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The Darkest Domain: Deference, Judicial Review, and the Bill of Rights

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***943** I. INTRODUCTION

After Japan bombed Pearl Harbor, the United States government initiated a series of policies to restrict the freedom of over 100,000 American citizens of Japanese ancestry living on the West Coast. These policies were carried out under the combined authority of the President, the Secretary of War, military officials, Congress, and the War Relocation Authority (an agency of the Department of the Interior).[1] Eventually, Japanese-American citizens were incarcerated indefinitely in camps guarded by military police. The Supreme Court, in a series of decisions--the most famous being *Korematsu v. United States*[2]--upheld these acts, under the "most rigid scrutiny,"[3] as permissible exercises of power within the bounds of the United States Constitution. How could a vigilant judiciary permit such an abuse of power, such an infringement on individual rights?

Few in the legal academy would come to the defense of the Japanese internment cases. Indeed, the United States government later recognized the profound mistake it made when it interned the Japanese.[4] Korematsu is often easily dismissed as a judicial mistake, a constitutional anomaly created out of the passions of wartime. However, the jurisprudential underpinning of the opinion--the deferential method of judicial review--is still quite prevalent in current constitutional law. In an increasing number of contexts, the Court articulates the rhetoric of what I will call the "deference principle": that the Court should not attempt to "second-guess" or "substitute" its judgment for the judgment of another decisionmaker or pass on the "wisdom" of a policy or law.

Deference is a type of judicial self-restraint, an approach to constitutional interpretation exemplified by Justice Frankfurter, Judge Learned Hand, and Professor James B. Thayer.[5] Ronald ***944** Dworkin

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[1] *See* Eugene V. Rostow, *The Japanese American Cases--A Disaster*, 54 YALE L.J. 489, 492-502 (1945) (describing the developments leading up to, and including, the Japanese internment).

[2] 323 U.S. 214 (1944).

[3] *Id.* at 216.

[4] See PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS (1982).

[5] Deference is sometimes used interchangeably with the term "judicial self-restraint." Judicial self-restraint is a broad term encompassing many distinct judicial practices. For example, Alexander Bickel, one of the chief proponents of judicial restraint, did not advocate deference. In his book *The Least Dangerous Branch*, Bickel suggested an uncompromising judicial review-- with the caveat that it be used very sparingly. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962). Judicial restraint has been identified with several judicial practices, including a focus on principles rather than ideology or results, a respect for precedent, and avoidance of political

defines deference as a form of judicial restraint in which "political institutions other than courts are responsible for deciding which rights are to be recognized."[6] Judge Posner defines the deferential judge as one who "is cautious and circumspect, and thus hesitant about intruding [her own views of policy]."[7]

Deference is the current method by which the Court exercises judicial review when examining decisions made in connection with what this Article terms the "bureaucratic state." The bureaucratic state consists of the web of interacting public and private institutions that regulate numerous facets of modern life. By "institutions," I am referring to large organizations with hierarchical structures of specialized functions. In the modern state, government power affecting rights is exercised increasingly by various institutions (schools, prisons, agencies, hospitals, workplaces) and by government experts and professionals. The Court frequently accords deference to the judgments of numerous decisionmakers in the bureaucratic state: Congress, the Executive, state legislatures, agencies, military officials, prison officials, professionals, prosecutors, employers, and practically any other decisionmaker in a position of authority or expertise. The scope of deference is staggering, and the areas within its dominion often affect fundamental constitutional rights such as freedom of speech, freedom of religion, and equal protection.

Deference has placed its imprimatur upon modern constitutional jurisprudence. Deference has such profound effects that the incantation of its rhetoric becomes a climactic moment in a judicial opinion. Critics of deference have complained that it distorts the balancing of rights and governmental interests. In the military context, commentators have characterized deference as placing a "thumb-on-the-scale"[8] or as "de facto non- justiciability."[9] As Justice ***945** Blackmun observed with regard to the prisons, courts can "substitute the rhetoric of judicial deference for meaningful scrutiny of constitutional claims."[10] Justices and commentators have criticized deference as being a collection of "hollow shibboleths,"[11]

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questions. See Daniel Novak, *Economic Activism and Restraint, in* SUPREME COURT ACTIVISM AND RESTRAINT 77 (Stephen C. Halpern & Charles M. Lamb eds., 1982).

[6] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 138 (1978) [hereinafter Dworkin, Taking Rights Seriously].

[7] RICHARD A. POSNER, THE FEDERAL COURTS 314 (1996).

[8] Seth Harris, *Permitting Prejudice to Govern: Equal Protection, Military Deference, and the Exclusion of Lesbians and Gay Men from the Military*, 17 N.Y.U. REV. L. & SOC. CHANGE 171, 208 (1990).

[9] C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779, 819 (1988).

[10] Block v. Rutherford, 468 U.S. 576, 593 (1984) (Blackmun, J., concurring).

[11] Rostker v. Goldberg, 453 U.S. 57, 112 (1981) (Marshall, J., dissenting).

"seductively broad,"[12] mechanically applied,[13] and inconsistently practiced.[14]

Surprisingly, while deference has been examined in various contexts, it has never been analyzed in depth as a fundamental issue for constitutional jurisprudence.[15] Much of the literature about deference concerns the deference given by the courts to the legal interpretations of agencies.[16] A few articles examine the role of deference in specific contexts, such as prisons and the military.[17] For the most part, however, theorists of judicial review have failed to explore deference conceptually. Despite the profound effects and the wide scope of deference in modern judicial review, the concept of deference remains malleable, indeterminate, and not well-defined.[18] Critiques of deference have remained relatively superficial, often dismissing deference as a mere tool wielded by ideological judges to achieve a particular political result. Unfortunately, critics of deference have failed to adequately address deference at the level of its ***946** conceptual underpinnings. As a result, deference has yet to be addressed in its full complexity, and it continues to be practiced with an alarming frequency in cases involving fundamental constitutional rights.

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[12] Brown v. Glines, 444 U.S. 348, 369 (1980) (Brennan, J., dissenting).

[13] *See* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 197 (1962); Kelly E. Henriksen, Note, *Gays, the Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as Their Area of Expertise*, 9 ADMIN. L.J. AM. U. 1273, 1280 (1996).

[14] *See* Barney F. Bilello, Note, *Judicial Review and Soldiers' Rights: Is the Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465, 467 (1980).

[15] Discussions of deference have surfaced primarily in debates concerning deference to administrative agencies, especially after the seminal case of *Chevron, U.S.A. Corp. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* only constitutes a small part of the vast geography of deference. The issue that I am concerned about in this Article is the interaction between deference and constitutional rights.

[16] *See generally* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. 187 (1992); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 621 (1996); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992).

[17] On deference and the military, *see* Dienes, *surpa* note 9; John Nelson Ohlweiler, *The Principle of Deference: Facial Constitutional Challenges to Military Regulations*, 10 J.L. & POL. 147 (1993); Bilello, *surpa* note 14. On deference and prisons, see Daniel J. Solove**,** Note, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459 (1996).

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

This Article analyzes the conceptual underpinnings for deference.[19] Deference has a strong conceptual foundation rooted in the long-accepted principle that the judiciary must avoid doing what was done in *Lochner*--the substitution of judicial judgment for that of the policymaker or legislature. I argue that deference is a misguided attempt to carry out this principle in practice rooted in an impoverished conception of how the judiciary and government institutions evaluate empirical and factual evidence. As a result, deference often serves as an unjustified judicial stamp of legitimacy for the decisions made by government officials and bureaucrats.

Part II presents an overview of deference: its meaning in practice, its scope, and its effects on constitutional rights. Deference is the practice of accepting, without much questioning or skepticism, the factual and empirical judgments made by the decisionmaker under review. I argue that the domination of deference in the context of modern institutions poses a great threat for liberalism because of the rapid growth and expansion in power of the bureaucratic state. The constitutional rights of a growing number of citizens are dependent upon institutions and officials subject only to deferential review. Liberal theories of judicial review not only fail to account for the growing impact of the bureaucratic state on central liberal values, but also do not adequately confront the conceptual issues and practical concerns that serve to justify the practice of deference.

Part III sketches a genealogy of deference, illustrating how the practice of accepting, without criticism, the factual and empirical judgments made by the decisionmaker under review became associated with the deference principle. Under the prevailing view, the deference principle was originally articulated in Justice Holmes' dissent in *Lochner* v. New York,[20] and adopted by the Supreme Court nearly thirty years later at the end of the *Lochner* era. I claim, however, that the deference principle existed long before the *Lochner* ***947** era. The critical issue during the *Lochner* era was not the existence or the even the validity of the deference principle, but the way in which the judiciary was to embody the principle in practice. It was the Court's difficulties in grappling with the complex relationship between facts and law that led to the formation of the current practice of deference.

Finally, Part IV critiques the current practice of deference. I argue that the practice associated with the deference principle is not the inherent embodiment of its meaning. The practice of deference is legitimated by a set

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[19] I have limited my inquiry to opinions explicitly implicating fundamental constitutional rights, for this is where deference is at its most problematic. Deference occurs in a variety of other contexts, and its rhetoric and practice are quite similar across these various contexts. I will touch upon these other contexts only when necessary to illuminate the deferential review in cases involving fundamental rights.

[20] 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

of interrelated justifications which concern the practicalities of the judiciary evaluating factual and empirical evidence. This set of legitimating justifications rests upon a particular conception of the judiciary, the adjudicatory process, and government institutions. I provide a detailed critique of this conception and argue why the practice of deference should be abandoned.

II. THE PROBLEM OF DEFERENCE

A. *THE DEFERENCE PRINCIPLE AND ITS EMBODIMENT IN PRACTICE*

It has become almost commonplace for the Court to declare that it will "defer to the expert judgment" of a government official,[21] that it will not "interfere" with the "internal operations" of an institution,[22] that it will not "substitute its judgment" for that of another decisionmaker,[23] that it will not examine the "wisdom" of a regulation or law,[24] that the matter is within the "professional expertise" of ***948** another decisionmaker, or that the matter is within a government official's "domain," "province" or "discretion."[25] This

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[21] *E.g.,* Pell v. Procunier, 417 U.S. 817, 827 (1974) ("[C]ourts should ordinarily defer to [prison officials'] expert judgment in such matters.").

[22] *E.g.,* Youngberg v. Romeo, 457 U.S. 307, 322 (1982) ("[I]nterference by the federal judiciary with the internal operations of [state medical] institutions should be minimized.").

[23] *See, e.g.,* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 278 (1989) ("It is not our role to review directly the award for excessiveness [of punitive damages], or to substitute our judgment for that of the jury."); Rostker v. Goldberg, 453 U.S. 57, 68 (1981) (stating that the Court must "not substitute our judgment of what is desirable for that of Congress"); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("The court is not empowered to substitute its judgment for that of the agency.").

[24] *See, e.g.,* Heller v. Doe, 509 U.S. 312, 319 (1993) ("[R]ational- basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices'") (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)); INS v. Chadha, 462 U.S. 919, 944 (1983) ("We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts ...."); Connick v. Myers, 461 U.S. 138, 147 (1983) ("[A] federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."); Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976) ("It is not our function to appraise the wisdom of [the City of Detroit's] decision to require adult theatres to be separated rather than concentrated in the same areas.").

[25] *See, e.g.*, Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989) ("[W]e must defer to 'the informed discretion of the responsible federal agencies.") (citing Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)); Bell v. Wolfish, 441 U.S. 520, 547 n.29 (1979) ("[C]ourts should defer to the informed discretion of prison

rhetoric points to an overarching general principle--which I will refer to as "the deference principle"--that judges should not second-guess the decisionmaker under review or impose their own judgments about the wisdom of a policy.

Legal principles cannot be adequately understood in isolation, plucked from the feverish world in which they exist and studied like specimens preserved in glass jars. Principles have histories, and throughout their long pasts, they are often used in a panoply of contradictory ways. They evolve, change, and are weathered and tempered by their repeated use. Like other legal principles, the deference principle has a long history. It did not always exist in its current form but was part of a larger idea that became focused and honed during the death throes of the *Lochner* era. That larger idea is the longstanding distinction between law and policy: that legal and constitutional interpretation must remain untarnished by politics and ideology. The Framers constructed a written constitution based on the idea of the rule of law--"a government of laws and not of men."[26] Written law must be interpreted and applied, and this necessity creates vexing problems for the rule of law. When judges insert their own personal politics into the interpretive process, the rule of law transforms into the rule of individuals. While the Constitution itself was a creation of politics, the rule of law dictates that the process of interpreting it must remain politically neutral.[27] The rule of law depends upon a strict dichotomy between the judicial and the political, between the realm of legal interpretation and the world of politics and policy. This dichotomy, however, readily dissolves. Alexander Hamilton recognized this problem when he observed ***949** in Federalist No. 78:

> The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved any thing, would prove that there ought to be no judges distinct from that body. [28]

Aware of the danger of judges turning into legislators, Hamilton asserted

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administrators ...."); *id.* at 548 ("[T]he operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."); Pell v. Procunier, 417 U.S. 817, 827 (1974) (stating that courts defer to the judgment of officials on matters "peculiarly within the province and professional expertise of corrections officials").

[26] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

[27] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 9 (1992).

[28] THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

that the solution was an independent judiciary, separate from the turbulent political world.[29]

Notwithstanding its virtues, judicial independence is only a structural aid, insulating judges from certain political pressures. It cannot cleanse judges of their ideologies. The task of maintaining the law-policy distinction falls upon the judiciary. "[T]he only check upon our own exercise of power is our own sense of self-restraint," Justice Stone once remarked, "For the removal of unwise laws from the statute book appeal lies, not to the courts, but to the ballot and to the processes of democratic government."[30] With his cynical wit, Justice Holmes put it most bluntly: "I hope and believe that I am not influenced by my opinion that it is a foolish law .... [I]f my fellow citizens want to go to hell, I will help them. It's my job."[31]

The deference principle, a manifestation of the distinction between law and policy, became enshrined as the central principle of judicial review after the demise of the *Lochner* era. The *Lochner* era, a period of Supreme Court jurisprudence spanning from 1899 to 1937, has long been inscribed into constitutional legend.[32] The legend characterizes the *Lochner* era as one of the darkest chapters in the saga of constitutional jurisprudence. During this time, the Court struck down numerous progressive laws involving economic and social welfare.[33] In *Lochner* v. *New York*,[34] the symbolic decision ***950** of the age, the Court struck down a New York statute that limited the amount of hours that a bakery employee could work to sixty per week, reasoning that the law interfered with the constitutional protection of liberty of contract. Although the state had the power to regulate to promote the public welfare, its statute exceeded the scope of the state's legislative power. During the ensuing years, the Court found numerous other progressive laws to be unconstitutional, including several important New Deal statutes during the 1930s.[35] The *Lochner* era ended abruptly in 1937 when the Court began

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[29] *Id.* at 526-27.

[30] United States v. Butler, 297 U.S. 1, 79 (1936) (Stone, J., dissenting).

[31] Letter from Oliver W. Holmes to Harold J. Laski (Mar. 4, 1920), *in* 1 HOLMES-LASKI LETTERS, 1916-1935, at 248-49 (Mark D. Howe ed., 1953).

[32] Several recent works of scholarship attempt to debunk many of the myths that persist about the *Lochner* era. *See, e.g.,* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994).

[33] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8.2, at 567 (2d ed. 1988).

[34] 198 U.S. 45 (1905).

[35] *See, e.g.,* Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936) (invalidating the New York minimum wage law for females); Ashton v. Cameron County Water Dist., 298 U.S. 513 (1936) (invalidating the Municipal Bankruptcy Act); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding the Bituminous Coal

consistently to uphold New Deal legislation.[36]

Today, *Lochner*ism is "universally acknowledged to have been constitutionally improper."[37] Justice Holmes' famous dissent in ***951** *Lochner* has become the prevailing view of what the Court did wrong in *Lochner*. According to Holmes, the Court had struck down the law because it merely disagreed with it. "I strongly believe," Holmes asserted, "that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law."[38] Holmes declared that the Court had smuggled its own ideology into its interpretation of the Constitution:

> A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizens of the State or of laissez

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Act of 1935 unconstitutional); United States v. Butler, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act); Hopkins Fed. Sav. & Loan v. Cleary, 296 U.S. 315 (1935) (invalidating parts of the Home Owners Loan Act); Louisville Joint Stock Land Bank v. Randford, 295 U.S. 555 (1935) (invalidating the Federal Farm Bankruptcy Act); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating a section of the NIRA as beyond congressional power); Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (invalidating the Railroad Retirement Pension Act as not within the powers of the Commerce Clause); Perry v. United States, 294 U.S. 330 (1935) (ruling that the joint resolution is a direct violation of Section 4 of the Fourth Amendment); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (finding a section of the NIRA unconstitutional).

[36] The beginning of the demise of the *Lochner* era has been pinpointed to the 1937 case of West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (reversing Adkins v. Children's Hosp., 261 U.S. 525 (1923)). This was followed by a series of other opinions upholding New Deal legislation. *See, e.g.,* United States v. Darby, 312 U.S. 100 (1941) (ruling that the Fair Labor Standards Act is a constitutional exercise of the Commerce Clause); Helvering v. Davis, 301 U.S. 659 (1937) (upholding provisions of the Social Security Act); Wright v. Vinton Branch, 300 U.S. 440 (1937) (holding unanimously that the second Federal Farm Bankruptcy Act, similar to the first one invalidated in Radford, was constitutional). The traditional legend has it that the *Lochner* era ended because the Court buckled under the pressure of Roosevelt's well-known Court-packing plan. However, as Barry Cushman points out in his excellent study on the New Deal Court, there were a flurry of proposals to weaken the Court's judicial review throughout the entire span of the *Lochner* era, none of which seemed to have much effect on the Court. The Court-packing plan was far from becoming a guaranteed success. CUSHMAN, *supra* note 32, at 12. Further, West Coast Hotel was actually voted on long before the Court-packing plan was known to the Court, and Chief Justice Hughes deliberately withheld its release to prevent "the false impression that the Court was capitulating to political pressure." *Id.* at 18; see also Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 Harv. L. Rev. 620, 637 (1994); Friedman, *supra* note 32, at 1949.

[37] John Hart Ely, Democracy And Distrust 14 (1980).

[38] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

> faire. It is made for people of fundamentally differing views, and the accident of finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[39]

The heart of Holmes' dissent was that the *Lochner* majority had confused law and policy, and it was this dissent, more than any other writing, that has become the canonical text of the *Lochner* legend.

During the New Deal and afterwards, liberals seized upon Holmes' dissent. Legal thought could have adopted a pragmatic conception of constitutional interpretation, viewing it as an activity shaped by historical context and the prevailing ideologies of the day. Under this view, the *Lochner* Court was wrong because it was out of touch with the practical consequences of laissez faire capitalism. Too focused on the past, the Court failed to develop a vision for the future that was responsive to the needs and realities of the times. The Court's problem was not that it was failing to be ideologically neutral; and the solution was not to try to cleanse the interpretative process of the influence of the justices' ideologies. Rather, the Court's guiding ideology was what had to change--from its rigid laissez faire viewpoint to a more progressive perspective.

However, proponents of New Deal liberalism chose not to fight the *Lochner* Court substantively. Instead, Liberals chose a procedural approach based upon Holmes' eloquent rhetoric of the deference principle. They argued that the problem with the *Lochner* Court was that it engaged in an improper method of judicial review; that the deference principle had always been a fundamental principle ***952** of constitutional jurisprudence; that the Court had strayed from following the deference principle during the dark days of *Lochner*ism; and that, as Holmes had asserted, the Court had infected its interpretation of the Constitution with its own laissez faire ideology.[40] Justice Black's famous eulogy of the *Lochner* era in *Ferguson v.*

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[39] *Id.* at 75-76 (Holmes, J., dissenting).

[40] *See* Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 6 (1993) ("The legal thinkers who justified the New Deal constitutional revolution after 1937 explained their triumph not as a constitutional revolution but as a restoration of neutral constitutional principles."). Professor Ackerman argues that post-New Deal jurisprudence views the *Lochner* Court as straying from preexisting principles of constitutional interpretation, established since the Marshall Court era. He dubs this view "the myth of rediscovery":

> Modern lawyers are taught to dismiss as essentially worthless the interpretive effort of the Supreme Court during the long period of Republican ascendancy between 1869 and 1932 .... Only if the Old Court of the 1930's was completely wrong can the Rooseveltian Revolution be presented as merely requiring the Justices to rediscover the ancient wisdom of the Marshall Court.

