problem.[314] In *Baze*, for instance, the Court emphasized that "some measure of deference to a State's choice of execution procedures" was appropriate because the alternative "would involve courts in debatable matters far exceeding their expertise."[315]

In many instances, courts are correct that agencies and other government actors possess important information and skills to make policy decisions.[316] This assumption, however, is not always well-founded. When the relevant political actors lack expertise, the delegation becomes less deserving of deference because the relevant agents are no better than courts at evaluating the key facts. Indeed, to the extent that such agencies may create policy without even looking at the relevant facts, they would be even less competent than judges, who at least hear and consider evidence. Additionally, delegation without expertise lacks the implicit democratic support that other delegations enjoy. In an era of a pervasive administrative state, "the people" typically expect that when the legislature delegates, it will be to experts.[317]

As with political authority, judicial scrutiny of epistemic authority will usually be more searching for agencies than legislatures. The Court sometimes considers the legislature's epistemic authority but does not seem to take the inquiry too seriously. For instance, the Court sometimes strongly encourages Congress to include fact finding with statutes, such as those passed pursuant to the Commerce Clause or Section 5 of the Fourteenth Amendment.[318] But when Congress then supplies such fact finding, the Court sometimes ignores what it itself has encouraged and strikes down the statute in question anyway, suggesting that Congress's epistemic authority is not terribly persuasive after all.[319] The Court's erratic approach to these problems suggests that it sees legislative expertise and fact finding (or the lack thereof) as rhetorically useful but,

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314. Solove, *supra* note 11, at 1003–06.

315. Baze v. Rees, 128 S. Ct. 1520, 1532 n.2 (2008).

316. For example, courts assume, usually correctly, that prison officials will understand security issues better than courts. *See supra* note 168 (citing cases). This expertise, of course, does not mean that everything prison officials do is constitutional, but it does mean that deference based on epistemic authority is more deserving than when officials lack such expertise.

317. KAPLOW & SHAVELL, *supra* note 224, at 400–01.

318. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (faulting Congress for "lack of evidence" of age discrimination); United States v. Lopez, 514 U.S. 549, 562–63 (1995) (faulting Congress for failing to include findings of facts linking guns in school zones to interstate commerce).

319. *See* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 368–73 (2001) (rejecting relevance of congressional findings of fact after having faulted Congress for not providing them in *Kimel*); United States v. Morrison, 529 U.S. 598, 614 (2000) ("[T]he existence of congressional findings is not sufficient . . . to sustain . . . legislation.").

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ultimately, of marginal importance to the business of actually deciding cases.[320]

By contrast, agencies derive much legitimacy from their supposed expertise, so courts can and do examine whether a particular agency's expertise is real or illusory.[321] As the Court explained in *Hampton v. Mow Sun Wong*,[322] an administrative agency "has an obligation to perform its responsibilities with some degree of expertise."[323] Even beyond administrative law, courts have substantial experience assessing levels of expertise. For instance, courts often must make credibility determinations regarding potential expert witnesses, serving as a "gatekeeper" to ensure that the claimed basis for technical testimony is valid.[324]

Indeed, verification of expertise is essential to the proper workings of the administrative state.[325] Delegation may be theoretically undemocratic, but it can relieve an overburdened legislature of some of its workload and place difficult, technical problems in the hands of people uniquely qualified to find workable remedies. From this perspective, delegation may be democratically justifiable, because in a modern, complex world, the general public expects that complicated problems will be handled by experts suited to understanding those problems.[326] Similarly, the public

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320. *But see* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 821 (1991) (quoting Justice Stone indicating a justice ought "not apply [the] ordinary presumption [of deferring to the legislature] in [a] field where [he] knows the leg[islature] knows nothing" (citing conference notes of Justice Douglas) (internal quotation marks omitted)).

321. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (suggesting that an administrative agency's interpretation of language in a complex and technical regulatory scheme is entitled to some deference because of administrators' expertise); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 419–21 (2007) (explaining the central role of agency expertise in defining the deferential judicial role in administrative law).

322. 426 U.S. 88 (1976).

323. *Mow Sun Wong*, 426 U.S. at 115.

324. *See, e.g.*, 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).

325. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 62 (1993) (explaining that expertise is a virtue of bureaucracy and that agencies, therefore, typically should "understand th[e] subject matter at least well enough to communicate with substantive experts, to identify the better experts, and to determine which insights of the underlying discipline can be transformed into workable administrative practices"); David A. Brennen, *The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389, 413–26 (2000) (describing a history of courts invalidating agency actions for lack of expertise); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 739–42 (2002) (discussing Supreme Court cases invoking "enhanced agency expertise as the rationale for affording agency work product deference on judicial review").

326. *See, e.g.*, A.C.L. Davies, *Judicial Self-Restraint in Labour Law*, 38 INDUS. L.J. 278, 304

expects that expert agencies will make their decisions "based on a consideration of the relevant factors."[327] In other words, agencies should actually make use of their putative expertise, rather than making haphazard, unstudied decisions. When agencies lack expertise or fail to make use of the expertise they have, the presumptive deference they receive should diminish significantly.[328]

Collectively, these inquiries should help courts gauge the political and epistemic authority of a challenged policy. No inquiry is itself determinative, but, together, they reveal much about a policy's democratic pedigree. Accordingly, courts should consider these factors when deciding upon a level of deference in constitutional cases, at least where no existing doctrine already provides such guidance.

C. Applications

1. Baze

The *Baze* Court failed to adequately consider the factors examined above. Indeed, the *Baze* plurality was startlingly oblivious to lethal injection's weak democratic pedigree. With regards to political authority, the legislature played little role in designing the challenged procedure. The relevant Kentucky statute, like many other lethal injection statutes, lacked any specificity. For example, it did not specify the drugs, merely stating that "every death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death."[329] Nor did the statute provide for any details about drug administration.[330] Of course, it would be unrealistic and impractical for a statute to specify each step of a complicated procedure like lethal injection. Nor would a more specific statute guarantee humane executions. But statutes could specify some important guidelines to help improve

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(2009) (noting the "assumption that officials are using their expertise to identify a 'public interest' solution to a problem").