BRUCE ACKERMAN, WE THE PEOPLE I: FOUNDATIONS 62 (1991) [hereinafter

Skrupa, [41] best illustrates the prevailing view of the *Lochner* era:

> The doctrine that prevailed in *Lochner*, Coppage, Adkins, Burns, and the like cases--that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely--has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.[42]

The *Ferguson* Court was articulating the deference principle: that courts should not "substitute" their judgment for that of the legislature. Thus, post-New Deal liberalism hoisted up the deference principle, enshrining it as a hallmark principle of jurisprudence.

Today, the deference principle has become so widely accepted that its viability is rarely questioned. Indeed, few would claim that judges should intrude on the world of policy and exercise their judgment on the wisdom of laws. Of course, the legal realists did much to dissolve the tidy boundaries between law and politics, emphasizing the influence of personal ideology in interpretation.[43] The realists were rather skeptical about whether a strict separation between ***953** the judicial and legislative spheres of power could ever be achieved. Today, most in the legal academy agree with the realists; the statement that we are all legal realists now "has been made so frequently that it has become a truism to refer to it as a truism."[44] Although most lawyers, judges, and scholars recognize that a strict separation of law and politics cannot be achieved in practice, the deference principle still prevails as one of the most powerful normative guideposts of the judicial function.

The interesting issue is how the judiciary has attempted to follow the deference principle--in other words, how the deference principle has been embodied in practice. The meaning of a legal principle cannot be adequately analyzed by looking only to the principle itself. The intricate interaction between a principle and its embodiment in practice most completely reveals all the shades and contours of its meaning. As with all general principles, the deference principle did not have a static meaning throughout history; the meaning of a principle often changes over time, sometimes even drifting to a meaning that is radically opposite to a previous one.[45]

ACKERMAN, FOUNDATIONS].

[41] 372 U.S. 726 (1963).

[42] *Id.* at 730.

[43] *E.g.*, JEROME FRANK, LAW AND THE MODERN MIND 118 (1935).

[44] LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960, at 229 (1986).

[45] *See* J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 871 (1993) ("Ideological drift in law means that legal ideas and symbols will change their political valence as they are used over and over again in new contexts.").

When courts recite the rhetoric of the deference principle--that they will not "second-guess" the judgment of a decisionmaker or will not pass on the "wisdom" of certain policies--they employ a specific practice of judicial review. The deference principle is not carried out by withdrawing certain cases from the scope of judicial review. Deference is not nonjusticiability; unlike political questions,[46] when courts invoke the deference principle, they purport to engage in judicial review. The method of judicial review practiced involves the way courts evaluate the factual and empirical evidence underlying the law or policy at issue. Courts accept uncritically the factual and empirical evidence of the government supporting its laws and policies in a profound number of cases where the deference principle is invoked.

The practice of deference has drastic effects on the outcomes of cases because factual and empirical evidence plays an enormously ***954** influential role in the interpretation of the Constitution.[47] During the latter part of this century, the Supreme Court engaged in a jurisprudence of balancing rights and interests when interpreting many provisions of the Constitution, especially the First and Fourteenth Amendments.[48] Professor Aleinikoff quite appropriately dubbed modern constitutional law the "age of balancing."[49] Balancing "analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests."[50]

The most common form of balancing occurs through levels of judicial scrutiny.[51] Each level of judicial scrutiny shares the same basic structure. First, the government interest must meet a threshold of importance: it must

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[46] *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (holding that the Court will not consider an issue when there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department," a "lack of judicially discoverable and manageable standards for resolving" the issue, or other factors relating to separation of powers).

[47] *See* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 477 (1988) ("Once heretical, the belief that empirical studies can influence the content of legal doctrine is now one of the few points of general agreement among jurists."). For a series of examples of Supreme Court Justices using social science research in their opinions, *see id.* at 477 n.2.

[48] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943-44 (1987).

[49] *Id.*

[50] *Id.* at 945.

[51] These formulas can be traced back to footnote four in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see infra* Part III.A.4; *see also* Aleinikoff, *supra* note 48, at 963-72.

be "compelling" for strict scrutiny,[52] "substantial" for intermediate scrutiny,[53] or "legitimate" for minimal scrutiny.[54] Second, the means of the law must be connected or tailored in some way to the governmental interest (the law's purpose or "end"): the least restrictive means, narrowly tailored, or reasonably related. The importance of the governmental interest and the tailoring of the means are the predicate to the government's exercise of power.

At its very foundations, judicial balancing is an approach to judicial review that emphasizes the importance of factual and empirical data. Balancing understands laws in an instrumental manner--***955** as means to achieve certain ends. Analysis of the government interest requires a valuation of the end that the law aims to achieve. Although this can certainly be viewed as an empirical question,[55] rarely has the Court conducted an empirical valuation of the end in question. Instead, it is the way judicial balancing calls for the evaluation of the tailoring of the means that is unquestionably empirical. Determining how closely the means of the law are tailored to its end involves factual and empirical judgments, including determinations about the viability of the means, the effectiveness of the means, and the existence and effectiveness of alternative means.

In deference cases, the very minimal examination of factual and empirical evidence tends to override whatever level of scrutiny is applied, and is often dispositive. For example, in *Clark v. Community for Creative*

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[52] Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989) (holding that a total ban on indecent dial-a-porn services was invalid under strict scrutiny).

[53] United States v. O'Brien, 391 U.S. 367, 376 (1968) (upholding the conviction of a defendant who burned a draft registration certificate in order to express anti-war beliefs).

[54] Heller v. Doe, 509 U.S. 312, 320 (1993) (holding that involuntary commitment of mentally retarded individuals did not violate equal protection or due process).

[55] John Dewey articulated an alternative approach to valuation that avoided the pitfalls of looking for some intrinsic or a priori value. *See generally* 13 JOHN DEWEY, *Theory of Valuation, in* THE LATER WORKS (Jo Ann Boydston ed., 1991) (1939) [hereinafter DEWEY, *Theory of Valuation*]. Dewey criticized existing theories of valuation for failing "to make an empirical analysis of concrete desires and interests as they actually exist." *Id.* at 217. According to Dewey, ends were never fixed; they were merely "ends-in-view or aims," which were constantly subject to revision and change as the individual strove toward them. JOHN DEWEY, HUMAN NATURE AND CONDUCT 155 (Jo Ann Boydston ed., 1988) (1922) [hereinafter DEWEY, HUMAN NATURE]. "Ends are foreseen consequences which arise in the course of activity and which are employed to give activity added meaning and to direct its further course." *Id.* Ends guided present activity, preventing it from being "blind and disorderly" or "mechanical"; however, ends were never fixed. In the course of action, old ends were modified and new ends would come into being. *Id.* at 156, 159.

Non-Violence,[56] a group of demonstrators planned to erect tents in Lafayette Park and sleep in them overnight to publicize the plight of the homeless. The National Park Service, which was responsible for managing the park, denied the group's request because of a regulation prohibited camping.[57] The Court upheld the regulation as applied to the group, noting that the regulation was not content-based, but was a time, place, or manner restriction.[58] Time, place, or manner restrictions are subject to intermediate scrutiny and thus they must be "narrowly tailored to serve a significant governmental interest" and must "leave open ample alternative channels for communication of the information."[59] The Court of Appeals held that while the Park Service could reduce the size, duration, and frequency of the demonstrations, an absolute ban failed intermediate scrutiny. The Supreme Court, however, argued that ***956** the Court of Appeals' "suggestions represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained."[60] The Court declared that the judiciary lacked "the authority to replace the Park Service as the manager of the Nation's parks or ... the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained."[61] The Court refused to question factual judgments made by Park Service officials that were essential for the proper application of intermediate scrutiny.

In *Goldman v. Weinberger*,[62] an Orthodox Jew and ordained rabbi who served as a clinical psychologist at an Air Force base challenged a military regulation which prohibited him from wearing his yarmulke. He claimed it violated his First Amendment rights to the free exercise of religion. The Court declared that it would "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[63] In applying this "great deference," the Court observed that in the Air Force's "professional judgment," standardized uniforms are "vital during peacetime as during war" because of the need for discipline, obedience, unity, and "subordination of personal preferences and identities."[64] Goldman contended that the Air Force failed to prove that making an exception for wearing a yarmulke would threaten the Air Force's goals. He also argued that "the Air Force's assertion to the contrary is a mere ipse dixit, with no support from actual experience or a scientific study in the

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[56] 468 U.S. 288 (1984).
[57] The National Park Service acted pursuant to 36 C.F.R. § 50.19(e)(8) (1983).
[58] Clark, 468 U.S. at 293.
[59] *Id.* at 293.
[60] *Id.* at 300.
[61] *Id.* at 298.
[62] 475 U.S. 503 (1986).
[63] *Id.* at 507.
[64] *Id.* at 508.

record"[65] and that the Air Force's contentions were refuted by "expert testimony that religious exceptions to [the regulation] are in fact desirable and will increase morale by making the Air Force a more humane place."[66] The Court determined, however, that the expert testimony was irrelevant, because "[t]he desirability of dress regulations in the military is decided by the appropriate military officials."[67] The practice of deference in *Goldman* involved the acceptance, without much evidentiary support, of not only the military officials' judgment about the importance of the regulation's goals (discipline, obedience, ***957** and subordination of personal identity), but also about its tailoring to these goals. The Court accepted without question the factual judgment of the Air Force officials that standardized uniforms could not achieve these goals with religious exceptions.[68]

In *O'Lone v. Estate of Shabazz*,[69] Muslim inmates at a state prison challenged a work policy which prevented them from attending Jumu'ah, a congregational service held on Fridays mandated by the Qur'an. Prison administrators found it too burdensome to permit those prisoners working outside the prison to return to the facility during the hours of the Jumu'ah service. The Court concluded that the prison policy did not violate the Free Exercise Clause of the First Amendment.[70] The Court began by observing that prisoners "clearly retain protections afforded by the First Amendment,"[71] limited only when they conflict with legitimate "penological

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[65] *Id.* at 509.
[66] *Id.*
[67] Goldman, 475 U.S. at 509.
[68] Recently, the D.C. Circuit used Clark to uphold a regulation by the National Park Service that banned the sale of message-bearing T-shirts on the National Mall. Although the T-shirts often contained political messages, espousing causes such as raising public awareness for POW/MIAs, urging action to combat global warming, and advocating statehood for the District of Columbia, the Park Service banned their sale to reduce commercialism on the Mall. The vendors of the T-shirts complained that the T-shirt was the primary source of funds that enabled them to continue to engage in First Amendment activities. The district court found that the ban was not narrowly tailored because the goal of reducing commercialism could be reached short of a complete ban by designating certain areas for the T-shirt sales. See Friends of the Vietnam Veterans Mem'l v. Kennedy, 899 F. Supp. 680, 686-87 (D.D.C. 1995). The D.C. Circuit reversed, claiming that it would not consider "what the Park Service could have done" to limit its regulation so that it would be less restrictive, and stated that it did not have "'the authority to replace the Park Service as manager of the Nation's parks or ... the competence to judge how much protection of parklands is wise and how that level of conservation is to be attained." Friends of the Vietnam Veterans Mem'l v. Kennedy, 116 F.3d 495, 498 (D.C. Cir. 1997) (quoting Clark, 468 U.S. at 299).
[69] 482 U.S. 342 (1987).
[70] *See id.* at 353.
[71] *Id.* at 348.

objectives."[72] Nevertheless, the Court noted that prison officials are entitled to deference and that the "evaluation of penological objectives is committed to the considered judgment of prison administrators."[73] The Court declared that it would refuse to "'substitute our judgment on ... difficult and sensitive matters of institutional administration,' for the determinations of those charged with the formidable task of running a prison." [74]

***958** A central aspect of the Court's examination involved the viability of several alternative ways that the prison could permit the inmates to attend Jumu'ah services.[75] One suggestion was that all Muslim inmates work inside the prison on Fridays.[76] Another alternative was that the Muslims would work on a day during the weekend instead of on Fridays.[77] However, the Court rejected both of these suggestions, relying entirely on the bald assertions of the prison officials that these alternatives were not feasible.[78] The Court noted that the district court found that the additional supervision required to permit Muslim prisoners to work on weekends "'would be a drain on scarce human resources' at the prison."[79] The district court opinion, however, contained no indication that the prison supplied any evidence to support this claim.[80] Second, the Court observed that "[p]rison officials determined that the alternatives would also threaten prison security by allowing 'affinity groups' in the prison to flourish."[81] The only supporting evidence was the testimony of the prison administrator, which the Court quoted in part: "[A]lmost every prison administrator knows that any time you put a group of individuals together with one particular affinity interest ... you wind up with ... a leadership role and an organizational structure that will almost invariably challenge the institutional authority."[82] As in *Goldman* and *Clark*, the Court failed to question the bare assertions of the officials under review.

As illustrated by these examples, the practice of deference involves the way the Court evaluates factual claims made by the government institutions, officials, and experts under review. Deference is practiced as the acceptance of these factual and empirical judgments without much questioning or

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[72] *Id.*
[73] *Id.* at 349.
[74] O'Lone, 482 U.S. at 353 (quoting Block v. Rutherford, 468 U.S. 576, 588 (1984)) (citation omitted).
[75] *Id.* at 352-53.
[76] *Id.*
[77] *See id.*
[78] *See id.*
[79] O'Lone, 482 U.S. at 353 (quoting Shabazz v. O'Lone, 595 F. Supp. 928, 932 (D.N.J. 1984)).
[80] *See* Shabazz v. O'Lone, 595 F. Supp. 928, 932 (D.N.J. 1984).
[81] O'Lone, 482 U.S. at 353.
[82] *Id.* (quoting from transcript).

skepticism. In a judicial balancing approach, a court's task is to evaluate the evidence about the existence or nonexistence of certain factual conditions (the importance of the government's interest and the tailoring of means to ends). Evaluation involves an examination of the quantity and quality of the evidence supporting a particular decision. A less skeptical evaluative method directly affects whether the requirements of the ***959** judicial scrutiny formulas will be satisfied. Thus, in an age where factual and empirical evidence is becoming more integral to the interpretation of the Constitution, the current practice of deference is having a profound effect on the outcomes of judicial decisions.

B. *THE BREADTH AND SCOPE OF DEFERENCE*

Although the deference principle hovers over constitutional jurisprudence, it is explicitly invoked and practiced in a particular group of cases involving a common set of contexts: (1) experts or professionals with a particular expertise in making certain factual judgments; or (2) institutions such as administrative agencies, prisons, schools, and the military that envelop much of contemporary life.[83] I refer to these contexts collectively as the "bureaucratic state." Typically, courts defer to decisionmakers (often located in an institutional setting) who, by virtue of their day-to-day activities or professional training, have specialized knowledge or expertise.

One of this century's most profound developments in the American social and political structure was the rise of the bureaucratic state. Throughout human history, large institutions (feudal, ecclesiastical, and monarchical) have often existed in societies. The defining characteristic of the modern institution is its highly developed bureaucratic structure with hierarchies of power and established standards and processes. These institutions have their own special politics, practices, cultures, and traditions. According to Max Weber, bureaucracy consists of fixed areas of specialty, a carefully controlled distribution of authority to act, a system of hierarchical levels of authority, and a set of general rules and procedures to govern the behavior of persons operating within the system.[84] Today, American bureaucracy is characterized by highly specialized systems of controlled expertise. These systems are designed to process immense amounts of complex factual and empirical data. Thus, Weber observes that

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[83] *See, e.g.,* Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1442 (1983) ("The history of the twentieth century is largely the history of increasing bureaucratization."); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1295 (1984) ("Bureacracy is the primary form of organized power in America today ....").

[84] MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196-98 (H.H. Gerth & C. Wright Mills eds., 1946).

the bureaucratic state depends heavily on expertise:

> The more complicated and specialized modern culture becomes, the more its external supporting apparatus demands ***960** the personally detached and strictly 'objective' expert, in lieu of the master of older social structures, who was moved by personal sympathy and favor, by grace and gratitude.[85]

The complexity of modern regulation demands specialized knowledge and large sophisticated public institutions. Although our entire society is not structured in these massive conglomerates of associated expertise, a very large part of our lives comes under the influence of these entities. While humankind has always been subject to the power of various institutions, the bureaucratic state employs a distinct structure of power with distinct possibilities for and impediments to individual self-definition.

Today, we live in a world composed significantly by government institutions. There are about 1 million people incarcerated in our prisons.[86] In 1800, the federal government had 3000 civilian employees; now, it has 3.1 million civilian employees in 143 federal agencies.[87] Between the turn of the century and WWII, the number of federal employees grew at a rate four times greater than the population.[88] From 1947 to 1980, the size of legislative staffs increased by 600%.[89] There are numerous governmental and private enclaves of expertise, as well as a burgeoning mass of hybrids: privately-run institutions operating under government funding or performing government functions.[90]

Not only do a myriad of new institutions govern almost every aspect of society, but our traditional institutions have grown substantially. "In addition to some 500 senators and representatives," observes Owen Fiss, "Congress now consists of about 40,000 employees, more than 300 committees and subcommittees, and 8 internal agencies."[91]

Currently, although fundamental rights are protected by strict scrutiny, when they arise in the contexts of the bureaucratic state, the deference principle remains the dominant force. Today, even when important freedoms and liberties are implicated, courts defer ***961** in cases involving the commerce clause as well as cases involving social and economic

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[85] *Id.* at 216.
[86] *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 217 (1995).
[87] *See* JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW 6 (3d ed. 1992).
[88] *See* Henry Steele Commager, The American Mind 339 (1950).
[89] *See* STEVEN BRINT, IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE 130 (1994).
[90] *See infra* note 367.
[91] Fiss, *supra* note 83, at 1442.

regulation.[92] Courts frequently accord deference to the judgments of numerous decisionmakers: Congress,[93] state legislatures,[94] agencies,[95] military officials,[96] prisons,[97] government health institutions,[98] prosecutors,[99] defense attorneys,[100] government employers,[101] and practically any other decisionmaker in a position of authority or expertise.[102]

Courts readily defer to administrative agencies--to the fact-finding of administrative tribunals and the factual conclusions underlying agency regulations[103] as well as to agency interpretations of federal law.[104] Even when faced with infringements to rights typically protected by heightened scrutiny, courts often defer when reviewing the factual judgments made by

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[92] *See* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

[93] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994) ("[C]ourts must accord substantial deference to the predictive judgments of Congress.").

[94] *E.g.,* Gregg v. Georgia, 428 U.S. 153, 176 (1976) (stating that courts owe deference to state legislatures).

[95] *E.g.,* Chevron, U.S.A. Corp. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (deferring to agency interpretations of law); United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) (deferring to agency factfinding).

[96] *E.g.,* Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986) (holding that courts "must give great deference to the professional judgment of military authorities").

[97] *E.g.,* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (holding that courts must "afford appropriate deference to prison officials").

[98] *E.g.,* Youngberg v. Romeo, 457 U.S. 307, 323 & n.30 (1982) (holding that decisions made by a "professional"--"a person competent, whether by education, training or experience, to make the particular decision at issue"--are presumptively valid).

[99] *E.g.,* Wayte v. United States, 470 U.S. 598 (1985) (holding that courts must be very deferential to prosecutors when reviewing claims of selective prosecution).

[100] *E.g.*, Strickland v. Washington, 466 U.S. 668, 689 (1984) ("Judicial scrutiny of counsel's performance must be highly deferential.").

[101] *E.g.*, Waters v. Churchill, 511 U.S. 661, 673 (1994) ("[W]e have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.").

[102] *E.g.*, Clark v. Community for Creative Nonviolence, 468 U.S. 288, 299 (1984) (holding that the judiciary must defer to the Park Service's judgment of "how much protection of park lands is wise and how that level of conservation is to be attained").

[103] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[104] *See* Chevron, U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). In *Rust v. Sullivan*, 500 U.S. 173 (1991), an agency interpreted a statute that prohibited the use of federal funds in programs where abortion was a method of family planning to apply not only to performing abortions but also to any counseling concerning abortions. The Court, noting that the statute was ambiguous as to this issue, deferred under Chevron to the agency's interpretation. *See id.* at 184 (according "substantial deference" to agency's interpretation).

officials in institutions or by ***962** persons with expertise. Courts frequently defer to the judgments of employers who fire employees for expressing their political views.[105] Courts also defer to the judgments of officials at government mental health institutions. For example, in *Youngberg v. Romeo*,[106] the Court held that individuals involuntarily committed to treatment facilities had "liberty interests in safety and freedom from bodily restraint."[107] The Court determined that the proper level of necessity to "justify use of restraints or conditions of less than absolute safety" was "reasonable" rather than "compelling" or "substantial."[108] However, the Court also articulated an additional standard of deference: "In determining what is 'reasonable' ... we emphasize that courts must show deference to the judgment exercised by a qualified professional."[109] Thus, the Court held that because "judges or juries are [not] better qualified than appropriate professionals in making such decisions," the official's decision would be "presumptively valid."[110]

Courts readily defer to legislatures when a statute involves forecasts and predictions,[111] and complex factual data based on technical and scientific expertise.[112] For example, in *Turner Broadcasting System, Inc. v. FCC*,[113] the Court upheld against a First Amendment ***963** challenge "must-carry"

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[105] *See, e.g.,* Waters v. Churchill, 511 U.S. 661, 673 (1994) ("[W]e have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large."); Connick v. Myers, 461 U.S. 138, 152 (1983) ("[A] wide degree of deference to the employer's judgment is appropriate."). For a good analysis of *Waters v. Churchill*, see Kermit Roosevelt, Note, *The Cost of Agencies: Waters v. Churchill and the First Amendment in the Administrative State*, 106 YALE L.J. 1233 (1997).