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

328. *See* United States v. Mead Corp., 533 U.S. 218, 228 (2001) ("The fair measure of deference to an agency . . . has been understood to vary with circumstances, and courts have looked to . . . [*inter alia*] relative expertness . . . .") (footnotes omitted).

329. KY. REV. STAT. ANN. § 431.220(1)(a) (West 2006); *see also* ARIZ. REV. STAT. ANN. § 13-704 (2009) ("The penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections."); DEL. CODE ANN. tit. 11, § 4209(f) (2008) (proscribing similar guidelines); GA. CODE ANN. § 17-10-38 (2008) (same); Berger, *supra* note 7, at 303 (discussing vague statutes).

330. *See* KY. REV. STAT. ANN. § 431.220(1)(a) (West 2006).

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safety, such as the general qualifications and training of execution team members, and the need for recordkeeping and contingency plans. Such a statute would still leave many important details to the DOC, but Kentucky's statute did not specify how to approach any of these issues.[331] This lack of legislative input casts serious doubt on the plurality's insistence that rigorous judicial inquiry "would substantially intrude on the role of state legislatures in implementing their execution procedures."[332]

Similarly, though the legislature likely did intend for the lethal injection protocol to carry the force of law, Kentucky did not adopt that protocol using formal administrative procedures. The Supreme Court in *Baze*, though, never asked what administrative procedures Kentucky followed, even though problems in other states arose in large part because prison officials designed execution protocols without following administrative law norms.[333] A decision to promulgate a policy outside normal administrative procedures deprives the general population of notice of the agency's action and the agency itself of the benefit of outside input.[334] That decision also makes it more likely that the officials in charge of the procedure will throw something together haphazardly and without serious reflection on the constitutional issues.[335]

Relatedly, Kentucky, like other states, did little to oversee its execution procedure. The *Baze* trial court found that "[t]hose persons who developed Kentucky's lethal injection protocol were apparently given the task without the benefit of scientific aid or policy oversight."[336] Despite the trial court's criticism, this issue virtually disappeared from the case, even

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331. *See* Baze v. Rees, No. 04-CI-01094, 2005 WL 5797977, at *6 (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 . . . .").

332. Baze v. Rees, 128 S. Ct. 1520, 1531 (2008) (plurality opinion).

333. *See, e.g.*, *Baze*, 128 S. Ct. at 1545 (Stevens, J., concurring) (explaining that in most states, lethal injection was developed without the benefit of medical knowledge or expert guidance); Eric Berger, *Thoughts on LB 36: Problems with the Proposed Bill to Institute Lethal Injection in Nebraska*, 1 NEB. L. REV. BULL. 14, 16–17 (2009), http://lawreview.unl.edu/?p=405 (arguing that both state and federal administrative law requirements generally provide opportunity for meaningful deliberation that lethal injection procedures sorely need).

334. Some states explicitly exempt execution protocols from state APAs. *See, e.g.*, Jackson v. Danberg, No. 07M-09-141, 2008 WL 1850585 (Del. Super. Ct. Apr. 25, 2008) (holding that Delaware's lethal injection protocol is not subject to state APA); Middleton v. Mo. Dep't of Corr., 278 S.W.3d 193 (Mo. 2009) (en banc) (same for Missouri); Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 311 (Tenn. 2005) (same for Tennessee); *supra* note 302.

335. *See* Berger, *supra* note 7, at 268–73, 301–14 (discussing problems resulting from states' lack of attention to lethal injection); Denno, *Quandary*, *supra* note 44, at 66–76 (explaining that the state adopted lethal injection procedures by just copying original Oklahoma protocol).

336. Baze v. Rees, No. 04-1094, 2005 WL 5797977, at *12 (Cir. Ct. Ky. July 8, 2005).

http://openscholarship.wustl.edu/law_lawreview/vol88/iss1/1

though problems in other states seemed to result from the legislature's abdication of responsibility.[337]

As for transparency, Kentucky, like most death penalty states at the time of *Baze*, kept its execution protocols secret.[338] For instance, it shielded its execution team from depositions, even though it could have made those team members available without disclosing their identities.[339] While most of the general public is unlikely to engage with lethal injection, states concealing their procedures are more likely to cut corners and make mistakes than if their procedures are in plain view. Collectively, then, the administrative inquiries cut sharply against the procedure's political authority and the Court's deferential approach in *Baze*.

The "unpopular minority" component of political authority is more complicated. Death row inmates—and, indeed, people charged with capital crimes—are usually unable to protect themselves through the political process.[340] Indeed, death row inmates, like many convicted felons, are often literally disenfranchised.[341] Capital defendants are, as Professor Lain puts it, "about as unpopular a minority as one can find (for obvious and perfectly legitimate reasons)."[342] They also are disproportionately poor, black, and inadequately represented—that is, at a disproportionate risk of systematic disadvantage, even before they have been charged with a crime.[343] Additionally, disenfranchisement laws for

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337. *See* Taylor v. Crawford, No. 05-4173, 2006 WL 1779035, at *7–8 (W.D. Mo. June 26, 2006) (finding that "there are no checks and balances or oversight, either before, during or after the lethal injection occurs" and that resulting flaws in the procedure "subject[] condemned inmates to an unacceptable risk of suffering unconstitutional pain and suffering"); Berger, *supra* note 7, at 301–08 (discussing problems with lack of oversight in Missouri, California, and Tennessee procedures).

338. *Baze*, 128 S. Ct. at 1571 n.5 (Ginsburg, J., dissenting); Berger, *supra* note 7, at 277, 307 (discussing secrecy in lethal injection); Denno, *Quandary*, *supra* note 44, at 95 (explaining that "[s]tates never have been forthcoming about how they perform lethal injections" and that some states recently have "retreated into greater secrecy"); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 117–18 (2002) (discussing missing information in lethal injection protocols).

339. In Missouri, for instance, the trial court fashioned an anonymous deposition in which the execution team leader sat behind a curtain during his deposition. *See* Doe Deposition, *supra* note 111, at 2 (noting anonymous deposition).