[106] 457 U.S. 307 (1982). For a critique of the Court's deferential standard of review in *Youngberg*, see Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639 (1992).

[107] Youngberg, 457 U.S. at 319.

[108] *Id.* at 322.

[109] *Id.*

[110] *Id.* at 323.

[111] *E.g.,* Hirabayashi v. United States, 320 U.S. 81, 99 (1943) (deferring to the government's predictions as to the likelihood of espionage and sabotage by Japanese-Americans during World War II).

[112] *E.g.,* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102-03 (1973) (examining the legislative and administrative development of the broadcast system).

[113] 512 U.S. 622 (1994). In this case the Court articulated the deferential standard and then remanded to a three-judge panel for consideration of the facts in light of that standard. The Court then affirmed the decision of the three-judge panel. *See* Turner Broad. Sys. Inc. v. FCC, 520 U.S. 180 (1997).

regulations that required cable operators to carry broadcast stations. The Court determined that the regulations were content-neutral restrictions on free speech requiring intermediate scrutiny but then then stated that the review of Congress' factual predictions should be accorded "substantial deference."[114]

The standard of review for many challenges to the criminal justice system, which implicate a panoply of constitutional rights, is highly deferential. When determining whether a punishment is proportional to the gravity of a particular criminal offense for the purposes of the Eighth Amendment, courts "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes."[115] Likewise, ineffective assistance of counsel claims are reviewed with great deference. In *Strickland v. Washington*,[116] the Court held that claims of ineffective assistance of counsel under the Sixth Amendment should be reviewed under a reasonableness standard.[117] Additionally, the Court declared that "[j]udicial scrutiny of counsel's performance must be highly deferential.... [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[118] Under this deferential standard, a court rejected an ineffective assistance claim involving an attorney in a capital trial who did not know the seminal case *Gregg v. Georgia*[119] or any other criminal precedent other than *Miranda*.[120] Another court rejected an ineffective assistance claim regarding an attorney who made a four-sentence closing argument in a capital murder case.[121] The defendant was sentenced to death. In *Mitchell v. Kemp*,[122] a court denied an ineffective assistance claim for a defense counsel in a capital case who called no witnesses and presented no mitigating evidence at the sentencing proceeding. In addition, the counsel made no attempt to interview potential witnesses and did not look into the defendant's medical or psychological ***964** history. Earlier, during the regular trial, the attorney filed no pretrial motions. He failed to examine the police officer, a cousin of the victim and a witness to the defendant's

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[114] Turner, 512 U.S. at 665. For a critique of the Turner cases, *see* Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting,* 111 HARV. L. REV. 2312 (1998).
[115] Solem v. Helm, 463 U.S. 277, 290 (1983).
[116] 466 U.S. 668 (1984).
[117] *See id.* at 688.
[118] *Id.* at 689.
[119] 428 U.S. 153 (1976).
[120] *See* Birt v. Montgomery, 725 F.2d 587 (11th Cir. 1984).
[121] *See* Romero v. Lynaugh, 884 F.2d 871, 875 (5th Cir. 1989) (reversing a finding of ineffective assistance of counsel by the district court).
[122] 762 F.2d 886 (11th Cir. 1985).

confession because, in counsel's words, "I personally don't like the man."[123] The defendant was sentenced to death, and after the Supreme Court denied certiorari, he was executed.

When reviewing prosecutorial decisions--such as selective prosecution and claims for potential discriminatory jury selection--courts again are highly deferential. In *United States v. Armstrong*,[124] the Court held that due to "deference" for prosecutorial decisions, claimants charging selective prosecution must make a demanding showing even to obtain discovery.[125] When reviewing prosecutiorial decisions, "'[t]he presumption of regularity supports' their prosecutorial decisions and 'in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties."[126] For example, *Wayte v. United States*[127] involved a prosecution for failure to register for the draft. Wayte claimed that only those that did so vocally--exercising their political speech--were singled out for prosecution. Deferring to the discretion of the prosecutor, the Court denied Wayte even the opportunity to obtain discovery.

When reviewing fundamental rights infringed by the military, courts are likewise exceedingly deferential.[128] The *Goldman* Court upheld an infringement on an individual's free exercise of religion.[129] The Court applied deference in *Rostker v. Goldberg*[130] to uphold against an equal protection challenge a law requiring the conscription of males but not females. Under deferential review, courts have sustained the military's policies on homosexuals, even when free speech rights were implicated.[131] In addition, courts have ***965** consistently upheld various restrictions on free speech in the military, including prior restraints.[132]

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[123] Mitchell v. Kemp, 483 U.S. 1026, 1026 (1987) (Marshall, J., dissenting from denial of certiorari).

[124] 517 U.S. 456 (1996). See also Batson v. Kentucky, 476 U.S. 79 (1986) (prohibiting the discriminatory use of preemptory challenges); Wayte v. United States, 470 U.S. 598 (1985) (rejecting a selective prosecution claim).

[125] Armstrong, 517 U.S. at 463.

[126] *Id.* at 464 (quoting United States v. Chemical Found., Inc., 272 U.S. 1, 14-15 (1926)) (first alteration in original).

[127] 470 U.S. 598 (1985).

[128] For a good analysis of First Amendment rights and the military, *see* Dienes, *supra* note 9.

[129] *See supra* Part II.A (discussing Goldman).

[130] 453 U.S. 57 (1981).

[131] *See, e.g.,* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989). *See generally* Harris, *supra* note 8; Henriksen, *supra* note 13 (discussing numerous cases involving deference to the military).

[132] *See, e.g.,* Brown v. Glines, 444 U.S. 348 (1980) (upholding Air Force regulation requiring prior approval of all petitions circulated); Greer v. Spock, 424 U.S. 828

In the prisons, courts defer to judgments of prison officials that implicate freedom of expression and religion.[133] In *Pell v. Procunier*,[134] the Court upheld, without discussing any less restrictive alternatives, a regulation that prohibited fact-to-face interviews between inmates and the media. In *Jones v. North Carolina Prisoners' Labor Union*,[135] the Court upheld a regulation restricting prisoners' ability to form labor unions, which, in turn, severely infringed on their free speech rights. In *Bell v. Wolfish*,[136] the Court upheld regulations banning hardbound books mailed to inmates from sources other than book clubs or publishers. Even with the passage of the Religious Freedom Restoration Act,[137] which elevated the level of scrutiny for prisoners' free exercise claims to strict scrutiny, courts continued to apply deference, rendering the Act virtually ineffectual in prisons.[138]

Recently, the D.C. Circuit upheld an amendment, attached to the 1997 Budget Act, that effectively prohibited the distribution in prisons of any publication or material that "is sexually explicit or features nudity."[139] The purported goal of the law was to further the "rehabilitation" of prisoners. The district court enjoined the law because it was not content- neutral; it focused exclusively on the "sexual nature of the publications"; and the legislative history indicated that its real aim was to "make prisons more punitive."[140] The D.C. Circuit reversed, holding that although Congress did not consider any social science data, "the government could rationally have seen ***966** a connection between pornography and rehabilitative values."[141] Judge Wald dissented, noting that the majority simply deferred to Congress' claim that the Amendment was "reasonably related to the interests asserted."[142] Due to its deference, the majority looked to whether there was "any conceivable basis" to support the law, a test under which "there would

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(1976) (upholding regulations barring political speech at a military base by civilians); see also Stephanie A. Levin, *The Deference That Is Due, Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009 (1990).

[133] For a more detailed examination of prisoners' First Amendment rights, see Solove, *supra* note 17. *See also* MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS (2d ed. 1993); Ira P. Robbins, *The Prisoners' Mail Box and the Evolution of Federal Inmate Rights,* 144 F.R.D. 127 (1993); Geoffrey S. Frankel, Note, *Untangling First Amendment Values: The Prisoners' Dilemma*, 59 GEO. WASH. L. REV. 1614 (1991).

[134] 417 U.S. 817 (1974).

[135] 433 U.S. 119 (1977).

[136] 441 U.S. 520 (1979).

[137] 42 U.S.C. § 2000bb-1 to -4 (1994).

[138] *See* Solove, *supra* note 17, at 460.

[139] Pub. L. No. 104-208, § 614, 110 Stat. 3009 (1996).

[140] Amatel v. Reno, 975 F. Supp. 365, 369 (D.D.C. 1997).

[141] Amatel v. Reno, 156 F.3d 192, 199 (D.C. Cir. 1998).

[142] *Id.* at 205-06.

be no need for judicial review at all, for no statute infringing on inmates' constitutional rights would fail to satisfy the test."[143]

In sum, given the staggering breadth of the bureaucratic state, the fundamental rights of millions of citizens are routinely curtailed by an intricate web of regulations designed by bureaucrats and by a countless series of decisions made by government officials. Deference extends pervasively throughout the bureaucratic state, resulting in an alarming frequency in which judicial review is practically ineffectual in protecting fundamental constitutional rights.

C. *THE IMPLICATIONS OF DEFERENCE FOR MODERN JUDICIAL REVIEW*

The practice of deference presents severe problems for maintaining judicial review as an institution that furthers the values of liberalism. Put most broadly, modern liberalism aims to empower individuals to realize their full potential as selves, to develop their creative and intellectual capacities, and to promote freedom in discourse and expression.[144] One of the lasting legacies of the Warren Court is its demonstration that judicial review can serve as a powerful tool of liberalism--a significant change from the way New Deal liberals viewed judicial review, as a practice preserving conservative ideologies and thwarting democratic reforms. Of course, not all liberal theorists agree that the Warren Court liberalism was commendable. Despite these disputes, most modern liberals see judicial review as a potentially positive instrument of liberalism and as a necessary check on the discretion of government officials.[145] Of course, it is certainly possible for other branches of government to protect rights and further liberal values. But my point is a narrow ***967** one--namely, that despite their differences, liberal theorists of judicial review generally support a vigorous judicial scrutiny when fundamental constitutional rights are involved.[146]

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[143] *Id.* at 206.

[144] Liberalism is a broad term, encompassing a wide variety of philosophical viewpoints. For some classic statements of liberalism, *see* JOHN DEWEY, *Liberalism and Social Action, in* 11 THE LATER WORKS, 1925-1953, at 1 (Jo Ann Boydston ed., 1991); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., 1980) (1690); JOHN STUART MILL, ON LIBERTY (David Spitz ed., 1975) (1859).

[145] For a detailed examination of the debates about liberalism among legal thinkers, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996).

[146] In legal and political scholarship, proponents of liberalism have generally embraced judicial review, even in the face of the countermajoritarian difficulty. *See, e.g.,* ACKERMAN, FOUNDATIONS, *supra* note 40; BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) [hereinafter ACKERMAN, TRANSFORMATIONS]; RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter DWORKIN, LAW'S EMPIRE]; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 6; ELY, *supra* note 37; TRIBE, *supra* note 33. Even Alexander Bickel, who best described the problem of the

There are at least three reasons why the practice of deference poses significant problems for liberal theories of judicial review. First, the bureaucratic state poses problems that all liberal theories of judicial review, regardless of their differences, cannot ignore. Increasingly, individual autonomy and freedom are becoming circumscribed by government institutions. The problem for liberalism is that the geography of liberty has radically changed since the founding days of the Constitution. Today, our liberty is bound up in the institutions that employ, license, regulate, conscript, imprison, police, and educate us. We live under a sprawl of numerous interacting and overlapping regulatory regimes, controlling the types of food we eat, the medicines we take, the roads we drive, the products we use, the air we breathe, and the layout of the cities in which we live. Decisions about what we watch on television, what we learn in school, what we can say at work, and how much privacy we will have are frequently made by public and private bureaucrats, officials to whom we have scant access to and over whom we have little power. Their decisions, however, play an enormous role in shaping liberty in the modern state. Deference places the burgeoning contexts of the bureaucratic state--the rise of administrative agencies, the growth in the power and pervasiveness of existing institutions--outside the scope of more searching judicial inquiry. This means that the geography of liberty is shifting toward areas that are protected only by deferential judicial review.

Second, due to the growing emphasis on factual and empirical evidence in constitutional interpretation, the effects of deference are proving to be quite significant. Because the practice of deference insulates governmental judgments about factual and empirical evidence ***968** from judicial scrutiny, it has an increasingly greater effect on the outcome of judicial decisions. In light of the growing emphasis on facts in constitutional interpretation, deference threatens to eviscerate judicial review in the contexts of the bureaucratic state. The cases discussed earlier dealt with rights that are central to rights-based liberalism: the right to the free exercise of religion in *O'Lone* and *Goldman*; the right to free expression in *Clark*, the rights to liberty and equality in *Korematsu*. The practice of deference represents a disturbing degradation of the power of judicial review. This does not mean that liberal values go unprotected but that judicial review, which history has demonstrated can be a powerful tool for the furtherance of liberal values, is effectively shut out of the bureaucratic state.

The third reason why deference poses a difficulty for liberalism is that

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countermajoritarian difficulty, did not advocate for the abolition of judicial review. In *The Least Dangerous Branch*, Bickel argued that judicial review should still remain highly principled; however, because the court was countermajoritarian yet dependent upon the respect of the people for its power, it had to be extremely cautious about the exercise of judicial review. *See* BICKEL, *supra* note 5.

the current developments in society, government, and the judicial system are all leaning toward a heightening of the practice of deference. The 1990 Report of the Federal Courts Study Committee indicated that within the past thirty years, the caseload of the federal courts has increased at a much greater rate than the number of judges and that the federal court system was quite near the feasible limit of its growth.[147] The legislative and executive branches, as well as the administrative agencies, have grown much more substantially than the judiciary.[148] In The Federal Courts, Judge Posner paints a portrait of the federal judicial system strained, stretched, and compromised by a burgeoning caseload and its consequences.[149] Indeed, the federal judiciary increasingly resorts to unpublished dispositions, streamlining of review, and assembly-line jurisprudence with the aid of law clerks.[150] Judge Posner observes that judicial deference has escalated, in part, to help alleviate the caseload crisis:

> [The modern tendency] has been to enlarge the deference due the court or administrative agency whose decision is being reviewed. The result, whether intended or not, is to reduce the incentive to appeal by making it more difficult to obtain a reversal, and to reduce the amount of work that ***969** the appellate court has to do in cases that are appealed, since it is easier to decide whether a finding is reasonable or defensible than to decide whether it is right .... [151]

We live in an age of increasing specialization, and government institutions have become enclaves of expertise. As the quantity of information grows--as well as the complexity and detail regarding numerous realms of regulated activity--the premium on expert judgment (the ability to sift through all the information, to weed out the good data from the bad, and to understand the field) will increase. Professor Susan Stefan observes that courts are deferring with greater frequency to the professional judgment of "experts" to resolve cases involving rights.[152] Stefan points out that courts increasingly extend their application of the professional judgment standard--a deferential standard of review for expert judgments--to a larger set of contexts: mental institutions, prisons, schools, police, and zoning challenges.[153]

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[147] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 5-7 (1990).
[148] *See* Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis,* 51 U. CHI. L. REV. 366, 377 (1984).
[149] *See* POSNER, *supra* note 7, at 53-192.
[150] *See* Judge Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 904-05 (1987).
[151] POSNER, *supra* note 7, at 176.
[152] Stefan, *supra* note 106, at 643.
[153] *Id.*

As the concerns that animate the decision to defer become more paramount, will deference continue to expand? Will important rights increasingly be left to the mercy of government officials and their predictions and risk assessments?

Unfortunately, liberal theories of judicial review have failed to adequately confront deference. Scholars have often debated the descriptive accuracy of the deference principle (i.e., whether or not law can be separated from politics and policy), yet have rarely examined how the deference principle is embodied in practice. Indeed, most jurists accept the deference principle. Even if it is not descriptively accurate, the principle that judges should avoid impinging their personal ideology into constitutional interpretation remains a normative ideal. Yet many of the same jurists view the practice of deference as an abdication of judicial review. Why is deference practiced in the way it is? Are there ways available to embody the deference principle in practice? Why does deference prevail in the bureaucratic state? A much deeper understanding of deference is clearly necessary to answer these questions and to engage in a meaningful critique of deference.

***970** III. A GENEALOGY OF DEFERENCE

In order to understand the practice of deference, its genealogy must be traced. This Part explains how the deference principle became associated with the practice of accepting, without much questioning, the factual judgments of the decisionmakers under review. Sketching the genealogy of deference will uncover the concerns, conceptions, and assumptions that underpin deference so that they can be examined and evaluated.

A. *A FRACAS OVER FACTS: FIGHTING FOR THE MEANING OF THE DEFERENCE PRINCIPLE*

Beneath the polished Holmesian rhetoric about the deference principle lie deeper issues *Lochner*-era jurisprudence struggled over--namely, the way the deference principle was to be embodied in practice. According to the legend of *Lochner*, the deference principle became sanctified after the *Lochner* era. The legend, however, only presents the surface of what occurred during the *Lochner* era and beyond. New Deal liberalism did not merely enshrine the deference principle after *Lochner*, it declared how the deference principle should be carried out in practice: as a method of reviewing the factual and empirical evidence pertaining to the constitutionality of laws. To explain how the deference principle acquired this meaning, this section examines the growing recognition in constitutional jurisprudence of the interrelationship between facts and interpretation.

Facts are intricately tied to legal standards and rules. "If you scrutinize a legal rule," Judge Jerome Frank once observed, "you will see that it is a conditional statement referring to facts."[154] Rules are not like boxes into which facts are placed; instead, facts define and shape rules. Yet legal scholars continue to dismiss facts as an uninteresting element of jurisprudence. While jurists today certainly recognize that facts influence the meaning of law, the relationship between facts and law and its implications for jurisprudence and constitutional theory have received scant attention. Only a few isolated articles have examined this issue in depth.[155] In his wide-***971** ranging critique of constitutional theory, Paul Kahn aptly illustrates that the history of constitutional theory has, in large part, remained captivated with the question of legitimacy.[156] Constitutional theory

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[154] JUDGE JEROME FRANK, COURTS ON TRIAL 14 (1949).

[155] For discussions of the Court's explicit use of empirical evidence, see generally THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM (1978); Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931 (1980); David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991); Geoffrey C. Hazard, Jr., *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1 (1978); *Kenneth L. Karst, Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75 (1960); Charles M. Lamb, *Judicial Policy-Making and Information Flow to the Supreme Court*, 29 Vand. L. Rev. 45 (1976); Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111 (1988).

[156] *See* PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY (1992).

has generally concerned itself with finding ways to reconcile judicial review with democratic principles.[157] In the realm of jurisprudence, the focus has been on rules and principles rather than their relationship with facts.[158] For example, Ronald Dworkin states that his theory concerns only "theoretical disagreements in law" rather than on "whether the facts satisfy some agreed test in some particular case."[159] Although largely ignored, the relationship between facts and interpretation presents several important questions for jurisprudence: To what extent do facts influence legal interpretation? To what extent has recognition of the role of facts influenced the style and approach that courts have employed in legal and constitutional interpretation? How has the dissolving boundary between facts and law affected other longstanding legal distinctions and conceptions?

In the early twentieth century, during the heyday of the *Lochner* era, the Court explicitly recognized and grappled with the relationship between facts and interpretation. Most scholars have ignored this critical dimension of the *Lochner* era. A closer examination of legal thought during the turbulent years of the *Lochner* era reveals significant insight into how the Court struggled with this issue. As this Article demonstrates, it was the Court's confrontations with this issue that most influenced the Court's attempt to embody the ***972** deference principle in post-*Lochner*-era constitutional law.

1. Formalism, Pragmatism, and the Relationship Between Law and Fact

During the nineteenth century, formalism dominated constitutional jurisprudence. Epitomized by Langdell, formalism tended toward generalization, abstraction, and systemization in the law.[160] It stemmed from the epistemological tradition in philosophy originating during the Enlightenment which was concerned with searching for foundations for knowledge and with discerning what could be known with certainty.[161]

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[157] Theorists of constitutional law have focused much of their energy on the legitimacy of judicial review. *See* ACKERMAN, FOUNDATIONS, *supra* note 40 (stating that legitimate judicial review occurs when the Court locates principles from past "constitutional moments" when the people were most engaged in public discourse and lawmaking); BICKEL, *supra* note 5 (stating that judicial review cannot be legitimate because it is inherently countermajoritarian); ELY, *supra* note 37 (stating that legitimate judicial review depends upon the Court preventing stoppages in the processes of representative democracy).

[158] I have explored this problem in more depth in an earlier article. See Daniel J. Solove**,** *Postures of Judging: An Exploration of Judicial Decisionmaking,* 9 CARDOZO STUD. IN L. & LITERATURE 173 (1997).

[159] DWORKIN, LAW'S EMPIRE, *supra* note 146, at 11, 73.

[160] *See* HORWITZ, *supra* note 27, at 13, 15.

[161] *See id.* at 16. For a more detailed account of the epistemological tradition in philosophy, shaped in large part from Enlightenment thought, see RICHARD RORTY,

Following this tradition, formalism focused heavily on the issue of legitimacy, the quest for rational foundations to justify precepts and practices. Formalism looked for foundations that were fixed and immutable. These foundations were often in the form of a priori principles, abstract propositions that were true for all ages, that were general enough to apply broadly across a multitude of situations. Formalists employed a highly deductive approach to legal reasoning.[162] They did not reason from the ground-up, making tentative generalizations from the facts of particular situations. For the formalist, principles were not created and developed during the practice of interpretation; they already existed prior to the practice and were only waiting to be discovered. Formalists understood constitutional interpretation as a neutral method of discerning the fixed and eternal meaning of the Constitution,[163] a meaning completely divorced from the personal ideology of any individual judge.

The prevailing wisdom today is that *Lochner*-era jurisprudence was rigidly formalistic.[164] With its inflexible formalism, the oft-told ***973** legend

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PHILOSOPHY AND THE MIRROR OF NATURE (1979).

[162] *See* Neil Duxbury, Patterns Of American Jurisprudence 9 (1995) (observing that formalists employed "a narrower, deductive approach to decision-making whereby legal relationships were treated as somehow subsumed under a small collection of fundamental legal principles").

[163] *See* South Carolina v. United States, 199 U.S. 437, 448 (1905) ("The Constitution is a written instrument. As such its meaning does not alter."); THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 124 (Carrington's 8th ed. 1927) ("The meaning of the Constitution is fixed when it is adopted and is not different at any subsequent time.").

[164] *See, e.g.,* Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 558 (1996) ("In this article, I use the label 'formalism' to describe the body of ideas about law that encompassed these attributes of *Lochner* era jurisprudence, ideas that were part of the fundamental legal consciousness of the time."); Laura Kalman, *Eating Spaghetti With a Spoon*, 49 STAN. L. REV. 1547, 1559 (1997) ("Judicial formalism, meanwhile, reflecting 'the entrenched faith in laissez faire,' emerged in cases such as *Lochner* v. New York and Coppage v. Kansas."); R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 191 (1994) ("The formalist-era approach to economic rights is best seen in *Lochner* v. New York, and its progeny.") (citation omitted); Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591, 633 (1998) ("The jurisprudence of the *Lochner*-era Court was formalistic and categorical. The New Deal Court rejected this analysis and developed balancing tests to determine when a regulation crossed the constitutional line."); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 511 (1988) ("Few decisions are charged with formalism as often as *Lochner* v. New York."); Steve Sheppard, *The State*

goes, the Court engaged in rampant judicial activism. But this simple picture of the *Lochner* era Court ignores the conflict and turbulence of the times. The *Lochner* era was a time of profound change. It spanned almost forty years, and encompassed the overlapping careers of twenty-six Justices, with vastly different political leanings, philosophies of law, and judicial temperaments.[165] The *Lochner* Court was not a unified institution, producing a monolithic constitutional jurisprudence but a divided and contentious Court issuing a surprisingly high number of inconsistent opinions. Formalism did not dominate the Court's jurisprudence, but was in the midst of a powerful challenge by pragmatism. As Stephen Seigel aptly observes, the *Lochner* era was "a transitional era that blended ***974** the tenets of early and modern American constitutionalism."[166] To disregard the conflict and contradictions of the era ignores one of the most important aspects of this chapter in constitutional jurisprudence--the Court's dynamic struggle over how to evaluate factual evidence.

The first half of the twentieth century was a remarkably dynamic time in legal thought. During the *Lochner* era, the formalistic conception of legal and constitutional interpretation began to undergo a profound change. This was due, in substantial part, to the influence of pragmatism on legal thinking.[167] Among other things, pragmatism attacked the assumptions of

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Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State, 45 HASTINGS L.J. 969, 972 n.12 (1994) ("No more notorious banner for this phenomenon [formalism] flies in constitutional education than does *Lochner* v. New York ...."); Tom Stacy, *What's Wrong With* Lopez, 44 U. KAN. L. REV. 243, 244 (1996) ("The doctrinal categories of 'noncommercial activities' and 'areas of traditional state regulation' constructed by the majority resurrect the mindless formalism of the *Lochner* Court. These categories enforce a blindness to the obvious national economic consequences of education, family structure, and tort liability, and otherwise disregard federalism's underlying values."). For a list of numerous additional sources that condemn the *Lochner* era as formalistic, see Schauer, *supra*, at 511 n.2.

[165] The Justices include: John Harlan (1877-1910); Horace Gray (1881- 1902); Melville Fuller (1888-1910); Henry Brown (1890-1906); George Shiras (1892-1903); Edward White (1894-1921); Rufus Peckham (1895-1909); Joseph McKenna (1898-1925); Oliver Wendell Holmes (1902-1932); William Day (1903-1922); William Moody (1906-1910); Horace Lurton (1909-1914); Charles Evans Hughes (1910-1916, 1930-1941); Willis Van Devanter (1910-1937); Joseph Lamar (1910-1916); Mahlon Pitney (1912-1922); James McReynolds (1914-1941); Louis Brandeis (1916-1939); John Clarke (1916-1922); William Taft (1921-1930); George Sutherland (1922-1938); Pierce Butler (1922-1939); Edward Sanford (1923-1930); Harlan Stone (1925-1946); Owen Roberts (1930-1945); and Benjamin Cardozo (1932- 1938).

[166] Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 4 (1991).

[167] Pragmatism, a distinctively American movement in philosophy, developed in the

formalism, such as the ability to ground claims of knowledge in immutable a priori principles.[168] Shifting the focus of philosophy away from pure thought and immutable foundations, pragmatism emphasized facts, making the empirical realities of everyday life central to philosophy. William James declared that the pragmatist "turns away from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action and towards power."[169] John Dewey advanced the "experimental method" (which he also called the "empirical method"). In contrast to the deductive method of traditional philosophy, which derived true propositions from irrefutable first principles, the experimental method focused on experience as "the starting point for philosophic thought."[170] The experimental method was patterned after scientific inquiry, which began with difficulties and problems in experience, sought to define the difficulties, made hypotheses, and then tested the hypotheses by examining their consequences through continual experimentation.[171] "Knowledge is ***975** an affair of making sure," Dewey observed, "not of grasping antecedently given sureties."[172] Dewey envisioned the empirical method as a map, providing guidance for critical inquiry.[173] "Experimental method is something other than the use of blow-pipes, retorts and reagents. It is the foe of every belief that permits habit and wont to dominate invention and discovery, and ready-made system to override verifiable fact. Constant revision is the work of experimental inquiry."[174]

The pragmatic insistence on the importance of facts eroded the formalistic conception of legal and constitutional interpretation.[175]

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thoughts of Charles Sanders Peirce, William James, John Dewey, Josiah Royce, George Santayana, and George Herbert Mead. The birth of pragmatism can be traced to around 1870, and it flourished until shortly after WWII. *See* JOHN J. STUHR, CLASSICAL AMERICAN PHILOSOPHY 5 (1987); CORNELL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM 235-38 (1989).

[168] Of course, pragmatism is a far more nuanced and complex philosophy than the very attenuated discussion here, which is merely intended to point out certain aspects of pragmatism.

[169] WILLIAM JAMES, PRAGMATISM 25 (Prometheus Books ed., 1991) (1907).

[170] JOHN DEWEY, EXPERIENCE AND NATURE 9 (Jo Ann Boydston ed., 1988) (1929) [hereinafter DEWEY, EXPERIENCE].

[171] *See* JOHN DEWEY, HOW WE THINK (Jo Ann Boydston ed., 1978) (1910).

[172] *See* DEWEY, EXPERIENCE, *supra* note 170, at 123.

[173] *Id.* at 34.

[174] JOHN DEWEY, INDIVIDUALISM OLD AND NEW 115-16 (Jo Ann Boydston ed., 1984) (1929).

[175] *See* MORTON G. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST

Gradually, jurists began to recognize that the task of discerning the meaning of legal and constitutional provisions often depended upon an evaluation of factual and empirical evidence. This was not the simple realization that understanding that the facts of a case were important; rather, it was a recognition that law was not merely applied to facts, but that the meaning of the law was shaped by the facts.

This change did not occur overnight. The distinction between law and fact had existed in Anglo-American law for ages. Although it was called into question as early as the late eighteenth century,[176] only in the early twentieth century did the distinction become a serious problem in jurisprudence. Formalism conceived of interpretation as a universal method of reasoning. It was a process of deducing the correct results from abstract principles of constitutional law rather than a ground-up inductive and experimental practice that varied throughout history. Factual and empirical claims were considered the domain of policy, matters that should be determined by legislatures, officials, or juries. For the formalist, legal interpretation transcended mere facts. If constitutional meaning were influenced by current empirical knowledge, the Constitution would no longer have a fixed and unchanging meaning. Thus, for the formalist, there had to be a relatively clear boundary between facts and law; the judge discerned what the law was through legal reasoning and applied it to the facts, but the meaning of the law was not dependent ***976** upon the facts.

During the *Lochner* era, however, this view underwent a profound change. A vanguard of legal thinkers such as Roscoe Pound and Justices Cardozo and Holmes infused pragmatic ideas into the law and emphasized a more hermeneutical relationship between law and fact. Pound developed a notion of sociological jurisprudence, a theory of law that turned away from abstractions toward the current social scientific understandings of the day.[177] Justice Cardozo tempered the rigid conceptions of formalism with a pragmatic philosophy: "The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice."[178] But most ironically, Justice Holmes, who loathed facts, also vigorously stressed their importance. "I hate facts," wrote Holmes. "I always say the chief end of man is to form general principles--adding that no general proposition is worth a

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FORMALISM (1957) (arguing that legal realism can be understood as part of a larger revolt against formalism in American thought).

[176] *See* KENNETH CULP DAVIS, 4 ADMINISTRATIVE LAW TREATISE § 30.01, at 189 (1958) (discussing Lord Mansfield's recognition of mixed fact-law questions).

[177] *See* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912).

[178] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 23 (1921) (quoting MUNROE SMITH, JURISPRUDENCE 21 (1909)).

damn."[179] Although recognizing that it would be good to immerse himself in facts, Holmes confessed: "I shrink from the bore."[180] Holmes observed that law was "essentially empirical"[181] and that "the man of the future is the man of statistics and the master of economics."[182] Because he recognized that facts shaped legal meaning, Holmes viewed the jury system as infringing upon the province of the judiciary. He recognized that when juries applied facts to the law, they, in effect, were engaging in legal interpretation as well as affecting the meaning of the law. "[W]hen standards of conduct are left to the jury," Holmes observed, "it is a temporary surrender of a judicial function which may be resumed at any moment in any case when the court feels competent to do so.... [Otherwise this] would leave all our rights and duties throughout a great part of the law to the necessarily more or less accidental feelings of the jury."[183] Specifically, Homes could not understand what made the "reasonable man" standard of negligence a ***977** factual, as opposed to a legal, issue. With his usual cynical wit, Holmes observed: "[I]f a question of law is pretty clear we [judges] can decide it, as it is our duty to do, if it is difficult it can be decided better by twelve men taken at random from the street."[184]

The legal realists, who began to enter the scene during the *Lochner* era, also stridently emphasized the importance of facts in legal interpretation.[185] The realists recommended that the judiciary openly base their decisions on current social scientific, economic, and psychological understandings.[186] Felix Cohen argued that legal reasoning should not become divorced "from questions of social fact and ethical value."[187] Rather than focus on

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[179] Letter from Holmes to Pollock (May 26, 1919), in 2 MARK DEWOLFE HOWE, HOLMES-POLLOCK LETTERS, 1874-1932, at 13-14 (1941).

[180] *Id.*

[181] Oliver Wendell Holmes, *Codes and the Arrangement of the Law*, 5 AM. L. REV. 1, 4 (1870).

[182] OLIVER WENDELL HOLMES, *The Path Of The Law*, *in* COLLECTED LEGAL PAPERS 167, 187 (1920).

[183] OLIVER WENDELL HOLMES, THE COMMON LAW 100-01 (1881).

[184] Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 457 (1899).

[185] *See, e.g.,* FRANK, *supra* note 43; KALMAN, *supra* note 44, at 3 (stating that realism was "an attempt to understand law in terms of its factual context and economic and social consequences"); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 275 (1997) (stating that realists argued that judges respond to the stimulus of facts).

[186] As Professor Singer observes about the realists: "The legal realists wanted to replace formalism with a pragmatic attitude toward law generally. This attitude treats law as made, not found. Law therefore is, and must be, based on human experience, policy, and ethics, rather than formal logic." Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 474 (1988) (book review).

[187] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35

transcendental concepts, he claimed, practitioners and scholars should focus on what the law does empirically. Jerome Frank, drawing upon his experience as a trial judge, became a vigorous proponent of the importance of facts. Similarly, Karl Llewellyn emphasized that meaning was not an inherent property in general rules; rather, the "heaping up of concrete instances" supplied rules with their meaning.[188]

The rigid conceptual boundary between facts and law quickly dissolved during the *Lochner* era. This change stemmed from the fact that the very style of constitutional adjudication was becoming more instrumental, often focusing on an empirical analysis of the connection between means and ends. Of course, vestiges of formalism remained in the constitutional jurisprudence of the *Lochner* era, but this was an era where categorical reasoning was breaking down.

In stark contrast to the prevailing wisdom that the *Lochner*-era Court was rigidly formalistic, the Court during this time was far from absolutist in its protection of contract and property rights. The *Lochner*-era Court openly acknowledged that contract and property ***978** rights were not absolute and were subject to curtailment by the legitimate exercise of the state or federal government's "police power"--the power to regulate for the public welfare, to facilitate commerce, to protect against dangers, and to advance the health, prosperity, and safety of the people. For example, in *Adkins v. Children's Hospital*,[189] the Court recognized that there was "no such thing as absolute freedom of contract."[190] Likewise, in *Coppage v. State of Kansas*,[191] the Court stated that it was "the thoroughly established doctrine of this court that liberty of contract may be circumscribed in the interest of the state and the welfare of its people."[192]

One of the crucial issues was the scope of the state or federal government's police power. The test for the scope of police power was whether or not the law was a "reasonable" exercise of the power. To be reasonable, the law had to address an existing danger or problem; and it had to have some logical connection to alleviating that danger. The changing style of lawmaking in the early twentieth century increasingly made this analysis fact-intensive. Inspired by the Progressive Movement of the late nineteenth century, the twentieth century opened amid a flurry of new laws and regulations. The progressives, reacting to great industrial and technological changes and the rise of big business during the latter half of

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COLUM. L. REV. 809, 814 (1935).

[188] KARL N. LLEWELLYN, THE BRAMBLE BUSH: SOME LETTERS ON LAW AND ITS STUDY 2 (1930).

[189] 261 U.S. 525 (1923).

[190] *Id.* at 546.

[191] 236 U.S. 1 (1915).

[192] *Id.* at 29.

the nineteenth century, pushed for a new brand of regulation of industry--concerned with product safety, the powerlessness of the workers, and the power of trusts. These new laws were often very fact-specific; they controlled size, shape, number, and degree--from the size of strawberry containers to the weight of a loaf of bread. These laws were not broad generalities or statements of principle, but were intricate regulations of the minutia of industrial life. The new nature of these laws made the issue of whether they were reasonable exercises of police power one that was often unavoidably dependent on questions of fact.

The *Lochner*-era cases suggest that the Court understood the role of facts in determining the scope of the police power, and ultimately, the constitutionality of the law. The Court was quite self-conscious about the role of facts, and countless justices discussed the issue in majority opinions and dissents, such as the majority opinion of Justice Roberts in *Nebbia v. People of State of New* ****979*** *York*,[193] that noted that "the reasonableness of each regulation depends upon the relevant facts."[194] Justices were deeply divided in their approaches toward the relationship between facts and law. In *Home Building & Loan Association v. Blaisdell*,[195] the Court upheld a law that imposed a moratorium on mortgage foreclosures. Justice Hughes, writing for the Court, stated that the scope of a constitutional prohibition was determined by its application:

> To ascertain the scope of the constitutional prohibition, we examine the course of the judicial decisions in its application. These put it beyond question that the prohibition is not an absolute and is not to be read with literal exactness like a mathematical formula.[196]

Hughes also argued that the Constitution had a meaning and application that evolved over time. He asserted that "[i]t is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time."[197] Justice Sutherland wrote a fiery dissent, claiming that the Constitution "does not mean one thing at one time and an entirely different thing at another time."[198] With rigid adherence to formalistic principles, Sutherland maintained a strict distinction between law and facts. He believed that the meaning of the provisions in the Constitution were unchanging, and that "it is only their application which is extensible."[199]

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[193] 291 U.S. 502 (1934).
[194] *Id.* at 525.
[195] 290 U.S. 398 (1934).
[196] *Id.* at 428.
[197] *Id.* at 442.
[198] *Id.* at 449 (Sutherland, J., dissenting).
[199] *Id.* at 451 (Sutherland, J., dissenting).

While Hughes articulated a hermeneutical relationship between law and fact, Sutherland's dissent viewed law as a rigid skeleton, having a unilateral relationship with facts. Thus, the simple dismissal of *Lochner*- era jurisprudence as formalistic conceals the tensions of the age. *Lochner*- era jurisprudence was engaged in a struggle over how to conceptualize the complicated relationship between law and facts. With this background in mind, I turn to *Lochner* itself.

2. Evaluating the Empirical Facts in *Lochner*

In the opening paragraphs of *Lochner*, Justice Peckham, writing ***980** for the Court, stated that the right to make a contract "is part of the liberty of the individual protected by the Fourteenth Amendment."[200] Peckham went on to recognize that contract rights may be curtailed through a state's "legitimate exercise of its police power."[201] The Court then articulated the standard of review: whether the exercise of the state's police power was "reasonable and appropriate" or "unreasonable, unnecessary and arbitrary."[202] This standard was beyond dispute and was applied in virtually all *Lochner*-era opinions.[203] None of the dissents argued that a different standard should be employed. Instead, the dissenters charged the *Lochner* majority with second-guessing the legislature by imposing its own policy choices. However, the *Lochner* majority maintained that it was not "substituting the judgment of the court for that of the legislature."[204] At least in its rhetoric, the Court did not hold that the law was invalid because it was unwise, but because it was irrational and, therefore outside the bounds of the state's police power.[205] Thus, the *Lochner* majority was not disputing the deference principle; indeed, it agreed with the principle that the Court must avoid substituting its judgment for that of the legislature.

Instead, the real dispute concerned the method of review. The constitutionality of the statute depended upon the underlying empirical question of the extent of a material danger to the health of the workers. The *Lochner* Court concluded that in the case of the bakers there was no "fair ground, reasonable in and of itself, to say that there is a material danger to the public health or to the health of the employees, if the hours of labor are not curtailed."[206] In reaching this conclusion, the Court was cavalier in its

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[200] Lochner v. New York, 198 U.S. 45, 53 (1905).
[201] *Id.*
[202] *Id.* at 56.
[203] There are, of course, a few exceptions. In the most notable example, Coppage v. Kansas, 236 U.S. 1, 19 (1915), the Court seemed to imply that police powers only existed during emergencies.
[204] *Lochner*, 198 U.S. at 56-57.
[205] *Id.* at 61.
[206] *Id.*

treatment of the facts and was overly dismissive of the legislature's claims about the danger to worker health. The *Lochner* opinion dismissed the existence of any danger to the workers' health without much mention of the evidence that led the New York legislature to conclude that such dangers required the protection of a law. The *Lochner* Court, however, did not completely ignore facts. *Lochner*'s brief supplied statistics concerning the comparative healthiness of various occupations, ***981** with the trade of a baker located in the middle of the pack. New York's brief contained no data in support of the statue.[207] "In looking through statistics regarding all trades and occupations," Justice Peckham wrote, "it may be true that the trade of a baker does not appear to be as healthy as some other trades, but is also more healthy than still others."[208] Rather than presume that the legislature had a factual basis to conclude that there was a danger to the health of bakers and place the burden on *Lochner* to refute these facts, the Court appeared to demand some type of proof from New York that such a danger existed: "There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty."[209] Yet instead of engaging in a detailed factual analysis, the Court relied upon "the common understanding" that "the trade of a baker has never been regarded as an unhealthy one."[210]

Unlike Justice Holmes, who claimed that the Court had strayed from the deference principle, Justice Harlan, in dissent, focused on the Court's casual treatment of the empirical issue. He argued that the Court should not have been so dismissive of the legislature's factual finding that the hour limit was necessary to prevent danger to the health of the bakers.[211] Harlan then cited treatises and commentary on the hazards of baking as well as the conclusions of a report by the New York Bureau of Statistics of Labor, which stated that shorter hours of work lead to improved health and longer life.[212] The burden of proof was on the challenger of the law to refute the state's factual basis and the legislature did not have to provide elaborate evidence to justify its laws. In this case, there were enough facts to justify the law. Harlan recognized that although different conclusions could be drawn from the facts in *Lochner*, the fact that there was room for dispute was not a ground for striking down the law.