340. *See* ELY, *supra* note 20, at 103; *supra* Part III.B.1.c.

341. *See The Sentencing Project Publishes Report on Disenfranchisement Reform*, THE SENTENCING PROJECT (Sept. 25, 2008), http://www.sentencingproject.org/detail/news.cfm?news_id=492 (estimating that five million convicted felons were disenfranchised in 2008 election, including many who had completed their sentences).

342. Lain, *Deciding Death*, *supra* note 87, at 4.

343. *Id.* at 4–5; *see also* Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1, 16 (noting that the death penalty has historically "been reserved almost exclusively for those who are poor"); Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate*

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felons in many states burden not just those convicted of serious crimes but the communities from which they come, depriving them of representation proportionate to their population.[344]

These are burdens not faced by the general population. "People like us"—the affluent and well-connected in society—don't commit murder very often, but when they do, it is exceedingly rare that they end up on death row.[345] Thus, some scholars have argued that "the death penalty context presents the quintessential case for the Court's countermajoritarian function. If there is any place one would want and expect the Supreme Court to guard against majoritarian overreaching, it is a capital case."[346]

All of this would suggest that the plaintiff in many Eighth Amendment cases would be entitled to heightened or even strict scrutiny. But the issue is not quite so simple. The point of many laws, especially criminal laws, is "to sort people . . . for differential treatment."[347] There is nothing wrong with imprisoning convicted murderers and rapists, even though the law will clearly treat the incarcerated very differently than it treats the rest of us. The law, in fact, treats them differently because it wants to discourage the very behavior that put them in this class in the first place. Grave flaws in the criminal justice system should make us wary of trusting its outcomes too much,[348] but the system would likely function even worse if

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Characteristics, Adjustment, and Confinement: A Critical Review of the Literature, 20 BEHAV. SCI. & L. 191, 195 (2002) ("African-Americans are markedly over-represented on death row compared with their percentage of the population (42.72% versus 12.3%)."); *infra* note 355.

344. *See* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1161 (2004) (arguing that felon disenfranchisement laws "penalize not only actual wrongdoers, but also the communities from which incarcerated prisoners come and the communities to which ex-offenders return by reducing their relative political clout").

345. ELY, *supra* note 20, at 176; *see also* Furman v. Georgia, 408 U.S. 238, 251–52 (1972) (Douglas, J., concurring) ("One searches our chronicles in vain for the execution of any member of the affluent strata of this society.").

346. Lain, *Deciding Death*, *supra* note 87, at 5; *see also* Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 459 (1999) ("Those . . . in prisons . . . are classic discrete and insular minorities, who have little political power."); Stuntz, *Civil-Criminal Line*, *supra* note 309, at 20 (arguing that if ever a group was unable to protect itself politically, it is the "universe of criminal suspects").

347. *See* ELY, *supra* note 20, at 135; KOMESAR, *supra* note 12, at 251 ("The very essence of public policy is differentiating and distinguishing.").

348. *See generally* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1716–18 (2008) (arguing that even with the development of DNA evidence, the criminal justice system still has inadequate procedures for dealing with claims of actual innocence); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 121–31 (2008) (discussing the failure of the criminal justice system to properly address claims of factual innocence in cases that subsequently resulted in exoneration through DNA); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1846–60 (2000) (finding that, during the period of study, sixty-eight of one hundred capital convictions were reversed for serious errors); James S. Liebman, *The*

every criminal defendant or convicted felon challenging some aspect of that system's constitutionality could trigger strict scrutiny merely by filing a complaint.

Nor would it be realistic to expect judges to adopt such a view. Indeed, while aspects of our criminal justice system are deeply troubling, it is not constitutionally suspect in the same way that, say, Jim Crow was. Despite the flaws, including some instances of police and prosecutor misconduct, most participants on all sides of the criminal justice system want it to be fair; surely the same could not be said for law in the Jim Crow South.[349] Additionally, while the inequities of the criminal justice system fall disproportionately on minorities and the poor, the system as a whole (unlike Jim Crow) does not deliberately target minorities.[350] Accordingly, it would be neither realistic nor doctrinally justifiable to apply heightened scrutiny to Eighth Amendment challenges comparable to deliberate state race discrimination.[351]

None of this is to downplay the serious flaws and racial inequality of the system today.[352] If we take footnote four seriously, we must admit that the political system simply cannot protect capital defendants and death row inmates' constitutional interests, and that poor, inner-city minorities bear the disproportionate brunt of society's fear of and anger about crime at all stages of the criminal justice system.[353] Courts, in other words, should be more sensitive to the inequities of the criminal justice system and should approach many policies regarding criminal suspects,

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Overproduction of Death, 100 COLUM. L. REV. 2030, 2032 (2000) (arguing that police, prosecutors, and judges have strong incentives to "overproduce" death sentences, relative to what would be appropriate based solely on substantive law).

349. Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 263 (2007) ("Unlike state violence inflicted in the Jim Crow era explicitly to reinstate blacks' slave status, today's criminal codes and procedures operate under the cloak of colorblind due process.").

350. *Id.*; *see also* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1972 (2008) [hereinafter Stuntz, *Unequal Justice*] ("Official racism is an unlikely explanation for a massive rise in black punishment . . . .") (footnote omitted). *But see infra* notes 352–53 and accompanying text.

351. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (subjecting Virginia miscegenation statute to the "most rigid scrutiny" (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944) (internal quotation marks omitted))).

352. *See, e.g.*, Stuntz, *Unequal Justice*, *supra* note 350, at 1970 ("American criminal justice is rife with inequality.").

353. *See generally* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 766–69 (1995) (arguing that due to intense political pressures, elected judges "heed, and perhaps even lead, the popular cries for the death of criminal defendants"); Bright, *supra* note 343, at 12 ("[I]n many courthouses . . . everything looks the same as it did during the period of Jim Crow justice") (footnote omitted); Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 94–95 (2009) (arguing that the criminal justice system devalues black victims).