Harlan's dissent, in contrast to that of Holmes, is responsive to the dispute of the *Lochner* era over the way the Court evaluated factual

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[207] *See* Siegel, *supra* note 166, at 19 n.77.
[208] *Lochner*, 198 U.S. at 59.
[209] *Id.*
[210] *Id.*
[211] See *Id.* at 69 (Harlan, J., dissenting) ("[W]hether or not this be wise legislation it is not the province of the court to inquire.").
[212] *Id.* at 71.

evidence. Yet Holmes' dissent, rather than Harlan's, became the widely-accepted explanation of the Court's failure in *Lochner*--perhaps a significant reason why the issue of facts has been ne-***982** erhaps a significant reason why the issue of facts has been neglected in subsequent accounts of *Lochner* -era jurisprudence.

3. Justice Brandeis' World of Facts

Contrary to the popular wisdom, it was Justice Brandeis, rather than Justice Holmes, who battled in the trenches during the *Lochner* era, and who hammered out an approach over how the deference principle was to be embodied. As explained in the previous section, this issue was deeply connected to the relationship between law and fact, which was a major, unresolved question that loomed over *Lochner*-era jurisprudence. As Wigmore observed in 1924:

> Where a legislative act is argued to be unconstitutional, and this is to depend upon the unreasonableness, or the lack of possible reasonableness, of the law in its purpose or operation, and thus the external facts furnishing the possible legislative motive or the possible actual effect must be considered, this incidental question is not for the jury but for the court.... But by what theory or method shall the Court receive information of the alleged facts? This is an interesting inquiry, hitherto not carefully worked out by the courts.[213]

More than anyone else, Louis Brandeis, as both an attorney and then a Supreme Court Justice, brought attention to this issue. As Brandeis observed: "The determination of these questions involves an enquiry into facts. Unless we know the facts on which the legislators may have acted, we cannot properly decide whether they were (or whether their measures are) unreasonable, arbitrary or capricious."[214] As a Justice, Brandeis immersed himself in facts, and his clerks spent much time in the Library of Congress gathering sociological data that would be stuffed into his opinions.[215] Brandeis' focus on the facts led John Dewey to declare that Brandeis' "strict adherence to this policy of reference to factual context is one of the great contributions to legal thought in the last generation."[216]

Even before he came to the Court in 1916, Brandeis had recognized ***983** the importance of facts. In *Muller v. Oregon*,[217] just three years after

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[213] WIGMORE ON EVIDENCE § 2555d (2d ed. 1923).
[214] Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 519-20 (1924) (Brandeis, J., dissenting).
[215] *See* PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM 66 (1993).
[216] John Dewey, *Mr. Justice Brandeis*, 33 COLUM. L. REV. 175, 175 (1933) (book review).
[217] 208 U.S. 412 (1908).

Lochner, Brandeis (then an attorney) argued in defense of a statute that restricted the employment of females to no more than ten hours a day, a similar hour restriction to the one in *Lochner*. Brandeis submitted the famous "Brandeis brief," a 113-page brief which was unique because it provided factual and empirical support for the law in question.[218] In direct response to *Lochner*'s resort to "common understanding," Brandeis claimed that the facts in his brief were common knowledge, and the Court could take judicial notice of them.[219] Brandeis' tactic was successful. Justice Brewer, writing for the Court, explicitly mentioned Brandeis' brief and recognized its importance by noting that "when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration.[220]

Brandeis' tactic created a stir. He would employ it again on numerous other occasions, including a 1,000 page brief in *Bunting v. Oregon*[221] to defend an hour-restriction law for workers in mills, factories, or manufacturing establishments.[222] Felix Frankfurter (also an attorney at the time) argued the case, distinguishing it from *Lochner* by claiming that principles vary according to the facts to which they are applied, and that in *Bunting* there was a "mass of data" not in existence when the Court decided *Lochner*.[223] Again, the Brandeis brief tactic succeeded, and the Court upheld the law.[224]

Ultimately, however, Brandies believed that the "Brandeis brief" was a tactic that should not have been necessary. Brandeis believed that the challenger of a law, not the government, should bear the ***984** burden of proving the validity of the factual basis for a law. When he came to the Court in 1916, Brandeis repeatedly stressed that the Court must be more accepting of the legislature's facts. In his opinion for the Court in *Pacific States Box & Basket Co. v. White*,[225] he wrote:

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[218] See GERALD GUNTHER, CONSTITUTIONAL LAW 450 n.1 (12th ed. 1991) ("Muller was the first major case to resort to a fact-filled brief ... submitted by the defenders of the legislation.").

[219] See Alpheus Thomas Mason, *The Case of the Overworked Laundress, in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION 200-01 (John A. Garraty ed., 1987) (discussing the oral argument in Muller).

[220] See *id.* at 201.

[221] 243 U.S. 426 (1917).

[222] Brandeis drafted the brief, which was over 1,000 pages consisting mostly of statistics and data. See Seigel, *supra* note 166, at 20 n.83.

[223] Bunting, 243 U.S. at 432.

[224] *See* Seigel, *supra* note 166, at 20 n.83 (quoting from Frankfurter's oral argument); *see also* STRUM, *supra* note 215, at 185 n.47 (discussing the preparation of the Brandeis brief).

[225] 296 U.S. 176 (1935).

> When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge, or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.'[226]

Although Brandeis stressed this point tirelessly,[227] the Court failed to develop a sophisticated and uniform method of evaluating facts, and its failure captured the attention of a few commentators. In a 1924 article, Henry Wolfe Bikle observed that many disputes over the Court's interpretation of the Constitution boiled down to disputes over facts.[228] In 1936, another commentator argued that "issues of fact in constitutional decisions may at times have been realized, but adequate means for bringing the facts before the courts have been slow to develop."[229] Additionally, a 1930 note in the *Columbia Law Review* discussed the inconsistencies in the Court's treatment of facts: "Mr. Brandeis' presentation of [factual] material was marked with success in all the cases in which he prepared briefs. But Mr. Justice Brandeis has had to embody the results of many of his later investigations in dissenting opinions."[230]

These commentators suggested that the Justices disagreed significantly over how facts should be evaluated in cases of constitutional interpretation. Sometimes the Brandeis view would carry the day, and the Court would presume the facts for the government and ***985** place the burden of proof on the challenger. In *Borden's Farm Products Co. v. Baldwin*,[231] Justice Hughes, writing for the Court, declared that the presumption of constitutionality was a rebuttable presumption "of the existence of factual conditions supporting the legislation."[232] The legislation was valid "if any

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[226] *Id.* at 185 (quoting Borden's Farm Prods. Co., Inc. v. Baldwin, 293 U.S. 194, 209 (1934)).

[227] *E.g.*, O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251, 257 (1931) ("As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation for overthrowing the statute.").

[228] *See* Henry Wolf Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924).

[229] Note, *The Presentation of Facts Underlying the Constitutionality of Statutes*, 49 HARV. L. REV. 631, 632 (1936).

[230] Note, *The Consideration of Facts in "Due Process" Cases*, 30 COLUM. L. REV. 360, 371 (1930).

[231] 293 U.S. 194 (1934).

[232] *Id.* at 209.

state of facts reasonably can be conceived that would sustain it."[233] Under this view, the presumption meant that even hypothetical facts could support the legislature. Brandeis' view prevailed again in *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*,[234] in which the majority declared: "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation for overthrowing the statute." Justices Sutherland, Butler, McReynolds and Van Devanter, dubbed the "Four Horsemen" because they were the staunchest opponents of New Deal legislation, dissented claiming the government must demonstrate the circumstances necessary for a curtailment of rights.[235]

The Brandeis approach, however, did not always succeed. In *Adkins v. Children's Hospital*, [236] the Court explicitly departed from *Muller* and its progeny when it struck down a wage law for women. Writing for the Court, Justice Sutherland stated that "[a] mass of reports, opinions of special observers and students of the subject, and the like, has been brought before us in support of [the statute], all of which we have found interesting but only mildly persuasive."[237] The Court made no mention of the presumption of constitutionality in favor of legislative facts. In *Morehead v. People of the State of New York ex rel. Tipaldo*,[238] the Court again ignored the Brandeis brief, leading Justice Hughes to point to the statistics and assert that "we are not at liberty to disregard these facts." [239] Thus, while some cases, such as *Nebbia*, demonstrated a detailed examination of factual issues others relied more on the justices' common understandings. As one commentator observed:

> Theoretically, the presumption of constitutionality should ***986** induce courts to uphold legislation if any set of facts could reasonably be conceived to sustain it, and, therefore, the necessity for legislative findings might be questioned. Experience has taught, however, that the absence of some concrete evidence of constitutional facts may adversely affect the presumption's force.[240]

The Court's lack of consensus about the proper method of evaluating facts became abundantly clear in a series of cases beginning in the 1930s regarding the "constitutional fact doctrine." Under this doctrine, when the Court determined that factual issues were essential to its duty of interpreting

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[233] *Id.*
[234] 282 U.S. 251 (1931).
[235] *Id.* at 269.
[236] 261 U.S. 525 (1923).
[237] *Id.* at 560.
[238] 298 U.S. 587 (1936).
[239] *Id.* at 627 (Hughes, C.J., dissenting).
[240] Note, *supra* note 229, at 633.

the Constitution, it would review the facts de novo.[241] The doctrine emerged from the "jurisdictional fact doctrine" which was first enunciated in *Crowell v. Benson*.[242] In Crowell, an employer sought to enjoin the enforcement of a compensation award under the Longshoremen's Harbor Workers' Compensation Act. The award rested on the factual finding of an agency official that the employee was injured while employed by the defendant and while working in the navigable waters of the United States.[243] Although the Act implied that the Deputy's findings of fact were final, the Court classified the facts as "jurisdictional facts," for "their existence [was] a condition precedent to the operation of the ***987** statutory scheme."[244] The Court held that it had the power to review the facts because they were essential to the enforcement of federal rights:

> The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province ... does not require the conclusion that there is no limitation of their use.... That would be to sap the judicial power as it exists under the federal Constitution, and to establish a government of bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts,

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[241] Interestingly, this mysterious doctrine has been practiced only sporadically. It still is practiced in contemporary cases, such as Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995) and New York Times v. Sullivan, 316 U.S. 254 (1964). See also Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (overturning state trial court's factual conclusions regarding threat of violence and police protection in African-American student protest because "it remains our duty ... to make an independent examination of the whole record"); Feiner v. New York, 340 U.S. 315, 316 (1951) (reversing conviction of disorderly conduct by conducting independent review of evidence to "ascertain independently whether the right has been violated"); Niemotko v. Maryland, 340 U.S. 268, 271 (1951) (reversing conviction of Jehovah's Witnesses for disorderly conduct for giving Bible talks in public park). For further information about the constitutional fact doctrine, see, for example, Henry Wolf Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924); George C. Christie*, Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14 (1992); John Dickinson, Crowell v. Benson: *Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U. PA. L. REV. 1055 (1932); Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916 (1992); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985); Note, *The Consideration of Facts in "Due Process" Cases*, 30 COLUM. L. REV. 360 (1930); Note, *The Presentation of Facts Underlying the Constitutionality of Statutes*, 49 HARV. L. REV. 631 (1936).

[242] 285 U.S. 22 (1932).

[243] *Id.* at 36-37.

[244] *Id.* at 54.

and finality as to facts becomes in effect finality in law.[245]

The *Crowell* court also suggested that de novo review was appropriate for facts essential not only to federal statutory rights, but also to federal constitutional rights. Thus, the constitutional fact doctrine followed quite logically from the jurisdictional fact doctrine.[246] As the *Crowell* Court expounded: "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions both of fact and law, necessary to the performance of that supreme function."[247] Angered by these new doctrines--especially the constitutional fact doctrine--for their explicit refusal to presume the validity of the facts, Brandeis issued a lengthy and highly critical dissent. Shortly after *Crowell*, in *Norris v. Alabama*,[248] the Court evaluated a state trial judge's denial of a motion to quash an indictment because of systematic exclusion of African-American jurors in the county of the trial. The Court reviewed the facts at the hearing de novo, declaring: "[W]henever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."[249] The Court reasoned that it must not merely examine whether a right was violated "in express terms" but "whether it was denied in substance and effect."[250] Otherwise, ***988** the Court would not achieve its "purpose in safeguarding constitutional rights."[251]

In *Saint Joseph Stock Yards Co. v. United States*,[252] the issue came to a head. More than any other case of the *Lochner* era, this one revealed where the justices stood on the relationship between facts and law. Chief Justice Hughes, who in Borden's Farm had followed the Brandeis approach, explained that the legislature could not be permitted to escape judicial review by dressing its regulations in elaborate factual findings.[253] Hughes declared that "independent judicial review upon the facts and the law" was necessary because constitutional rights should not be placed "at the mercy of administrative officials."[254]

Although concurring in the result, Brandeis staunchly disagreed: "I

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[245] *Id.* at 56-57.
[246] Monaghan, *supra* note 241, at 249.
[247] Crowell, 285 U.S. at 60.
[248] 294 U.S. 587 (1935).
[249] *Id.* at 589 (emphasis added).
[250] *Id.* at 590.
[251] *Id.*
[252] 298 U.S. 38 (1936).
[253] *Id.* at 51-52.
[254] *Id.* at 52.

think no good reason exists for making special exception of issues of fact bearing upon a constitutional right."[255] For Brandeis, the role of the Court was merely to determine whether the procedures by which the facts were found were proper, not to review the substance of the facts.[256] Only in certain cases, such as habeas cases, could a court make a de novo determination of the facts.[257] If there were conflicting facts in the record, "a court [should] not substitute its judgment for that of the legislative body."[258] Brandeis explained:

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of fact by an administrative tribunal would be broader than their power to set aside a ***989** jury's verdict. The Constitution contains no such command.[259]

In sum, the Court could not come to any unified or consistent method for evaluating facts or conceiving the relationship between law and facts, and this resulted in the inconsistent jurisprudence of the *Lochner* Court. Contrary to myth of the *Lochner* Court being unwavering in its rejection of New Deal and Progressive legislation, the Court upheld more laws than it struck down during the *Lochner* era,[260] and in dissents as well as in majority opinions, Justices would frequently rattle off a laundry list of sustained regulations.[261] Even the Four Horsemen sustained a significant number of regulations.[262]

The failure of the Court to come to any consistent method for approaching the law-fact relationship left several important questions unanswered: What was the extent of the presumption of constitutionality? Which side had the burden of proof? How could this burden be met? Should

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[255] *Id.* at 73 (Brandeis, J., concurring).
[256] *Id.*
[257] Saint Joseph Stock Yards, 298 U.S. at 77.
[258] *Id.* at 83.
[259] *Id.* at 84.
[260] *See* PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 299 (3d ed. 1992).
[261] *See*, *e.g.*, Morehead v. New York, 298 U.S. 587, 628 (1936) (Hughes, C.J., dissenting); *id.* at 632 (Stone, J., dissenting); Nebbia v. New York, 291 U.S. 502, 526-28 nn.24-29 (1934).
[262] See the extensive citations in the footnotes to Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 605-16 nn.56-58 (1997).

the Court presume hypothetical facts to support the legislation?

4. Defining Deference: *Carolene Products* and the Evaluation of Facts

After the *Lochner* era ended in 1937, the Court did not "bring back" or "create" the presumption of constitutionality, for as discussed earlier, there was no dispute that laws were presumed to be constitutional, and countless *Lochner*-era opinions explicitly mentioned this fact.[263] No new legal tests or doctrines were announced. ***990** The Court used the same standards that it used during the *Lochner* era but embarked on a more consistent method of evaluating the factual data supporting the necessity of the legislation. After the Court's famous "switch in time," all New Deal reforms were upheld.[264] Brandeis' approach had prevailed.

In 1938, the Court decided *United States v. Carolene Products Co.*,[265] which became the most important opinion concerning judicial review since *Marbury v. Madison*.[266] In examining whether a law prohibiting the shipment of filled milk was within Congress' power to regulate interstate commerce, the Court engaged in a lengthy elaboration of the deference principle. While for most scholars, the only aspect of *Carolene Products*

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[263] *See*, *e.g.*, Concordia Fire Ins. Co. v. State of Illinois, 292 U.S. 535, 547 (1934) ("By reason of the presumption of validity which attends legislative and official action one who alleges unreasonable discrimination must carry the burden of showing it."); Nebbia, 291 U.S. at 537-38 ("Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."); Adkins v. Children's Hosp., 261 U.S. 525, 544 (1923) ("This court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt."); Buttfield v. Stranahan, 192 U.S. 470, 492 (1904) ("In examining the statute in order to determine its constitutionality we must be guided by the well-settled rule that every intendment is in favor of its validity. It must be presumed constitutional unless its repugnancy to the Constitution clearly appears.").

[264] *See* ACKERMAN, TRANSFORMATIONS, *supra* note 146, at 314.

[265] 304 U.S. 144, 152 (1938).

[266] 5 U.S. (1 Cranch) 137 (1803). Footnote Four has been hailed as "the most celebrated footnote in constitutional law." See Justice Lewis P. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982). It has also been called "[t]he great and modern charter for ordering the relation between judges and other agencies of government." Owen M. Fiss, *The Supreme Court, 1978 Term--Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979). Initially, Footnote Four was virtually ignored by constitutional theorists. For example, in the first five years following the opinion, there was little mention of Footnote Four or *Carolene Products* in the pages of *Harvard Law Review* or the *Yale Law Journal*.

worthy of discussion is its famous Footnote Four, the opinion as a whole is a profound document about the relationship between facts and constitutional interpretation as well as about the meaning of the deference principle. Justice Stone understood that the mere incantation of the deference principle was not sufficient to guide the Court in its judicial review. In addition to asserting the importance of the deference principle, he also expounded in significant detail the way it was to be embodied in practice. Therefore, to understand deference, we must first look beyond the text of Footnote Four and revisit the complete opinion. A look at the text immediately preceding Footnote Four provides significant insight:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude ***991** the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[267]

First, this quote suggests that the "presumption of constitutionality" concerns the existence of facts supporting the legislative judgment. Second, it indicates that for laws affecting ordinary economic affairs, the challenger of the law must prove deficiencies in the empirical basis of the law; the government is not required to offer affirmative proof. Laws are unconstitutional only if facts "generally assumed" by, or "made known" to, the Court demonstrate that the factual conclusions supporting the law are unreasonable. Later in the opinion, the Court went into great detail about how a litigant could prove facts to challenge the validity of a statute. The Court noted that facts "beyond the sphere of judicial notice" could become part of the judicial inquiry.[268] Additionally, "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."[269] Further, the Court recognized that litigants within the purview of the statute could prove that their situation was "so different from others of the [regulated] class as to be without the reason for the prohibition."[270] Thus, the Court in *Carolene Products* attempted to carve out the meaning of the deference principle by describing in great detail a method of evaluating the government's empirical evidence.

By defining deference in this way, the Court rejected the account of deference advocated in James Bradley Thayer's famous article, *The Origin*

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[267] *Carolene Prods.*, 304 U.S. at 152.
[268] *Id.* at 153.
[269] *Id.*
[270] *Id.* at 154.

and Scope of the American Doctrine of Constitutional Law.[271] According to Thayer, the Constitution was subject to a plurality of reasonable interpretations.[272] The Court was not to serve as the primary interpreter of the Constitution; instead, the function of the judiciary was to discern whether the legislature's interpretation of the law was reasonable. "The judicial function," Thayer claimed, "is merely that of fixing the outside border of reasonable ***992** legislative action."[273]

The Court did not adopt this method to carry out the deference principle, refusing to cede its role as primary interpreter of the Constitution. Deference applied only to the existence of facts supporting a law in question, not to the interpretation of the Constitution, which remained the province of the judiciary. As Henry Monaghan accurately observed, "The Court and the profession have treated the judicial duty as requiring independent judgment, not deference, when the decisive issue turns on the meaning of the constitutional text, and that specific conception of the judicial duty is now deeply engrained in our constitutional order."[274] Deference to factual judgements rather than to constitutional interpretations appeared to be a much less radical approach than the deference advocated by Thayer. In this way, the Court could retain its role as primary interpreter of the Constitution while simultaneously maintaining a healthy deference for legislatures and other government institutions and officials.

The Court was well aware that facts influenced the meaning of the Constitution. To the extent that facts could shape the meaning of the Constitution, deference could be a partial relinquishment of the judiciary's role as primary interpreter. With the growing recognition that facts were a critical component to defining the meaning of the Constitution, this relinquishment threatened to be quite significant. The more the law-fact distinction became blurred, the more deference to fact (Carolene deference) became deference to law (Thayer deference). When writing Carolene Products, Justice Stone recognized that this posed a significant problem for the future of judicial review, prompting him to insert Footnote Four.[275]

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[271] 7 HARV. L. REV. 129 (1893).

[272] *See id.* at 144 ("[T]he constitution often admits of different interpretations ... [and] there is often a range of choice and judgment .... [T]he constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.").

[273] *Id.* at 148.

[274] Monaghan, *supra* note 18, at 9.

[275] The full text of Footnote Four provides:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those

***993** Footnote Four presented itself as an exception to the presumption of "the existence of facts supporting the legislative judgment."[276] Tentatively,[277] the footnote explained that the deferential review ushered in by the Court in 1937 did not apply across-the-board to all constitutional rights. In contrast to Thayer's interpretation of deference, the Footnote argued for "a narrower scope for the operation of the presumption of constitutionality" and a "correspondingly more exacting judicial inquiry" when legislation implicates fundamental rights, affects the democratic processes, or discriminates against "discrete and insular minorities."[278] Footnote Four created a new regime of constitutional jurisprudence based upon a hierarchy of rights (fundamental vs. merely economic) and a corresponding dichotomy between methods of judicial review (deferential vs. heightened scrutiny).[279] Justice Hughes added the first paragraph, suggesting that the Bill of Rights receive additional protection because these rights were explicitly mentioned in the Constitution.[280]

Like the rest of *Carolene Products*, Footnote Four was quite concerned with resolving how the Court was to handle empirical evidence in constitutional interpretation. Footnote Four recognized that the degree of scrutiny with which the Court reviewed the empirical basis for a law had

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political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether 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.

Carolene Prods., 304 U.S. at 152 n.4 (citations omitted).

[276] *Id.* at 152.

[277] See J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 284 (1989) ("Indeed, not only do the most famous claims of *Carolene Products* appear in a lowly footnote, but the footnote does not even assert them directly. It merely raises them tentatively, deferentially (in the manner that the body of the opinion tells us the judiciary ought to behave).").

[278] Carolene Prods., 304 U.S. at 152-53 n.4.

[279] See Balkin, *supra* note 277, at 298; Miriam Galston, *Activism and Restraint: The Evolution of Harlan Fiske Stone's Judicial Philosophy*, 70 TUL. L. REV. 137, 139-40 (1995) (describing the "traditional interpretation" of the Court's post-New Deal jurisprudence as "a hybrid jurisprudence" minimally reviewing property and contract rights while strongly protecting "freedoms associated with political and civil rights").

[280] See Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1096 (1982).

profound effects for the ultimate result of the Court's decision about the constitutionality of the law. Thus, the Footnote suggested that certain rights deserved a greater degree of judicial protection than the deferential review ushered in by the New Deal. Unlike formalistic methods of the protection of constitutional rights, Footnote Four sought to protect rights by advocating a ***994** method of increased critical scrutiny of empirical evidence. Footnote Four served as an alternative, an exception to deference consisting of a rigorous factual review.

Because it emphasized that empirical evidence (typically viewed as the domain of policy-makers) was an essential component of constitutional interpretation, textualists such as Justice Hugo Black were strongly critical of Footnote Four. In a letter to Chief Justice Stone, Black wrote:

> As I read the opinion in connection with the cases cited, it approves the submission of proof to a jury or a court under certain circumstances to determine whether the legislature was justified in the policy it adopted. This is contrary to my conception of the extent of judicial power of review.... In matters concerning policy I believe the right of final determination is with the Congress.[281]

Justice Black urged a formalistic approach to interpretation, one that looked to the plain meaning of text for stable foundations. He resisted Footnote Four's open emphasis on the importance of the Court's method of evaluating empirical evidence in interpretation.

Justice Stone's Footnote Four became the basis for a rift among New Deal liberals. Some, like Justice Frankfurter and Learned Hand, remained committed to keeping judicial review at bay. Frankfurter was especially antagonistic to Footnote Four. His hero was Thayer, who in Frankfurter's words, had written "the most important single essay regarding judicial review."[282] According to Justice Frankfurter:

> [R]esponsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.[283]

Frankfurter was propounding the traditional New Deal response to judicial review, which had clashed with liberalism both procedurally and

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[281] Letter to Chief Justice Stone (Apr. 21, 1938) quoted in Lusky, *supra* note 280, at 1109.

[282] FELIX FRANKFURTER, REMINISCES 299 (H. Phillips ed., 1960).

[283] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 649 (1943) (Frankfurter, J., dissenting).

substantively. Procedurally, judicial review enabled unelected *Lochner*-era Justices to frustrate the will of the majority. Substantively, ***995** judicial review was used to impede the goals of New Deal liberalism. Other New Deal liberals, however, did not view judicial review as such an inherent threat to liberalism. Judicial review could be employed to promote substantive liberal values. They did not agree that majoritarianism was a sufficient procedural mechanism to maintain a democratic society. Indeed, the Warren Court illustrated that judicial review could be one of the most important instruments for furthering liberalism.

The Warren Court ensured that Footnote Four did not merely remain a footnoted exception to deference. Justice Frankfurter would write eloquent dissents, but his version of Thayer-like deference never won the day.[284] In fact, Footnote Four blossomed into the modern judicial balancing approach to constitutional jurisprudence.[285] Against the criticism of Frankfurter, Harlan, and Learned Hand, Footnote Four prevailed, confining deference to economic and property rights. The triumph of Footnote Four in cases involving fundamental constitutional rights, however, was not complete. An essential group of contexts remain in which deference continues to dominate.

B. *DEFERENCE AND THE BUREAUCRATIC STATE*

Currently, under the Footnote Four paradigm, fundamental rights are protected by strict scrutiny. When fundamental rights arise in the contexts of the bureaucratic state, however, the deference principle remains the dominant force. Why does deference prevail in the bureaucratic state? Why does the Footnote Four paradigm not apply in the bureaucratic state?

The reason stems from prevailing New Deal conceptions of institutions and experts as superior evaluators of factual and empirical evidence. The bureaucratic state owes much of its development to Progressive and New Deal thinkers and politicians. The administrative state emerged when liberals started questioning the notion that negative liberty (i.e., freedom from government) was the essence of freedom and began recognizing that freedom required the active ***996** assistance of government and its institutions.[286] One of the central problems faced by progressives and New

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[284] It is important to note that Frankfurter was not inimical to balancing. Indeed, he supported the balancing over the more absolutist approach of Justice Black. Yet, Frankfurter's conception of balancing differed significantly from the type of balancing the Court conducted. For Frankfurter, the balancing should be done by the legislature, not the Court. See Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

[285] *See* ELY, *supra* note 37, at 75-77.

[286] *See* KALMAN, *supra* note 145, at 14.

Dealers was the growing power of private corporate bureaucracies. Liberalism in the early twentieth century became critical of capitalism, especially "concentrated economic power, the problem of 'monopoly."[287] Progressive and New Deal thinkers, viewing public bureaucracy as the solution to the ills of private bureaucracy, propounded complex regulatory schemes that involved the need to analyze vast amounts of empirical and factual data. To carry out these tasks, the proposed legislation created specialized government agencies, and the modern administrative state began to be assembled.

Many New Deal and progressive thinkers believed that the public expert was the solution to the private corporate power.[288] They created public bureaucracies run by experts to respond to the growing power and influence of private bureaucracy. Roosevelt brought an unprecedented number of experts into government as part of his "Brain Trust." Early adherents of administrative process, such as James Landis, hailed administrative agencies for their expertise and specialization.[289]

Because of the centrality of institutions and experts to Progressive and New Deal liberalism, the judiciary during the 1940s and 1950s was faced with a difficult dilemma when reviewing rights involved in the contexts of the bureaucratic state: whether to vigorously protect individual rights as suggested by Footnote Four, or whether to maintain the special strengths of the growing bureaucratic state that New Deal liberalism had substantially helped set in motion. Cases involving the bureaucratic state were unusually difficult because they implicated the very heart of the New Deal revolution.

In *West Virginia State Board of Education v. Barnette*,[290] for example, the Court struck down a mandatory flag salute law in public schools in response to a challenge by Jehovah's Witnesses. "We cannot," the Court declared, "because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court ***997** when liberty is infringed."[291] In reaching this conclusion, the Court made a 180-degree turn in its jurisprudence. Just two years earlier, in *Minersville v. Gobitis*,[292] the Court rendered a contrary decision on a very similar issue. Responding to the tumultuous and frightening events culminating in WWII, *Barnette* was painted in sweeping strokes. Much of the world was in the clutches of fascist, communist, and totalitarian governments that dramatically

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[287] ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 9 (1995).
[288] HORWITZ, *supra* note 27, at 224.
[289] *Id.* at 216-17.
[290] 319 U.S. 624 (1943).
[291] *Id.* at 640.
[292] 310 U.S. 586 (1940).

emphasized the state over the individual. So far, the American experiment with public bureaucracy had not proven to be so grim. But with the political happenings throughout the world looming in their minds, how could the Court not be concerned? What made these times most alarming was the fact that it was often not merely through acts of physical force that these governments gained their power, but through the indoctrination and careful manipulation of the desires and passions of the people.

Barnette presented a stark invitation for the Court to consider America's future in light of the political events of the rest of the world. America was steadily heading toward greater state control over everyday life. With the blossoming of public education, state indoctrination of children appeared as a new and potentially dangerous form of power. Hitler had used the schools to promote Nazi propaganda; indeed, the flag salute in *Barnette* resembled the salute to Hitler.[293] In an important passage, the Court cast the conflict as one between "authority" and the "right to self- determination."[294] The Court recognized the importance of individual freedom in light of the growing power of state institutions throughout the world.

Barnette was part of a growing ambivalence of many liberals about the ability of public institutions to serve as a vehicle for achieving greater individual autonomy. New Deal liberals did not fully anticipate the overwhelming breadth of the contemporary bureaucratic state. The New Deal faith in expertise and government institutions came under its most profound challenge in the post-WWII period. The cold bureaucratic methods by which the Nazis carried out their exterminations in the Holocaust,[295] and the rise of totalitarianism in Nazi Germany and Stalinist Russia,[296] suggested ***998** the frightening potential of large state institutions to abuse power. Many liberals who had trusted administrative experts during the New Deal became increasingly skeptical during the heyday of McCarthyism in the 1950s.[297] In 1954, Professor Jaffe, once a proponent of expertise theory, stated there was a "Great Disillusion" with the administrative state.[298] The impact of these world developments was felt in the shifting focus of many liberals towards the importance of individual rights. Optimism over the ability of public bureaucracy to cope with the problems of private bureaucracy had waned.

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[293] *See* Barnette, 319 U.S. at 629 nn.3-4.
[294] *Id.* at 630-31.
[295] *See* HANNAH ARENT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).
[296] *See* Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 437-50 (1996) (discussing the effect of anti-totalitarianism on Supreme Court jurisprudence).
[297] HORWITZ, *surpa* note 27, at 241.
[298] Louis Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1106 (1954).

One of the hallmark decisions concerning the bureaucratic state was *Brown v. Board of Education*.[299] The opinion was not merely about Equal Protection, but also about the pernicious effects of segregation within state institutions, such as its educational facilities. In *Brown*, the Court, relying in part on empirical evidence (social-scientific and psychological data), boldly analyzed the effects of state power exerted through its institutions on individuals.[300] The Court made no mention of deference to legislative facts or to the judgment of state officials regarding segregated education.

Not all cases during this period recognized the new challenge to individual liberty in the burgeoning bureaucratic state. In several cases, the Court reasserted the deference principle, the most profound and tragic example being the Court's review of the Japanese internment. In *Hirabayashi v. United States*,[301] the Court upheld a set of laws and regulations that imposed a curfew only against persons of Japanese ancestry who lived along the Pacific Coast. The issue before the Court was whether the curfew was a constitutional exercise of the "war power" of the Executive and Legislative Branches,[302] extending "to every matter and activity so related to war as substantially to affect its conduct and progress."[303] The Court examined two judgments in the decision to impose the curfew: (1) the "nature and extent of the threatened injury or danger"; and (2) "the selection of the means of resisting [the danger]."[304] Although ***999** *Hirabayashi* did not involve judicial balancing, these judgments appear quite similar to the elements of the judicial scrutiny balancing tests. The Court then articulated the deference principle:

> Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice and means by those branches of the Government on which the Constitution has placed the responsibility of war- making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.[305]

The Court first analyzed the nature and extent of the threatened danger. It described the attack on Pearl Harbor and Japan's aggression and determined that "reasonably prudent men charged with the responsibility of our national defense had ample ground for concluding that they must face the danger of invasion [and] take measures against it."[306] Here, the Court's

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[299] 347 U.S. 483 (1954).
[300] *Id.* at 495 n.11.
[301] 320 U.S. 81 (1943).
[302] *Id.* at 92.
[303] *Id.* at 93.
[304] *Id.*
[305] *Id.*
[306] Hirabayashi, 320 U.S. at 94.

brief analysis of the factual situation led it to the conclusion that there was "ample ground" for the fear of invasion.

The remaining question was whether a "substantial basis" existed for believing the curfew was a "necessary" measure to combat the potential for sabotage and espionage--a question that rested on the weight of factual and empirical evidence.[307] The Court observed that the Japanese immigrants were not well assimilated; that children born to Japanese alien parents were deemed by Japan as Japanese citizens; and that Japanese children were being sent to Japanese language schools "generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan."[308] Recognizing the uncertainty involved in predicting the extent of the danger of espionage and sabotage,[309] the Court concluded that it could not "reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose numbers and strength could not be precisely and quickly ascertained."[310]

Based on this analysis, the Court concluded that there was "a rational basis" to believe that such a substantial number of Japanese Americans were disloyal and likely to present a danger of espionage ***1000** and sabotage that a curfew should be imposed on all Japanese-Americans.[311] However, the Court's opinion contained no evaluation of these empirical claims.[312] In contrast to *Hirabayashi*, which centered on the meaning and extent of the "war power," *Korematsu v. United States*[313] focused on whether the exclusion of Japanese Americans from the West Coast violated their civil rights. The *Korematsu* Court, although applying "most rigid scrutiny,"[314] based its analysis on *Hirabayshi*'s deferential factual analysis. The Court again concluded that the judgments of the military and Congress were not "unfounded."[315]

Thus, the Court's cases during the mid-twentieth century suggested vastly different approaches to the bureaucratic state. *Brown* and *Barnette* suggested a full recognition of the importance of protecting fundamental rights in the bureaucratic state. In contrast, cases such as *Korematsu* and *Hirabayashi* suggested that the Court should apply deference in these

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[307] *See* id. at 95.
[308] *Id.* at 97.
[309] *Id.* at 99.
[310] *Id.*
[311] Hirabayashi, 320 U.S. at 102.
[312] Eugene Rostow's analysis of the Recommendations concludes that they merely recorded "conclusions, not evidence" and that they exhibited significant prejudice against the Japanese. *See* Eugene V. Rostow, *The Japanese American Cases--A Disaster*, 54 YALE L.J. 489, 520-21 (1945).
[313] 323 U.S. 214 (1944).
[314] *Id.* at 214.
[315] *Id.* at 218 (quoting Hirabayashi, 320 U.S. at 99).

contexts.

Deference prevailed. As new cases involving institutions arose, the Court began applying deference as a matter of course. The more insular the institution and the more exclusive the expertise of a particular decisionmaker, the more likely courts would apply deference.

One reason why deference became so prevalent in these contexts was because deference appeared to be a compromise position. With the late nineteenth century formalism, the courts decided cases more categorically--either a particular government law or regulation was subject to judicial review or it was a political question, not subject to judicial review. There was no theory, akin to judicial balancing, of varying degrees of scrutiny. Judicial review was an all-or-nothing affair. In post-*Lochner*-era jurisprudence, the judiciary had a third option other than full review or no review--the practice of deference.

When faced with new situations involving rights threatened by government institutions, courts often acted against a history of nonreviewability. The staggering growth in size and importance of government institutions such as schools, agencies, prisons, the military, ***1001** and government workplaces during the twentieth century[316] forced the judiciary to abandon its policy of nonreviewability.[317] In the military, for example, the Court shifted from its position in *Decatur v. Paulding*,[318] and *Reaves v. Ainsworth*,[319] in which it declared that it had no power to review constitutional claims in the military to a recognition that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."[320] In the prisons, prior to the 1960s, the federal courts followed a "hands off" policy toward matters of prison administration regarding the treatment and rights of prisoners.[321] As one court declared:

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[316] *See* ACKERMAN, FOUNDATIONS, *surpa* note 40, at 107-08.

[317] The Court's ineffective assistance doctrine also seems to parallel this shift. Before *Gideon v. Wainright*, 372 U.S. 335 (1963), the provision of defense counsel for indigent defendants was controlled at the state and local level. After *Gideon*, the competence of counsel was recognized as a constitutional right, and the Court, in *Strickland v. Washington*, 466 U.S. 668 (1984), declared that the effectiveness of counsel would be reviewed deferentially. In sum, like the military and prisons, there was a shift in terms of the recognition of rights, but a corresponding declaration of weak deferential review for these rights.

[318] 39 U.S. (14 Pet.) 497 (1840).

[319] 219 U.S. 296 (1911).

[320] Chappell v. Wallace, 462 U.S. 296, 304 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962)).

[321] *See*, *e.g.*, WILLIAM L. SELKE, PRISONS IN CRISIS 28-29 (1993); see also Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963) (critiquing the "hands off" doctrine).

"[I]t is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."[322] This approach, however, ended in the 1960s.[323] As Justice Rehnquist observed in *Bell v. Wolfish*,[324] the federal judiciary abandoned the "hands off" doctrine because of the "deplorable conditions and Draconian restrictions of some of our Nation's prisons."[325]

Cruz v. Beto,[326] the first prisoner Free Exercise case to reach the Supreme Court, vividly illustrates the shift from the "hands off" doctrine to deferential review. In *Cruz*, prison officials forbade a Buddhist prisoner from worshipping in the prison chapel and from talking to his religious advisor. After sharing his religious materials with other prisoners, prison officials locked him in solitary confinement for two weeks on a diet of only bread and water. The federal ***1002** district court "denied relief without a hearing or any findings, saying that the complaint was in an area that should be left 'to the sound discretion of prison administrators."[327] The Court, however, declared that the complaint should not be dismissed without a hearing. In so holding, the Court charted a middle path: "Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners."[328]

Thus, when the Court began to review rights affected by certain government institutions and officials, it attempted to protect constitutional rights in these contexts as well as avoid judicial intrusion into institutions and practices that it had traditionally left alone. The astounding growth of the bureaucratic state occasioned the need for the Court to adopt some sort of judicial review where there had previously been none. Rather than look to Footnote Four for guidance, the judiciary simply chose to apply deference.

The history of the development of deference illustrates that deference is only one particular way of embodying the deference principle in practice among numerous other possible methods. The current practice of deference is a twentieth century creation, and it only makes sense in the jurisprudential world that emerged after the demise of late nineteenth century formalism. Indeed, the practice of deference would not have made sense to the formalistic legal mind of the late nineteenth century because it emerged within the more empirical paradigm of constitutional interpretation that was shaped by the influence of pragmatism. The constitutional landscape of

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[322] Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir. 1951).
[323] *See* SELKE, *surpa* note 321, at 28-29.
[324] 441 U.S. 520 (1979).
[325] *Id.* at 562.
[326] 405 U.S. 319 (1972).
[327] *Id.* at 321.
[328] *Id.*

judicial review around the turn of the century was governed by a dichotomy between political questions, outside the scope of judicial review, and issues that were within the scope of judicial review. This black-and-white dichotomy between full review and no review did not cause many difficulties in the early days of the Constitution because the bureaucratic state was still in gestation. There was no administrative state in the founding era. The prisons, the military, and the schools were vastly smaller in size and complexity than they are today. Because of the small size of the bureaucratic state, the protection of rights in this context was not even perceived as a problem.