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defendants, and convicts with more skepticism than they do.[354] The extreme deference applied in *Baze*, then, was inappropriate.[355]

As for epistemic authority, Kentucky demonstrated more expertise than many states, but not enough to justify the Court's great deference. It is true that Kentucky required that "members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman."[356] Pursuant to these requirements, Kentucky employed a phlebotomist and an EMT during executions.[357] These facts suggest that the State took some steps to find competent people to carry out the procedure. Other facts, however, suggest that the Court should have been still more attuned to questions of epistemic authority. For example, like other states, Kentucky appears to have had no particular understanding of the drugs it selected. Instead, it just copied Oklahoma's procedure, offering a "'stereotyped reaction' to an issue, rather than a careful analysis of relevant considerations favoring or disfavoring a conclusion."[358] Additionally, the protocol used in *Baze*

354. Obviously, the level of scrutiny will also turn on the substance of the precise policy and the applicable doctrine for a particular constitutional provision.

355. State lethal injection policies, of course, do not deliberately target racial minorities. But death row inmates are disproportionately poor, racial minorities. *See, e.g.*, David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 41 CRIM. L. BULL. 194, 213 (2005) ("[B]lack offenders whose victims are white are at particular risk of more punitive treatment . . . ."); Michael Tonry, *Theories and Policies Underlying Guidelines Systems: Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1255 tbl.3 (2005) (noting that in 2002, nearly 50% of federal and state prison inmates were black); *supra* note 343. They, therefore, come from groups that are already underrepresented in the political process generally and in the criminal justice system, in particular. *See, e.g.*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109–246, § 2(b)(7), 120 Stat. 577, 578 (2006) (to be codified at 42 U.S.C. §§ 1971, 1973) ("Despite the progress made by minorities under the Voting Rights Act of 1965, the evidence before Congress reveals that 40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution."); Stuntz, *Unequal Justice*, *supra* note 350, at 1973 (arguing that the weakening of poor city neighborhoods' electoral power during the second half of the twentieth century has significantly contributed to inequalities in the American justice system). To this extent, flawed execution methods, like most features of the death penalty, disproportionately affect a population whose political power to remedy those flaws is comparatively weak. *See* Stuntz, *Civil-Criminal Line*, *supra* note 309, at 20–21 (arguing that criminal suspects cannot protect themselves politically). To be sure, these factors do not make the method unconstitutional, but they do implicate political process concerns and, therefore, undermine some of the policy's political authority. *See, e.g.*, ELY, *supra* note 20, at 135–80.

356. Baze v. Rees, 128 S. Ct. 1520, 1533 (2008) (plurality opinion).

357. *Id.* A phlebotomist is trained to insert catheters into veins.

358. *Baze*, 128 S. Ct. at 1545 (2008) (Stevens, J., concurring) (quoting Mathews v. Lucas, 427 U.S. 495, 519, 520–21 (1976) (Stevens, J., dissenting)); *see also* Denno, *Quandary*, *supra* note 44, at 78–79 (explaining that all lethal-injection states have copied Oklahoma's procedure).

required the DOC warden "to reconstitute the Sodium Thiopental into solution form prior to injection," even though he "ha[d] no formal training on reconstituting the drug" and the process is, in fact, quite complicated.[359] The *Baze* plurality missed these issues, inquiring only into paper credentials—not actual competence in administering lethal injection—even though experience in other states demonstrates that some personnel may "look good on paper" but do not possess the skills or temperament to carry out lethal injection safely.[360]

All of this suggests that the plurality's preemptive deference in *Baze* was inappropriate. The Court was correct that the record lacked evidence sufficient to strike down the Kentucky procedure. But instead of upholding a procedure about which it knew very little, the plurality should have remanded for further fact finding.[361] And the plurality certainly should not have cast its decision so broadly so as to try to resolve many other lethal injection challenges, including those in states with more developed records. In short, attention to the challenged procedure's democratic pedigree would have counseled in favor of much less judicial deference.

2. Kennedy

Kennedy also looks poorly reasoned in light of democratic pedigree factors. The Court applied heightened scrutiny in overturning the Louisiana statute, but it neither articulated nor justified such scrutiny. Under the "political authority" inquiry, application of such heightened scrutiny for a legislatively enacted statute seems antidemocratic, especially in light of the deference to state legislatures in *Baze*, where the legislative involvement was minimal. Of course, to the extent that prosecutors and juries enjoy discretion respectively about whether to seek and impose the death penalty, the implementation of a statute like Louisiana's is not solely

359. Baze v. Rees, No. 04-01094, 2005 WL 5797977, at *3 (Cir. Ct. Ky. July 8, 2005); *see also* Ty Alper, *What Do Lawyers Know About Lethal Injection?*, 1 HARV. L. & POL'Y REV. 1, 2–4 (Mar. 3, 2008), http://www.hlpronline.com/2008/03/what-do-lawyers-know-about-lethal-injection/ (discussing state personnel's lack of understanding).

360. Missouri, Arizona, and the federal government, for instance, have all employed in their procedures the same dyslexic surgeon, who admitted to not knowing how much anesthetic he had prepared and who misunderstood basic principles of anesthesiology. *See* Trial Transcript at 29–57, Taylor v. Crawford, No. 05-4173, 2006 WL 1236660 (W.D. Mo. May 5, 2006) (medical expert testifying about the numerous wrong medical statements made by Dr. Doe); Berger, *supra* note 7, at 269–70 (discussing Doe).

361. *See Baze*, 128 S. Ct. at 1572 (Ginsburg, J., dissenting) (calling for remand); *cf.* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("[T]he court must consider whether the decision was based on a consideration of the relevant factors . . . .").

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the legislature's decision.[362] Nevertheless, *Kennedy* functioned as a facial challenge to the statute imposing capital punishment for the crime of child rape. The statute's political authority does not automatically make it constitutional, but, given the rhetoric about democratic values in cases like *Baze*, the Court's failure to address the issue is striking.[363]

As for epistemic authority, the Court implicitly determined that the legislature had little, concluding that the death penalty for child rape did not serve the legitimate penological purposes of deterrence and retribution. With regards to deterrence, the Court worried that the death penalty for child rape might "add[] to the risk of non-reporting" and remove the perpetrator's incentive not to kill the victim.[364] The Court, however, conceded that "we know little about" these inquiries.[365] Its conclusion that capital punishment is an insufficient deterrent, therefore, rested on empirically shaky ground, and yet the Court had no problem striking down the state policy.[366]

Even more curious is the Court's treatment of retribution. Retribution perhaps might be best thought of as a moral determination.[367] The Court nevertheless seemed to treat retribution in places as a factual inquiry into whether "the child rape victim's hurt is lessened when the law permits the death of the perpetrator."[368] Drawing on research about the emotional effects of courtroom testimony by child victims, the Court found that it was "not at all evident" that the victim's hurt would be lessened.[369] Relying on these findings, the Court in *Kennedy* then determined that capital punishment did not adequately serve a retributive purpose, even

362. *Cf.* 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 the power of federal prosecutors.").

363. The "unpopular minority" prong of political authority should function much as it should in *Baze*, justifying some heightened level of scrutiny, but not the very rigorous review applied in *Kennedy*. *See supra* notes 340–54.

364. Kennedy v. Louisiana, 128 S. Ct. 2641, 2663 (2008).

365. *Id.* at 2663–64.

366. *See supra* Part I.B.3.

367. *See* W. David Ball, *Heinous, Atrocious, and Cruel:* Apprendi, *Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 896 (2009) (arguing that juries "express[] the moral judgments ineluctably tied to the retributive principles at the heart of criminal law"); Douglas A. Berman, *Should Juries Be the Guide for Adventures Through* Apprendi-*Land?*, 109 COLUM. L. REV. SIDEBAR 65, 69 (2009) (discussing retribution as a moral question). Alternatively, retribution might be seen as a quasi-factual inquiry into whether a particular punishment is consistent with the principles of our criminal law, but the Court did not seem to engage in such an analysis.

368. *Kennedy*, 128 S. Ct. at 2662.

369. *Id.*

though the facts upon which it relied were neither obviously correct nor obviously relevant to the question of retribution.[370]

Kennedy's questionable reliance on questionable facts is especially striking because the Court never explained how its facts were relevant or why its view of uncertain evidence was sufficient to overrule the legislature. Nor did it explain why it was epistemologically better positioned to make these factual determinations than the legislature. This omission is noteworthy, given that other cases have emphasized that "[s]electing the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts."[371]

The Court's analysis in *Kennedy* is also perplexing because it could have more easily arrived at the same outcome. Given that the Eighth Amendment limits the kind of punishment society can impose, the Court could have more candidly emphasized that the Eighth Amendment forbids capital punishment in close cases, such as nonhomicide crimes.[372] Similarly, it could have acknowledged that, at some level, the propriety of capital punishment for a particular crime hinges not on factual inquiries but on moral calculations that defy empirical analysis.[373] To be sure, such admissions would force the Court to concede that it was essentially substituting its moral judgment for the legislature's,[374] but many believed that the Court was ultimately doing that anyway.[375] Attention to political and epistemic authority, then, might not have changed the result, but it would have encouraged a more coherent opinion and greater judicial candor about the factors really driving the decision.

Instead, the Court only briefly acknowledged "the necessity to constrain the use of the death penalty"[376] and purported to engage in an

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370. *See id*. at 2662–63 (explaining, "our conclusion that imposing the death penalty for child rape would not further retributive purposes").

371. Ewing v. California, 538 U.S. 11, 25 (2003) (plurality opinion).

372. The Court did concede that "there are moral grounds [on which] to question a rule barring capital punishment for a crime against an individual that did not result in death," but its analysis nevertheless rested significantly on facts it thought relevant to deterrence and retribution. *See Kennedy*, 128 S. Ct. at 2658, 2661–64. *But see* Graham v. Florida, 120 S. Ct. 2011, 2016–17 (2010) (articulating more clearly a categorical rule against capital punishment for nonhomicide crimes).

373. The dissent certainly saw this as a moral question. *See Kennedy*, 128 S. Ct. at 2676 (Alito, J., dissenting) ("[I]s it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist?").

374. Alternatively, the Court could have asked whether the challenged punishment is consistent with principles of deserved culpability embodied in our criminal laws.

375. *See, e.g.*, Kennedy v. Louisiana, 129 S. Ct. 1, 3 (2008) (describing majority opinion in *Kennedy* as "giving effect to the majority's own preference") (Scalia, J., concurring in denial of rehearing).

376. *Kennedy*, 128 S. Ct. at 2660.

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ostensibly factual study of retributive effects, deterrent effects, and other states' policies. These facts may be relevant, but many of them are also, as the Court itself conceded, subject to dispute.[377] The Court never justified why its interpretation of uncertain facts should be superior to the State's interpretation. Relatedly, the Court also insufficiently explained why its epistemic authority in *Kennedy* was superior to the legislature's (when it often is not) or why that putative epistemic authority should trump the state legislature's *political* authority (when it often does not). Given that deference in *Baze* (and elsewhere) is premised on the political branches' political and epistemic authority,[378] *Kennedy*'s disregard for these important questions is striking.

D. Advantages

1. Normative Advantages

A democratic pedigree theory of deference has several advantages, both normative and practical. Normatively, it helps encourage desirable behavior in both the political branches and the judiciary itself. With regards to the political branches, it helps promote healthy democracy. By increasing the level of judicial scrutiny of administrative policies, it encourages legislatures to delegate with greater specificity and with instructions to agencies to create rules with the force of law. While some legislatures delegate to avoid taking the political heat, they might be somewhat less inclined to do so if they knew that the resulting policy would be reviewed more stringently—and if resulting legal difficulties would generate attention reflecting poorly on the legislature. Under the proposed theory of deference, courts would at least consider whether legislatures are engaged in difficult policy decisions.[379]

Additionally, in prioritizing administrative principles such as formalized procedures, oversight, and transparency, courts would encourage agencies to respect these values. Transparent, formalized lawmaking is more likely to encourage open deliberation among policymakers and constituents than secretive, informal rulemaking.[380] Transparency, in particular, is a friend to democratic accountability,

377. *See id.* at 2663–64 (conceding uncertainty about several important facts and inquiries).