The practice of deference emerged as an attempt by the Court to grapple with the complicated interplay between law and fact. When the bureaucratic state began its rapid growth, the newly-***1003** minted practice of deference permitted the Court to navigate the increasingly complex task of exercising judicial review in the contexts of the bureaucratic state. Deference enabled the Court to declare that the Constitution applied to the institutions of the bureaucratic state, and the Court often began deference opinions with rhetoric about the existence of rights in prisons, schools, the military, hospitals, the workplace, and other institutions. However, as illustrated in the next Part, deference has remained a woefully inadequate solution.

IV. A CRITIQUE OF DEFERENCE

The genealogy of deference sketched in Part III illustrates that the embodiment of the deference principle in practice is historically contingent, shaped largely by the struggles of the Court during the *Lochner* era. The current practice of deference does not represent the inherent meaning of the deference principle, and the mere recitation of the principle is an insufficient justification for the practice. Therefore, it is necessary to explore how the current practice of deference is justified as the most appropriate embodiment of the deference principle.

This Part will examine and critique the justifications that legitimate the practice of deference as an appropriate embodiment of the deference principle.[329] Underpinning these justifications is a conception of how the judiciary and government institutions evaluate factual and empirical evidence. I will argue that this conception, while quite compelling and accurate in many respects, contains errors, which, although subtle, are of profound consequence.

A. *THE JUSTIFICATIONS FOR THE PRACTICE OF DEFERENCE*

[329] Throughout this Part, when speaking about the current practice of deference, I often refer to it simply as "deference" for the sake of readability.

Before launching into a critique of deference, I will first present the prevailing justifications for deference in their strongest light. Deference is not justified systematically in one coherent document. Nevertheless, when viewed together, the epithets and various other statements in support of deference reveal an underlying conception of how the judiciary and government institutions evaluate factual and empirical evidence.

Almost all of the opinions involving deference depict judicial evaluation of factual judgments as an intrusion into the discretion ***1004** of the officials and institutions under review. For example, in *O'Lone v. Estate of Shabazz*,[330] the Court justified its deference to the judgments of prison officials concerning inmates' right to free exercise of religion as follows:

> This approach ensures the ability of corrections officials 'to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration,' and avoids unnecessary intrusion of the judiciary into problems particularly ill suited to 'resolution by decree.'[331]

In *Youngberg v. Romero*,[332] the Court justified its deference to officials at state health institutions as minimizing "interference by the federal judiciary with the internal operations of these institutions."[333] In *Clark v. Community for Creative Non-Violence*,[334] the Court argued that it was deferring to the National Park Service because the judiciary lacked "the authority to replace the Park Service as manager of the Nation's parks."[335] According to the Court, factual judgments concerning the balance between preservation of park lands and the protection of free speech were within the discretion of the Park Service, and evaluating these judgments would usurp the authority of the Park Service officials.

Although not explicitly stated, these justifications for deference suggest that there is an overlap between the judgments made by the Court when engaging in judicial balancing and the judgments made by government officials when carrying out their responsibilities. Government officials need discretion in order to conduct good policymaking, experiment with creative solutions, and predict the efficacy and success of various decisions. The Court's language suggests that without deference, the Court would interfere with this important discretion of government officials. The image is of a bunch of naive judges meddling with matters they know little about: hampering good decisions, stifling creativity, and tyrannically imposing

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[330] 482 U.S. 342 (1987). For a detailed discussion of O'Lone, see *surpa* Part II.A.

[331] O'Lone, 482 U.S. at 349-50 (citation omitted) (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974)).

[332] 457 U.S. 307 (1982).

[333] *Id.* at 322.

[334] 468 U.S. 288 (1984). For a detailed discussion of Clark, see *surpa* Part II.A.

[335] Clark, 468 U.S. at 299.

their own unseasoned bookish ideas over the sound wisdom of experienced officials. The purpose of deference is to prevent judges from concocting their own "individual solutions" to difficult questions of policy that should be left to the appropriate experts and ***1005** officials.[336]

Not only do the justifications for deference suggest that judicial scrutiny is in tension with the discretion of government officials, but they also go on to provide reasons why the discretion of officials is preferable to judicial scrutiny. Courts often argue that deference is appropriate because the judiciary is less competent than the decisionmaker under review in making particular factual determinations. This claim involves assumptions about the judiciary as well as the officials and institutions of the bureaucratic state. For example, in *Goldman v. Weinberger*,[337] the Court, in deferring to the military and upholding a regulation that prohibited a Jewish military official from wearing a yarmulke, declared that judges are "illequipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[338] In Clark, the Court justified its deference on the ground that it lacked the "competence" of the Park Service to make the factual determinations necessary to determine whether the regulation was narrowly tailored.[339] When evaluating a claim for selective prosecution, the Court justified its deference to prosecutorial discretion by recognizing that "the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."[340]

According to these justifications, deference responds to the practical difficulties faced by the judiciary in the evaluation of complex empirical data. The Court recognizes that "the nature of the judicial process makes it an inappropriate forum for the determination of complex factual question of the kind so often involved in constitutional adjudication,"[341] and thus, deference is the proper ***1006** method of judicial review given the limitations of the judiciary. Further, the Court often contrasts the expertise of the officials under review to its own generalist and uninformed nature.

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[336] *See* Bell v. Wolfish, 441 U.S. 520, 562 (1979).

[337] 475 U.S. 503 (1986). For a detailed discussion of Goldman, see *surpa* Part II.A.

[338] Goldman, 475 U.S. at 507 (quoting Chappell v. Wallace, 462 U.S. 296, 305 (1983)).

[339] Clark, 468 U.S. at 299.

[340] Wayte v. United States, 470 U.S. 598, 607 (1985). For similar justifications, *see* Thornburgh v. Abbott, 490 U.S. 401, 407-08 (1989) ("[T]he judiciary is ill equipped to deal with the difficult and delicate problems of prison management."); Procunier v. Martinez, 416 U.S. 396, 405 (1974) ("[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.").

[341] Oregon v. Mitchell, 400 U.S. 112 (1970).

For example, in *Youngberg v. Romeo*,[342] the Court applied deference to the decisions of "the judgment exercised by a qualified professional" concerning matters affecting the rights individuals involuntarily committed to government treatment facilities.[343] The Court reasoned that a "professional" was "a person competent, whether by education, training or experience, to make the particular decision at issue."[344] The Court deferred because "judges or juries are [not] better qualified than appropriate professionals in making such decisions."[345] Deference, according to this reasoning, respects the judgments of those who are ensconced in the necessary empirical knowledge to make certain decisions.

Judges lack not only expert knowledge, but also the time and resources to review certain matters. As Justice Brennan wrote for the Court in *Oregon v. Mitchell*: [346]

> The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as 'arbitrary,' 'irrational,' or 'unreasonable.'[347]

The review of facts is time-consuming. Unlike legislatures and agencies, judges do not have years to amass the huge factual records. In today's highly fact- intensive legislation, the review of facts often involves scrutinizing a long and complex record--sometimes spanning hundreds of thousands of pages.[348]

Independent review of fact as a routine practice would prove impossible given the severe time constraints of the judicial process. In *Bates & Guild Co. v. Payne*,[349] the Court in reviewing a classification decision by the Postmaster General under a particular statutory ***1007** scheme, noted that although the issue of the classification was "largely one of law," the Postmaster's decisions should be reviewed deferentially:

> [W]e think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied.

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[342] 457 U.S. 307 (1982).
[343] *Id.* at 322.
[344] *Id.* at 323 n.30.
[345] *Id.* at 323.
[346] 400 U.S. 112 (1970).
[347] *Id.* at 248.
[348] *E.g.*, Indus. Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) (discussing agency record of 105,000 pages).
[349] 194 U.S. 106 (1904).

> The consequence of a different rule would be that the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance.[350]

In an article written shortly after the birth of the constitutional and jurisdiction fact doctrines, Professor Dickinson observed that the reasoning underpinning these decisions would open a Pandora's box of litigation,[351] because it would be impossible for the Court to conduct de novo review of facts in every case where facts could affect the meaning of law. Today, in an age of judicial balancing, the Court does not have the time or resources to conduct a complete evaluation of all the facts implicating the judicial scrutiny formulas. As Kenneth Culp Davis has commented, the Supreme Court's independent judgments about facts--its own institutional processes for fact-finding and making factual judgments--often is shoddy and performed in an unsophisticated manner.[352]

Tragically, constitutional jurisprudence must be hammered out in terms of adjudication. Adjudication--its slow slugging along, overburdened judges, lack of specialized knowledge, and absence of efficient facilities for digesting and evaluating facts--seems like a weary dinosaur when contrasted with increasingly detailed technological data, vast quantities of complex and conflicting empirical studies, and bureaucratized, highly-specialized government institutions.

Finally, deference is justified by focusing on the difficulties of government officials in proving their factual conclusions. Courts justify deference by recognizing that data is often uncertain and ambiguous. Consider the following justification for deference to Congress:

> [C]ourts must accord substantial deference to the predictive judgments of Congress. Sound policymaking often requires legislators to forecast future events and to anticipate ***1008** the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. As an institution, moreover, Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here.[353]

Evidence is frequently contestable; experts often disagree. Many laws and regulations depend upon predictions, forecasts, and educated guesses. If government officials were forced to offer relatively unassailable scientific proof for their factual and empirical claims, most of their decisions would

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[350] *Id.* at 107-08.

[351] *See* Dickinson, *surpa* note 241, at 1060.

[352] *See* Davis, *surpa* note 155, at 940-41.

[353] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665-66 (1994) (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985)).

never survive judicial review.[354]

In many situations, government officials must act quickly or suffer disastrous consequences. In *Hirabayashi v. United States*,[355] the dangers that the government sought to prevent--espionage and sabotage in a time of war--were quite severe. The Court described the situation as a "crisis of war and of threatened invasion."[356] "The Constitution as a continuously operating charter of government," observed the Court, "does not demand the impossible or the impractical."[357] In a balancing regime, rights cannot paralyze government from acting in exigent and dire circumstances; the Bill of Rights is not a "suicide pact."[358] Justice Douglas, in his concurrence to *Hirabayashi*, pointed out the need for prompt government action: "Certainly we cannot say that those charged with the defense of the nation should have procrastinated until investigations and hearings were completed."[359] Thus, deference is justified because sometimes the government must act quickly, and amassing adequate evidence to prove the need for its actions would take too much time. While rights must be protected, deference counsels that judges must be aware of the practical difficulties faced by government officials who have to make quick decisions with limited knowledge.***1009**

Deference is a measure of new respect for this difficult position, granting some space for government officials to exercise their own judgment. Deference demonstrates an understanding that it is all too easy for the Court to look at government actions in hindsight and condemn them when they were in error. These hindsight attacks, however, will result in government paralysis in times of great urgency. The judiciary cannot continue to second-guess government officials from the safe perspective of hindsight because it would eviscerate the discretion of legislatures, agencies, and government decisionmakers.

B. *EVALUATING THE JUSTIFICATIONS*

When the justifications for deference are viewed as a whole, it is apparent that they stem from a particular conception of how the judiciary

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[354] *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 814 (1978) (quoting FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 29 (1961)) ("[C]omplete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.").

[355] 320 U.S. 81 (1943). For a detailed discussion of *Hirabayashi*, see *surpa* Part III.B.

[356] Hirabayashi, 320 U.S. at 101.

[357] *Id.* at 104.

[358] *See* Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

[359] Hirabayashi, 320 U.S. at 107 (Douglas, J., concurring).

and government institutions should evaluate factual and empirical evidence. Most critiques of deference talk past the justifications for deference and merely emphasize that it is an abdication of the judiciary's responsibility of engaging in judicial review. These critiques fail to address the justifications for deference directly because the conceptual model underpinning deference is quite compelling, and most of the legal academy subscribe to it in significant part. Yet the conception contains certain assumptions that are not adequately justified by experience and history. This section uncovers the assumptions underlying this conception and demonstrates their inaccuracies.

1. Focus on Practice Rather Than on Theory

The conception underpinning deference focuses almost exclusively on the practical difficulties with the practice of judicial review, rather than on the substance of the issues before the courts. The justifications for deference suggest that although certain liberal values are protected by the Constitution, the practical reality is that judicial review often is not a feasible and efficient way to protect them. Concerns of accuracy, efficiency, and feasibility dominate the discourse of deference. Liberal values are subordinated to the difficulties of process. What is lost is a guiding vision of democracy in evaluating the practical concerns of deference. These practical concerns are accompanied by an assumption that the adjudicatory process is a fixed material construct to be worked around rather than shaped and directed. It is certainly possible, however, not just to ***1010** adapt to, but to transform, the material conditions of judicial institutions and the processes of adjudication. Unfortunately, liberal theories of judicial review fail to provide much guidance for reforming adjudication. Liberal theories of judicial review focus heavily on theoretical concerns over substantive rights but virtually ignore the practical difficulties of the adjudicatory process. The result is an alienation between practice and theory: the conceptual model legitimating deference focuses myopically on the problems of adjudication while liberal theories of judicial review afford scant theoretical attention to these problems.

2. Static Conception of the Judiciary

The conceptual model underpinning deference assumes a particular interpretation of the judiciary's institutional nature, viewing the judiciary as competent to engage in legal reasoning but not competent to make complicated factual and empirical judgments. This model of the judiciary was originally sculpted during the New Deal and then fired in the kiln of legal process jurisprudence. Legal process jurisprudence, which flourished during the 1950s and 1960s, is named after Henry Hart and Albert Sacks's influential textbook, *The Legal Process*.[360] According to William Eskridge and Philip Frickey, "*The Legal Process* was part of a larger collective effort

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[360] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). *The Legal Process* existed in manuscript form for most of its history and was published only recently. Bruce Ackerman declares that *The Legal Process* was "undoubtedly the most influential unpublished work in recent legal history." BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 38 n.9 (1984). In addition to Hart and Sacks, thinkers in this school included Justice Frankfurter, Lon Fuller, Alexander Bickel and Herbert Weschler.

to synthesize the lessons of pre-war American law--the realist legacy of law as function and policy, the institutional competence idea central to the regulatory state, and the rationalist view of law as reasonable and coherent."[361]

One of the central ideas of the legal process school was the notion of "institutional competence"--that each institution had distinctive strengths and weaknesses in performing various functions in society.[362] The concept of institutional competence originally ***1011** emerged in Justice Brandeis' opinions.[363] The legal process school developed this line of thought, examining the attributes and structures of legal institutions in order to determine the best institution to make certain political decisions. The underlying conception of the judiciary inherent in the application of deference is based on the institutional competence theories of legal process jurisprudence. These theories, however, have severe limitations. Process theorists focused rather narrowly on the existing realities of the institutions. The process discussion of institutional natures was advertised as a value-neutral assessment of empirical realities. As Bruce Ackerman observes, the process scholars looked to the "isolated blunders" made by institutions that courts were to point out and correct. Rarely did the process scholars explore the deeper structural or systemic failings of the institutions they described.[364] They often spoke of institutions as if they had an inherent and unchanging nature, and their models of the bureaucratic and legislative process were often rather unsophisticated.[365]

Like its legal process foundations, the justifications for deference focus heavily upon the existing limitations of practice. Deference assumes a static model of adjudication, viewing its current difficulties as the inevitable consequences of an unchanging process. The practical attributes of institutions are accepted without sufficient critical inquiry. In sum, deference paints a stilted portrait of institutions; it focuses too heavily on the current characteristics of institutions rather than on their potential for reform

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[361] William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW at li, c (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[362] *E.g.*, Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1396 (1996) (arguing that institutional competence was the central idea of the legal process school).

[363] *See* Eskridge & Frickey, *surpa* note 361, at ix.

[364] ACKERMAN, *surpa* note 360, at 39-40 (noting that mistakes of bureaucracies and legislatures are treated as isolated blunders, not systemic failures).

[365] *See* id. Neil Duxbury appropriately labels Hart and Sacks's "idea that legal institutions have their own specialist areas of competence beyond which they ought not to stray" as "institutional formalism" rather than "institutional competence." DUXBURY, *surpa* note 162, at 263.

and change. Deference is justified only if one assumes a Burkean vision of the judiciary, one where material conditions regarding adjudication are rigid and unchanging.

3. Unsophisticated Conception of Expertise and Institutions

Deference also depends upon certain assumptions about the superior ability of government institutions, officials, and experts to make factual judgments within their areas of specialty. These assumptions, ***1012** however, ignore the problems and constraints that experts and institutions face in making their judgments.

The glorification of the expert hearkens back to the New Deal era, when the New Dealers attempted to infuse new ideas and creativity into the realm of politics by bringing experts and academics into government. The most famous example of this practice was President Roosevelt's "Brain Trust," an inner circle of advisors composed largely of academics and scholars.[366] This was a new and pragmatic response to the demands of government; it brought in fresh perspectives and knowledge, and it engaged experts and academics in the practical problems of the times.

Public bureaucracy and expertise, however, have not dealt with many of the problems the New Deal reformers hoped to curtail--especially, the growing powerlessness of individual's in a society dominated by large impersonal conglomerates of power. The New Dealers thought that government bureaucracy was the antidote to the growing corporate power; they failed to see that the problem was not caused by the private nature of corporate power, but the very bureaucratic structure itself, whether public or private. Today, public and private power have become unprecedentedly intermingled.[367] Employees and officials frequently scuttle back and forth

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[366] For a description of Roosevelt's "Brain Trust" and the influence of its members on the President's policies, see ALAN BRINKLEY, LIBERALISM AND ITS DISCONTENTS 13-14 (1998).

[367] *E.g.*, Marianne Lavelle, *Public Works Go Private: When Government Sells Off Its Services, Does Public Law Still Govern?*, NAT'L L.J., Sept. 25, 1995, at A1. Recently, states have been allowing private companies to build and run prisons for profit. *See*, *e.g.*, Joan M. Cheever, *Cells for Sale: Critics Say Private Jails Cut Corners, Lose Money*, NAT'L L.J., Feb. 19, 1990, at 32 ("Nationwide, private companies have built about 100 prisons holding about 50,000 inmates."); Robert B. Gunnison, *Privately Run Prison Planned for Mojave: Firm Says It Can House Inmates Cheaper,* S.F. CHRON., Aug. 1, 1997, at A22. There have been several reported abuses at private prisons. Missouri brought 415 prisoners home from private rented jail cells in Texas. Kim Bell, *Other States Have Trouble with Texas Jail System But Missouri Is First to Pull Inmates for Abuse Concerns*, ST. LOUIS POST DISPATCH, Aug. 18, 1997, at 1A. In one prison, a videotape revealed private prison guards beating inmates, using stun guns on them, allowing dogs to attack

between the public and private sectors. In short, the assumptions made by progressive and New Deal thinkers about the bureaucratic state that underpin deference are no longer adequate.

The problem with these assumptions is that they undermine the most important contribution of the judiciary to contemporary problems: critical inquiry. There are numerous deficiencies in bureaucratic ***1013** expertise that go unrecognized in the justifications for deference. In the bureaucratic state, experts can become constrained in their vision by the needs of their institutions and by the existing practices of their fields. The expert judgments of agencies are often contorted by political needs; they are not always the product of an impartial analysis of factual data.[368] Judgments made by military and prison officials are often based on longstanding customs and unanalyzed assumptions that have managed to escape critical scrutiny. Most judges see their role as testing the accuracy of expert opinion by holding it up against the prevailing customs of the expert community in a particular field. Unfortunately, many deficiencies in expert judgment occur because of the limitations in vision created by these longstanding customs.

Institutions also have their own customs, which can become rigid and adverse to change. Institutions have distinctive cultures and traditions. They also often possess an internal self-esteem and a strong instinct for survival. For example, branches of the military take elaborate steps to instill in their members, in addition to patriotism, a special pride in being part of a particular branch of the military.

A central reason why critical inquiry over expert decisions is necessary is that the expert rarely factors democratic liberal values into her decisions. Expertise tends to be narrowly focused and highly specialized, and the expert often does not make her judgments in light of democratic liberal values. As one judge explained: "Prison officials often do not feel that their primary obligation is the illumination or enforcement of constitutional rights. It is for this reason that our review cannot be passive."[369] As Justice Marshall declared:

> The Court evidently assumes that the balance struck by officials is deserving of deference so long as it does not appear to be tainted by content discrimination. What the Court fails to recognize is that public officials have strong incentives

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them, and kicking them in the groin. Ironically, the video was shot for training purposes. *Videotaped Beating in Texas Spurs FBI Probe*, L.A. TIMES, Aug. 20, 1997, at A15.

[368] *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 580- 81 (1965) (arguing that only rarely is the expert's judgment based "purely" on technical considerations and that "power drives" as well as "legal attitudes" influence expert judgment).

[369] Iron Eyes v. Henry, 907 F.2d 810, 821-22 (8th Cir. 1990) (Heaney, J., dissenting).

> to overregulate even in the absence of an intent to censor particular views. This incentive stems from the fact that of the two groups whose interests officials must ***1014** accommodate--on the one hand, the interests of the general public and, on the other, the interests of those who seek to use a particular forum for First Amendment activity--the political power of the former is likely to be far greater than that of the latter.[370]

"The Constitution," wrote Justice Brennan in his dissent in *O'Lone*, "was not adopted as a means of enhancing the efficiency with which government officials conduct their affairs, nor as a blueprint for ensuring sufficient reliance on administrative expertise. Rather, it was meant to provide a bulwark against infringements that might otherwise be justified as necessary expedients of governing."[371] The specialized enclaves of expertise within the bureaucratic state often do not operate under a guiding vision of democratic liberal values. This is not to say that experts are not capable of developing such a vision; however, such an endeavor has not been adequately encouraged. In fact, in our age of increasing specialization, experts are taught just the opposite: to focus more exclusively on their specialties rather than on the larger societal implications of their decisions.

Contrary to the model that views expertise as neutral and impartial, the judgments of experts are just as susceptible to bias and discrimination as those made by non-experts. Although the expert is assumed to be a source of accurate impartial knowledge,[372] facts are shaded by the values, assumptions, biases, and interests of the individuals who produce them. Sheila Jasanoff observes: "If legally relevant knowledge is always interest-laden, then the choice between alternative scientific accounts necessarily involves narrative, even political judgments. Willingness to accept a particular knowledge claim amounts to an expression of confidence in the institutions and practices that produced it."[373] In *Hirabayashi* and *Korematsu*, the decisions of General DeWitt were quite prejudiced against the Japanese. When asked why similar measures were not being taken against the Italians and Germans, DeWitt answered: "You needn't worry about the Italians at all except in certain cases. Also, the same for the Germans except in individual cases. But we must worry about the Japanese all the time until he is [sic] wiped ***1015** off the map."[374]

The bureaucratic state has amplified this problem because of the ease in

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[370] Clark v. Community for Creative Nonviolence, 468 U.S. 288, 315 (1984) (Marshall, J., dissenting).

[371] O'Lone v. Estate of Shabazz, 482 U.S. 342, 356 (1987) (Brennan, J., dissenting).

[372] *See* Stefan, *surpa* note 106, at 655-61.

[373] SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA 209 (1995).

[374] Hearings on H.R. 30 Before the Subcomm. of the House Comm. on Naval Affairs, 78th Cong. 739-40 (1974).

which prejudice can be concealed in the bureaucratic structure. As Michel Foucault has observed, throughout Western history, the exercise of state power has shifted from being conducted as an open spectacle demonstrating the might of the monarch to being executed in the hidden corridors of large institutions.[375] Today, most of the government experts accorded deference are unelected officials, and there is often little public scrutiny of the internal workings of institutions. Decisions within government institutions often occur within the shadows, concealed from public view.[376] Even when known to the public, many decisions of government officials concern localized matters or particular individuals, and are thus not likely to engender large-scale public responses.

Bureaucratic organizations often strive to eliminate discretion because of its potential for prejudice and unfairness. To do so, bureaucracy attempts to establish a set of air-tight procedures and methods for making decisions mechanical. Discretion, however, cannot be eliminated, no matter how routine and mechanized the procedures.[377] Rather, discretion is shifted and hidden, exacerbating the problem by making discretion less transparent and open, and hence, more insulated from critical inquiry. In the bureaucratic state, institutional infringements on individual autonomy are often small and clandestine. Only when abuses are egregious do they capture public attention.[378] These abuses are often so shocking that they are seen as isolated occurrences rather than the outward symptoms of institutions riddled with disease.

With deference, the judiciary gives inadequate attention to the ***1016** troubled history of certain institutions, many of which have been places of the unpardonable abuses and neglect. It was not too long ago that mental institutions were harrowing places of squalor and torture. Our prisons used to be, and in many cases still are, overcrowded, inhumane, and dangerously violent.[379] In addition, prison administration was rampant with racism, as

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[375] MICHEL FOUCAULT, DISCIPLINE AND PUNISH 257 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978).

[376] *See* Rhodes v. Chapman, 452 U.S. 337, 358 (1981) (Brennan, J., concurring) ("Public apathy and the political powerlessness of inmates have contributed to the pervasive neglect of the prisons.").

[377] *See*, *e.g.*, Solove, *surpa* note 158, at 218.

[378] One example is the repeated outbreaks of police brutality. *See*, *e.g.*, *A Beating in Brooklyn: New York's Finest Come Under Fire After a Haitian Man Is Sexually Assaulted, Allegedly by Cops*, TIME, Aug. 25, 1997, at 38; Pierre Thomas, *Police Brutality: An Issue Rekindled*, WASH. POST, Dec. 6, 1995, at A1 (describing numerous cases of police brutality). The FBI is currently under scrutiny for abuses of power in several cases, such as Ruby Ridge. *See* Jim McGee, *The Rise of the FBI*, WASH. POST MAG., July 20, 1997, at 11.

[379] *See* Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 679-84 (D. Mass. 1973) (describing prison as run-down, vermin-infested, filthy, and

manifested by widespread discrimination against Black Muslims during the 1960s and early 1970s.[380] In the schools under the regime of segregation, facilities for African-Americans were decrepit and woefully inadequate compared to those for whites. The ability of inhumane practices to flourish in these and other institutions in the past should serve as an impetus for further critical inquiry into the customs and practices of these institutions rather than the trusting, unskeptical attitude of deference.

Thus, facially neutral policies and the need for uniformity can hide potential discrimination and abuses of power. Although courts rarely peer beyond the surface of these policies, the mere existence of a uniform policy does not mean that an institution is treating everyone fairly. Discrimination often occurs through the use of facially neutral laws[381] or uniform policies that fail to accommodate individuality and the special needs of certain minority groups. Cloaked in the garb of neutrality, these policies cover up their discretionary tracks. For example, in *Goldman v. Weinberger*,[382] the Court was not concerned with the fact that the enforcement of the regulation against the rabbi in the Air Force appeared to be retaliatory. For eight years, he wore his yarmulke at all times. When he testified as a defense witness at a court-martial, the prosecutor filed a complaint with the Hospital Commander, stating that *Goldman*'s wearing of his yarmulke violated an Air Force regulation. The Hospital Commander ordered *Goldman* not to wear the yarmulke outside the hospital, but after *Goldman*'s attorney protested to the Air Force General Counsel, the Commander changed his order and prohibited ***1017** *Goldman* from wearing his yarmulke at all times.[383] *Goldman* illustrates that bureaucratic rules and process often become a weapon wielded by officials for retaliation, favoritism, and bias. The *Goldman* Court, however, did not even address this issue.

Most often, of course, bureaucracy is not overtly discriminatory or abusive. However, it can still prove to be insidious to the autonomy of the individual. Bureaucracy often cannot provide adequate attention to the individual--not because government officials are malicious but because they are busy, face extreme stress, must act within strict time constraints, have limited training, and are often not encouraged (or even authorized) to

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overcrowded). For a history of the conditions of this nation's penal facilities, see LARRY E. SULLIVAN, THE PRISON REFORM MOVEMENT: FORLORN HOPE (1990); THE OXFORD HISTORY OF THE PRISON 111-29, 169-97 (Norval Morris & David J. Rothman eds., 1995).

[380] For a brief history of the Black Muslim cases, which spurred the judiciary away from its previous "hands-off" policy toward the judicial review of prison administration, see Solove, *surpa* note 17, at 466-67.

[381] *See*, *e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Ex parte Virginia, 100 U.S. 339 (1879); TRIBE, *surpa* note 33, §§ 16-17, at 1482-88.

[382] 475 U.S. 503 (1986).

[383] *See* id. at 505.

respond to idiosyncratic situations creatively. The bureaucratic state poses an ominous threat to liberal values because it becomes, as Max Weber observed, increasingly dehumanized and impersonal, striving to eliminate discretion, judgment, and individuation.[384] Only at the highest levels, or in isolated compartments, does the necessary freedom and flexibility exist for significant individual creativity.

The individual is dwarfed by the large-scale considerations and longstanding standard processes of bureaucratic institutions. As John Dewey observed: "The tragedy of the 'lost individual' is due to the fact that while individuals are now caught up into a vast complex of associations, there is no harmonious and coherent reflection of the import of these conditions into the imaginative and emotional outlook on life."[385] Bureaucracy has a way of mindlessly fitting people into a common mold, ignoring their idiosyncracies, failing to give due consideration to their needs, goals, and desires. The recent failure of efforts at accommodation for the free exercise of religion illustrates the problems of the bureaucratic state in permitting a wide range of freedom for individual beliefs.[386] Indeed, most Free Exercise accommodation cases involve government institutions that refuse to make allowances in uniform regulations and laws for the beliefs ***1018** of minority religious groups.[387]

With their ability to focus on individual cases, courts provide a needed dimension to the large-scale focus of bureaucracy. Adjudication permits analysis of the individual case; it allows for the making of policy at a highly individuated level--the exploration of a concrete instance where law affects an individual or an entity's rights. As John Dewey observed, it is the individual who serves as the source of change in institutions and customs:

> Every invention, every improvement in art, technological, military and

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[384] WEBER, *surpa* note 84, at 224.

[385] DEWEY, *surpa* note 174, at 81.

[386] I say "failure" because of the recent Supreme Court decision that invalidates the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-1 to -4 (1999). *See* City of Boerne v. Flores, 521 U.S. 507 (1997). RFRA had been passed in response to the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990), in which the Court refused to apply strict scrutiny to protect religious liberties under the Free Exercise Clause. *See* id. at 890. Without RFRA, Free Exercise rights fall back into the regime created by *Smith*, which provides a very minimal protection for religious liberty.

[387] *See*, *e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990) (concerning government employment); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (concerning prisons); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (concerning unemployment system); Goldman v. Weinberger, 475 U.S. 503 (1986) (concerning military); Wisconsin v. Yoder, 406 U.S. 205 (1972) (concerning schools).

> political, has its genesis in the observation and ingenuity of a particular innovator. All utensils, traps, tools, weapons, stories, prove that some one exercised at sometime initiative in deviating from customary models and standards. Accident played its part; but some one had to observe and utilize the accidental change before a new tool and custom emerged.[388]

Courts can force bureaucracies to focus more on the individual perspective. Biased towards the abstract and systematic, bureaucracy concerns itself with masses of empirical data and general broadly-applicable policies. A common assumption is that empirical data must be abstract and systematic in order to be useful. The immediate single experiences are ignored in this bias toward vastness. Individual stories and anecdotal evidence, however, are quite important. Indeed, much can be learned from the individual experience--much that is ignored by the statistician. By looking beyond this faceless data to particular individual situations, courts can observe new potentialities for improvement and become aware of unforeseen problems. Ironically, it is often not reams of data and empirical evidence that inspire pathbreaking discoveries and reforms, but inspiration from individual experiences.

In the contexts of the bureaucratic state, the courts can initiate an effort to make institutions more democratic and humane, to force officials to base their policies on the best empirical research of the day, to be guided by democratic values, to be more humble and skeptical of their own practices, and to continually look to individual ***1019** cases as well as to the big picture to form regulation. The judiciary is not the only instrument that can effect this change, but it is a powerful one. The conception of the judiciary that underpins deference, however, overlooks these difficulties of bureaucratic expertise and ignores the positive potential of the judiciary. As a result, this conception fails to provide a balanced and nuanced account of the relative competence of the judiciary vis-a-vis bureaucratic institutions in the evaluation of factual evidence.

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[388] DEWEY, EXPERIENCE, *surpa* note 170, at 164.

4. Conflation of Critique with Creation

The most critical flaw in the conception that underpins deference is the assumption that evaluating factual judgments invades the discretion of the decisionmaker under review. The assumption is that in the realm of policy, critique is tantamount to creation. The conception that underpins deference assumes an inherent conflict between judicial review and the discretion of government officials. In other words, it assumes that judicial review of a particular decision is equivalent to making that decision in the first instance. A significant distinction, however, can be made between the evaluation and creation of policy. While evaluation involves examining the wisdom of policies to some extent, it does not entail a wholescale replacement of judgment. Critique is not the same as authorship; rather, it is a process of interacting with a pre-existing judgment, of pointing out unanswered questions and deficiencies in reasoning.

The assumption that meaningful critical inquiry is tantamount to an invasion of discretion is founded on the improper association of critical inquiry with *Lochner*ism. The *Lochner* Court barely engaged in a critical analysis of the facts supporting the necessity of the hour restriction for bakers; instead, it just made the conclusory statement that there were none. This is not critical inquiry. Ideally, critical inquiry does not impose a fixed canon of beliefs and principles on the judgments under review; rather, it is process of openminded exploration. Critical inquiry does not have to be a stifling skepticism, one that annihilates all laws and policies in its presence. Notwithstanding the deference he advocated, Justice Brandeis displayed a sophistication in analyzing facts that serves as a good example of how the Court should have approached New Deal legislation.[389] Thus, the deference principle--that judges should refrain from injecting their own personal ideologies into their constitutional interpretation--is quite compatible with critical inquiry. Courts can ***1020** remain critical without substituting their judgment for that of experts and officials. Courts can be sensitive to the needs of officials and institutions while simultaneously engaging in a vigorous critical inquiry into their judgments. Experts serve as a wonderful resource in the process of critical inquiry because they are enmeshed in the actual practical difficulties of institutions, steeped in the facts, and constantly aware of the needs and concerns of practice. Nevertheless, courts must remain critical of the expert. Courts should prevent experts and institutions from cloistering themselves from the rest of the world, keeping their fields insular and impenetrable. Courts should force experts to engage in a dialogue with the nonexperts. Judges must remain wary of blind acceptance of authority and subject everything to constant critical inquiry.

Deference is the negation of critical inquiry. Deference assumes that

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[389] *See surpa* Part III.A.3.

judicial review via critical inquiry into empirical evidence is equivalent to judicial legislation and the imposition of judicial ideology. By making this equivalency, critical inquiry of facts is banished from judicial review. Deferential review merely becomes a form of additional legitimacy, a judicial stamp of approval for the decisions made by government officials in the bureaucratic state.[390]

V. CONCLUSION: JUDICIAL REVIEW WITHOUT DEFERENCE?

Can the existing practice of deference be abandoned? The conception that justifies deference is certainly accurate in some respects. In its current form, the adjudicatory process provides far from an efficient and capable method for judges to engage in sound critical analysis of the laws and policies of the bureaucratic state. Given the existing practices and structures of the judicial process, judicial review as critical inquiry would be quite difficult to achieve in practice. In order to achieve judicial review as critical inquiry, the processes of constitutional adjudication must be transformed. Theorists of judicial review should turn to examining creative methods of evaluating empirical evidence. The answer is not to repudiate the deference principle, but to abandon the practice of deference currently associated with the principle and to transform judicial review so that it more adequately deals with facts.

Judicial balancing is a vast improvement in constitutional adjudication over late nineteenth century formalism. In its virtues, ***1021** judicial balancing conceives of law as an instrument to achieve human purposes, not as an end unto itself; it remains deeply concerned with the consequences of laws; and it assesses each situation as it arises rather than categorically restricting the exercise of state power in the name of absolute rights. With its greater focus on empirical evidence in issues of constitutional interpretation, it brings law more in tune with contemporary science, social science, economics, and other fields of human knowledge.

Judicial balancing, however, remains primitive in its analysis of facts. Too many instances of constitutional interpretation--especially ones under a balancing approach--fail to adequately explore and develop the facts. Judicial balancing often is not a detailed exploration into a problem, but an attempt by overworked judges to guess, hypothesize, and make policy from untested assumptions about the facts. While science and other fields advance by careful study of factual and empirical data, by constant experimentation and critical review, modern judicial review does not even begin to approach the task of fact-finding with any degree of sophistication. All too often,

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[390] Alexander Bickel aptly observed, following Charles Black, Jr., that when the Court affirms a government law or regulation, it does not have a neutral effect. By affirming legislation, the Court is legitimating it. *See* BICKEL, *surpa* note 5, at 69.

judicial review is exercised as it was in *Lochner*, even in strict scrutiny cases, very little scrutiny actually goes on. Very often, the Court quickly strikes down a law without giving careful attention to the facts. The heart of the problem lies in a lack of methods and techniques of critical inquiry. This occurs not just in cases of deference, but in instances of heightened scrutiny as well. It is a problem that runs throughout judicial review.

Liberal theorists of judicial review should turn to the practical problems of the adjudicatory process. Instead of ignoring the justifications for deference, liberal theorists should engage them by exploring the potentialities and possibilities of the judiciary and by charting a course of systematic change. In addition, Congress must also become involved in working on these reforms. Lack of time and resources severely hampers most judges, and many of the tools necessary to grapple with these constraints are in the hands of the Legislative Branch. The time is long overdue for Congress to look to the topic of refashioning the adjudicatory process so that it is more capable of dealing with the complex problems it will face in the twenty-first century.

The judiciary must also become actively involved in this endeavor. Although the Constitution is mostly silent on how cases ought to be tried, leaving much room for the judiciary to shape and alter the future of adjudication, fairly little has been done to reform the customs and techniques of adjudication. Change does not have ***1022** to begin at the systemic level, as a massive all- or-nothing revamping of the entire structure of the judiciary. Meaningful change can occur quite rapidly if it is fostered in an attitude of pragmatic experimentalism. Individual judges can spearhead these efforts. Meaningful change does not require the unified action of the entire judiciary; it can begin with a small number of visionary and creative judges. For example, Justices Marshall, Cardozo, and Holmes each in their own way exerted a profound influence on the law, more than legions of other judges combined. Indeed, a single judge possesses the power to achieve lasting change--it takes only courage and creativity. Judge Learned Hand was among the first judges to hire law clerks. His idea was so bold and original that he initially experienced difficulty with finding clerks, and he even had to pay them out of his own pocket.[391] It is this type of innovation and creativity that is necessary to achieve a pragmatic reconstruction of judicial review.

The judiciary must take steps to transform itself so that it can engage in a thorough critical inquiry into the complex empirical issues surrounding decisions made by experts in the bureaucratic state. To make such an inquiry, judges do not have to become social scientists. Critical inquiry into factual and empirical judgments does not mean number-crunching or

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[391] *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 140-41 (1994).

pouring over reams of data. Rather, it is a process of intelligent inquiry into the facts. It is developing methods of evaluation, of testing data, and of interacting with experience.

To better engage in such a critical inquiry, judges must enhance their experience. The judicial office is conceived as a bookish domain, where judges sit quietly beside tomes of law books in their cloistered chambers. In contrast, judges should constantly strive to enrich their experience--through literature and through lived experiences. Judges should expand the traditional methods of learning about a matter--which often occurs through court briefs and testimony. They should actually go to the institutions that they review--they should study them and learn about them. Judges could greatly enrich their perspective if they actually visited the schools, the prisons, the military, the mental hospitals, and other such institutions. There are numerous structural changes that judges can achieve: using magistrates and special masters in creative ways, requiring attorneys to develop different types of information not typically supplied in the adjudicatory process, and seeking the input of independent experts.

***1023** Another aspect of adjudication can be modified--namely, the current finality of judicial decisions. In an age of balancing, instances of constitutional interpretation still remain a one-shot enterprise. Courts, especially the Supreme Court, address a specific issue in a specific case and then rarely follow up in that case. Occasionally, courts will revisit an issue in a similar case, but often, judicial balancings are final. Once the court decides, the litigants and the problem disappear from its attention. Existing adjudicatory practices do not permit sufficient opportunities for judges to examine the consequences of their decisions. This is problematic, because it shuts the courts off from the world in which their decisions take effect. The judiciary is often perceived as distant from the needs and concerns of modern institutions, almost oblivious to the consequences. Part of the problem with bureaucracy is that it tends to cut off the decisionmaker from the consequences of her actions, and unfortunately, courts also exhibit this tendency.

In sum, I am suggesting that the judiciary reform itself--beginning at the level of individual judges--to improve its ability to evaluate empirical evidence. Judges must think about the judicial branch--as Justice Marshall once thought about it--and how it can be transformed through their own actions. Justice Marshall transformed the judiciary through his opinions, achieving profound theoretical and structural changes in the judiciary as an institution. But today, judges often do not think in this manner. Many act as if judicial review is a fixed practice and as if the structure of the judiciary is an immutable reality. It is time for judges and scholars to begin to think creatively about the problems of judicial review in the bureaucratic state rather than continuing to retreat to the practice of deference.