378. *See supra* Parts I.A, III.A.

379. *Cf.* BREYER, ACTIVE LIBERTY, *supra* note 20, at 15 (arguing for a constitutional theory that promotes "a sharing of [the nation's] sovereign authority" among its people).

380. *See* GUTMANN & THOMPSON, *supra* note 18, at 135–36 (discussing virtues of transparent lawmaking).

motivating public officials to pay closer attention to their duties and encouraging citizens to deliberate about public policy.[381]

Collectively, by nudging legislatures to participate more in policymaking and agencies to make policies more openly, this approach to judicial deference would help promote democratic deliberation.[382] Such deliberation is generally valuable, but perhaps especially so for a policy issue like the death penalty.[383] Reasonable people, of course, can disagree about the moral propriety of capital punishment, but democratic deliberation could help force both legislators and their constituents to scrutinize both their own views and widespread misinformation about these hard issues.[384] Similarly, such attention could encourage administrators crafting policies to take greater consideration of relevant constitutional values, such as the Eighth Amendment.

Relatedly, administrative agencies often make decisions impacting constitutional rights, and yet judges in constitutional cases often pay scant attention to how agencies operate. Inattention to agency practices might be especially pronounced in the area of criminal justice.[385] But, as Professor Barkow argues, it is precisely in the highly politicized criminal justice context that agencies need to be well "designed to operate successfully."[386] The proposed theory would require litigants and, thus, courts to look more closely at agency practices in constitutional cases, thereby encouraging agencies to implement policies through regular, transparent procedures.[387]

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381. *Id.* at 97–98.

382. *See* Metzger, *Ordinary Administrative Law*, *supra* note 257, at 522 ("[A]gencies should have an obligation to take constitutional norms and requirements seriously in their decisionmaking."); Murphy, *supra* note 247, at 1303 (arguing that adjusting deference based on the quality of deliberation would help "improve legislative constitutional deliberations"); *cf.* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 13 (2008) (arguing in favor of governmental policies that "nudge" actors to behave in ways that benefit the common good while imposing minimal costs).

383. *See* GUTMANN & THOMPSON, *supra* note 18, at 4 (arguing that deliberation is an especially appropriate way for citizens to resolve moral disagreements).

384. *See, e.g.*, ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH?: CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 214–15 (2000) (arguing that states have reinstated or abolished capital punishment based on "perceived public sentiment" and "false assumptions" rather than "actual studies"); James R. Acker, *Be Careful What You Ask For: Lessons from New York's Recent Experience with Capital Punishment*, 32 VT. L. REV. 683, 712 n.129 (2008) (discussing various studies concluding that, contrary to popular myth, "capital punishment imposed costs greatly in excess of life imprisonment"); Craig Haney, *Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 GOLDEN GATE U. L. REV. 131, 143 (2006) ("[T]he widespread dissemination of misinformation has produced basic misconceptions about the death penalty held by many members of the public.").

385. *See* Barkow, *Administering Crime*, *supra* note 223, at 813–14.

386. *Id.*

387. Of course, ordinary administrative law, such as the APA, encourages these same values. But,

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Greater attention to administrative norms is not just an abstract goal but should result in more carefully designed policy. For example, critics of lethal injection argue that the procedure's dangers result directly from a "pervasive lack of professionalism."[388] By turning attention to the administrative processes by which a policy is adopted, courts could more easily identify whether a challenged procedure is undeserving of deference for arbitrariness or lack of "professionalism."[389]

As for the judiciary, this theory helps encourage judicial reflection and candor about the level of deference it is applying.[390] While the Court does overtly select a level of deference in some areas like equal protection,[391] in other areas it is less forthcoming about the level of scrutiny it is applying or the factors triggering that scrutiny. But whether they admit it or not, courts review government policy and facts in constitutional cases with varying degrees of deference. Encouraging judges to apply a theory of deference will help them become aware of the assumptions they sometimes make unconsciously.[392]

Considering democratic pedigree also helps shed light on particularly curious doctrinal moves. If the Court places special emphasis on the respect for democratic pedigree in one constitutional case but seemingly ignores such principles in a different case implicating the same constitutional provision, it has some explaining to do. The Court's alternating respect and disrespect for federalism in Eighth Amendment cases provides a helpful example. In the capital proportionality cases, the Court is insensitive to federalist principles, allowing the policy of a majority of states to trump other states' policies, notwithstanding the theory of federalism that states are laboratories of experimentation.[393] By

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as *Baze* demonstrates, the propriety of agency action sometimes arises in constitutional challenges, so predicating deference in constitutional cases on regular, transparent agency procedures could encourage agencies to pay more attention to their procedures, especially in cases where the APA does not reach a particular agency. *See, e.g.*, *supra* notes 302, 334.

388. Morales v. Tilton, 465 F. Supp. 2d 972, 980 (N.D. Cal. 2006); *see also* Berger, *supra* note 7, at 268–73, 301–14 (detailing problems with states' development of lethal injection procedures).

389. *See* Bressman, *Beyond Accountability*, *supra* note 258, at 515–27 (discussing significance of arbitrariness in "constitutional" administrative law cases).

390. *See* Metzger, *Ordinary Administrative Law*, *supra* note 257, at 534–36 (arguing in favor of greater judicial candor).

391. *See, e.g.*, CHEMERINSKY, *supra* note 266, at 669–74 (discussing tiers of scrutiny for equal protection analysis).

392. *Cf.* Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 599 (2006) (encouraging courts to "avoid deciding a case without at least testing their convictions").

393. *See, e.g.*, Jacobi, *supra* note 62, at 1125–42 (discussing federalism problems in proportionality cases); *supra* Part I.B.2.a.

contrast, in the method-of-execution cases, courts have cited federalism as a reason not to interfere with state execution procedures, even if those procedures have been designed beyond the gaze of the legislature and general public.[394] Increased judicial candor about the factors driving decision making can help increase judges' self reflection about the decisions they render.

2. Practical Advantages

From a practical standpoint, the democratic pedigree proposal is modest enough to appeal to some judges. More normative theories may rethink the law in illuminating ways, but they are less likely to impact the way judges decide cases. First, while the theory of deference proposed here asks courts to make difficult determinations about political and epistemic authority, it is actually consistent with principles that courts have embraced in other constitutional contexts. Despite the considerable deference given to agency interpretations of the statutes they administer,[395] the Court nevertheless favors legislative over administrative action in certain constitutional contexts. For example, in *Hampton v. Mow Sun Wong*,[396] the Court struck down the Civil Service Commission's ban on the federal employment of aliens, but indicated that the case may well have turned out differently had there been "an explicit determination by Congress or the President to exclude all noncitizens from the federal service."[397] The Court decided the case on equal protection grounds, but the challenged policy's weak democratic pedigree figured substantially in the Court's reasoning.

These democratic pedigree principles also form an important constitutional backdrop against which the Court interprets statutes. While federal courts have not revived the non-delegation doctrine, they have created nondelegation canons, indicating their preference for clear legislative statements over agency-made policy where certain constitutional principles are on the line.[398] For instance, whereas courts

394. *See, e.g.*, Berger, *supra* note 7, at 261, 286–93 (discussing deference offered to state execution procedures in method-of-execution cases). As noted above, the fact that state counting confirms the practice challenged in *Baze* and undermines the practice challenged in *Kennedy* does not adequately justify the different approaches to federalism. *See supra* Part I.B.2.a.

395. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

396. 426 U.S. 88 (1976).

397. *Id.* at 116; *see also* Barron & Kagan, *supra* note 268, at 236 n.126 (discussing *Mow Sun Wong*).

398. *See, e.g.*, Sunstein, *Nondelegation Principles*, *supra* note 271, at 139 (arguing that the nondelegation doctrine, far from being dead, has been relocated in "a series of more specific and

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typically defer to reasonable agency interpretations of ambiguous statutes under *Chevron*, due to federalism principles, they typically will not defer to agency views that state law is preempted.[399] Similarly, courts view skeptically agency interpretations applying statutes retroactively, indicating that such decisions should be made instead by Congress.[400]

The Court also distrusts vague grants of delegation. In the free speech context, for example, the Court has been skeptical of schemes granting government officials standardless discretion over licenses to speak.[401] In *Freedman v. Maryland*,[402] the Court explained that the statute there "lack[ed] sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contain[ed] the same vice as a statute delegating excessive administrative discretion."[403] In other words, the licensing cases reflect not just free speech principles but also concerns about delegations without intelligible principles, formalized procedures, oversight, or transparency. When an administrative agent has unsupervised, unguided discretion, the delegation itself becomes problematic, casting constitutional doubt on that agent's licensing determinations.[404]

Along similar lines, the Court sometimes polices the scope of delegation, refusing to give agencies more authority than Congress conferred.[405] In *Gonzales v. Oregon*,[406] the Court refused to allow the

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smaller, though quite important, nondelegation doctrines").

399. *See* Wyeth v. Levine, 129 S. Ct. 1187, 1201 (2009) (considering the "thoroughness, consistency, and persuasiveness" of the agency's explanation of state law's impact on the federal scheme); Sunstein, *Nondelegation Principles*, *supra* note 271, at 148–49.

400. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not . . . be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000) (explaining that the rule disfavoring congressional delegation of authority to apply laws retroactively is "an institutional echo of the notion that the Due Process Clause forbids retroactive application of law").

401. *See* Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 133 (1992) (invalidating county ordinance giving impermissibly standardless discretion to county administrator to determine whether demonstrators must pay a $1000-a-day fee); FW/PBS, Inc. v. Dallas, 493 U.S. 215, 226 (1990); Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755–58 (1988); Freedman v. Maryland, 380 U.S. 51, 56–57 (1965).

402. 380 U.S. at 51.

403. *Id*. at 57.

404. *See* Metzger, *Ordinary Administrative Law*, *supra* note 257, at 6–7 ("[T]he Court's decisions on parade licensing have underscored the importance of officials being required to explain their decisions, a typically administrative requirement.").

405. *See, e.g.*, Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 131–43 (2000) (finding that Congress did not delegate to the FDA authority to regulate tobacco products); Manning, *supra* note 272, at 226–27 (arguing that *Brown & Williamson*'s refusal to find delegation of authority to regulate tobacco was animated by nondelegation concerns).

406. 546 U.S. 243 (2006).

Attorney General to interpret the federal Controlled Substances Act (CSA) to forbid Oregon from allowing physicians to assist the suicide of terminally ill patients, given that the CSA nowhere delegated authority to the Attorney General over that subject matter.[407] Courts thus can and do make sure that agency action does not exceed the terms of the legislative delegation.

Beyond administrative norms, democratic pedigree concerns help shape constitutional doctrine in still other ways. Perhaps most notably, courts have frequently identified concern for unpopular minorities as a factor in their constitutional reasoning. Equal protection doctrine, of course, is explicitly concerned with policies uniquely targeting unpopular groups, especially racial groups.[408] But these principles have proved significant in other doctrinal areas, too, even where the Court has refused to find the burdened group a suspect class. *Lawrence v. Texas*, for instance, was ostensibly decided as a due process case, but emphasized the stigma resulting from the challenged ban on homosexual sodomy.[409] The Court, then, has paid special attention to laws burdening groups that, at least in some places, are unable to protect themselves adequately through normal political channels.

Even the criminal procedure revolution can be explained partially in democratic pedigree terms.[410] The criminal procedure decisions of the Warren Court sought to protect unpopular groups (especially poor blacks) from unfair police treatment and therefore served as a kind of

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407. *Id.* at 275.

408. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 10 (1967) (stating that the primary purpose of the Fourteenth Amendment is to prevent discrimination based on race); Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960) ("When a legislature . . . singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment."); Brown v. Bd. of Educ., 347 U.S. 483, 489–93 (1954) (discussing history of the Fourteenth Amendment "as proscribing all state-imposed discriminations against the Negro race"); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442–43 (1985) (noting mentally retarded people's inability to protect themselves and holding unconstitutional a requirement of a special permit for a proposed home for them); Graham v. Richardson, 403 U.S. 365, 372 (1971) ("Aliens as a class are a prime example of a 'discrete and insular minority' . . . for whom . . . heightened judicial solicitude is appropriate." (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (citation omitted))).

409. *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

410. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 467–68, 478–79 (1966) (applying privilege against self-incrimination in interrogation setting); Mapp v. Ohio, 367 U.S. 643, 657, 660 (1961) ("holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments" and that because the "right to be secure against rude invasions of privacy by state officers is . . . constitutional in origin, we can no longer permit that right to remain an empty promise").

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antidiscrimination law.[411] Significantly, the governmental actors in these cases are rarely politically accountable legislators, but rather law enforcement officials who lack the constitutional authority to issue a constitutional judgment on the matter at hand. If courts reflexively deferred to police judgments on Fifth and Sixth Amendment questions, then a criminal suspect would never get "a responsible and competent judgment on the constitutionality of what has been done to him" except by "his formal adversaries in the criminal process."[412] As Professor Black puts it, "[t]hat cannot be right."[413] In short, various strands of the democratic pedigree theory fit with long-standing constitutional principles.

A second pragmatic justification for the theory proposed here is that it responds to current theories behind judicial deference. When courts defer in constitutional cases, they typically cite concerns about their political or epistemic authority relative to the challenged political branch. But quite often in constitutional adjudication, the standard of review seems unmoored from these concerns. Sometimes, this is for very good substantive reasons, such as requiring strict scrutiny for racial discrimination or for laws burdening speech on the basis of content.[414] But in some areas of constitutional adjudication, where the Court silently applies varying levels of deference, it is odd that the deference or lack thereof is so disconnected from the reasons courts give when they defer. This proposed theory would bring courts' practices of deference more in line with their own theories.

Third, by encouraging courts to articulate the reasons for granting or not granting deference, this theory will provide more guidance for both litigants and lower courts. It is true, of course, that the multi-factor test proposed here is complicated and, therefore, an imperfect guide for lower courts. But to the extent it identifies factors that courts should consider in gauging the deference they apply, it is still an improvement over the stealth deference determinations under current doctrine.

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411. *See* ELY, *supra* note 20, at 97 (discussing the Fourth Amendment as a means of policing processes of representation and thus as a "harbinger of the Equal Protection Clause"); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) ("Warren-era constitutional criminal procedure began as a kind of antidiscrimination law.").

412. *See* BLACK, *supra* note 30, at 78.

413. *Id.*

414. *See, e.g.*, Simon & Schuster v. Members of N.Y. Crime Victims Bd., 502 U.S. 105, 118–21 (1991) (applying strict scrutiny to content discrimination in free speech context); Loving v. Virginia, 388 U.S. 1, 11 (1967) (subjecting racial classifications to "the most rigid scrutiny" (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944) (internal quotation marks omitted))).

Finally, the proposed theory would not excessively unsettle current Eighth Amendment doctrine—or other constitutional doctrines to which it might apply.[415] It would offer a new approach to judicial deference, but it would not disrupt current Eighth Amendment inquiries in either method-of-execution or proportionality cases. It would, in other words, affect the respect afforded the government in these cases and the way in which the Court viewed the relevant facts, but not the actual judicial inquiries.[416] Courts would still ask, *inter alia*, if a method of execution created a substantial risk of serious harm or if an arguably disproportionate punishment served deterrent or retributive purposes. Deference, then, is not itself the substantive inquiry, but rather the lens through which courts conduct the substantive inquiry. Of course, to the extent that Eighth Amendment doctrine is problematic and inconsistent, some observers might prefer a theory that does more to revamp the area. But courts often move incrementally, and many judges may be more willing to rethink deference than to adopt an entirely new theory of criminal punishment.

CONCLUSION

The Supreme Court's Eighth Amendment jurisprudence is in disarray, and the confusion is symptomatic of a much larger problem in constitutional decision making. In *Baze*, the Court applied highly deferential review in upholding Kentucky's lethal injection procedure. In *Kennedy*, it applied stringent scrutiny in striking down Louisiana's application of the death penalty to child rapists. In neither case did the Court justify (or even acknowledge) these vastly different approaches. Instead, it cloaked its analysis with malleable language and tests that recur in Eighth Amendment cases, giving the misleading impression of a coherent doctrine. But the Court's Eighth Amendment doctrine is anything but coherent, and attempts to explain the discrepancies between these two high-profile capital cases are just that—explanations, not adequate justifications. The Court therefore needs a theory of deference.

Courts typically cite political and epistemic authority as reasons to defer to the political branches in constitutional cases, but they sometimes fail to look closely at whether those reasons are applicable in a given case. Attention to a challenged policy's democratic pedigree—its political and

415. *Cf.* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–74 (1999) (arguing that courts should promote democracy by deciding cases modestly and not revamping constitutional doctrine dramatically).

416. *See supra* Part III.C.

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epistemic authority—would be an important step toward a sensible approach to deference in some constitutional contexts, particularly those without preexisting tests determining the level of scrutiny. With these concerns in mind, the Court's approaches in *Baze* and *Kennedy* seem deeply flawed. *Baze* offered a kind of preemptive deference to state execution procedures, even though many such policies are the products of agencies lacking both political and epistemic authority. *Kennedy* overruled Louisiana's judgments that capital punishment for child rape served retributive and deterrent purposes without explaining why (or if) the State's political and epistemic authority were lacking, or why the Court should overrule the State, given that important facts were neither clear nor necessarily probative. In light of *Kennedy*, it is hard to take seriously *Baze*'s rhetoric about respecting the political judgment and expertise of state officials designing lethal injection procedures.

The democratic pedigree test is admittedly only a modest step toward reconciling complicated and contradictory cases. Still, it would encourage courts to think through when and why they review state action deferentially. Even though the Court has crafted various tests in various lines of constitutional doctrine, the level of deference is often a decisive factor in determining the outcome of a case. This kind of test, then, could be an important first step toward greater judicial transparency about the factors really guiding the stringency of judicial review in constitutional cases.

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