Gross Error

Eric Berger

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GROSS ERROR

Eric Berger*

Abstract: Glossip v. Gross epitomizes judicial deference gone berserk. In rejecting an Eighth Amendment challenge to Oklahoma’s lethal injection protocol, the United States Supreme Court rested its holding on several forms of deference. Closer examination demonstrates that each of these unsupported deference determinations was, at best, contestable and, at worst, simply wrong. Far from being anomalous, such under-theorized deference reflects more generally the Court’s willingness to utilize various stealth determinations to manipulate outcomes in constitutional cases.

The understandable concern that frivolous lethal injection challenges will clog courts and delay executions likely motivated the Court’s approach. Remarkably, though, the Court did not even attempt to distinguish humane execution protocols from dangerous ones. Many states, including Oklahoma, have repeatedly shown that they cannot be trusted to implement lethal injection procedures carefully. The Court’s deference turned a blind eye to this history and upheld a manifestly dangerous execution procedure. In so doing, the Court tried to shut down an entire category of litigation, thereby abdicating its constitutional responsibility to safeguard individual rights. Regardless of one’s views on capital punishment, Glossip v. Gross’s reflexive deference determinations collectively amount to gross error.

INTRODUCTION

I. BACKGROUND

A. Lethal Injection Generally

* Associate Dean for Faculty and Professor of Law, University of Nebraska College of Law. For helpful conversations and comments, I am grateful to Ginger Anders, Anne Duncan, LeAnn Frobom, Mark Heath, Tom Henthorn, Roger Kist, Robin Konrad, Corinna Lain, Megan McCracken, Richard Moberly, Richard Posner, Craig Stevens, Steve Willborn, and the participants in the faculty workshop at the University of Nebraska College of Law, the Sixth Annual Loyola Constitutional Law Colloquium, the Wisconsin Discussion Group on Constitutionalism, and the panel on “The Supreme Court and the Future of Lethal Injection” at the January 2016 Annual Meeting of the Association of American Law Schools in New York. I am also grateful to Dr. Ian Carroll, Assistant Professor of Anesthesiology, Stanford School of Medicine; Dr. Mark Heath, Assistant Professor of Anesthesiology, Columbia University Medical Center; Dr. Tom Henthorn, Professor of Anesthesiology, University of Colorado Anschutz Medical Campus; and Dr. Craig Stevens, Professor of Pharmacology, Oklahoma State University Center for Health Sciences, for discussing relevant medical and pharmacological issues with me, most notably the properties of the drug midazolam. Special thanks to Robin Konrad and Jen Moreno for invaluable help finding legal documents and also to Stefanie Pearlman, librarian extraordinaire, who helped me track down numerous medical journals and textbooks. Thanks also to Michael Blackburn, Billie Gallagher, and Max Rodenburg for splendid research assistance; to Asti Gallina, Devon King, Thomas Miller, and Ben Robbins and the other editors of the Washington Law Review for very helpful editorial assistance; and to Vida Eden for very helpful assistance. A McCollum Grant helped support the writing of this Article. All views expressed herein and remaining errors are mine.
B. Lethal Injection in Oklahoma .................................................. 940
C. District Court Proceedings .................................................... 942
D. The Supreme Court Decision .................................................. 943

II. GLOSSIP’S QUADRUPLE DEFERENCE ........................................ 944
A. Deference as Appellate Standard of Review ......................... 944
   1. Formal Problems: The Propriety of Clear-Error
      Review .............................................................................. 944
   2. Contextual Problems: The Truncated Evidentiary
      Hearing .............................................................................. 949
   3. The Court’s Questionable Factual Analyses ...................... 951
      a. Factual Findings About Midazolam .............................. 951
      b. Factual Findings About the Availability of Other
         Drugs .............................................................................. 957
B. Deference as Institutional Analysis ........................................ 959
   1. Democratic Legitimacy ....................................................... 961
      a. Legislative Guidance .................................................. 961
      b. Oversight ...................................................................... 963
      c. Transparency .............................................................. 964
   2. Expertise ........................................................................... 967
   3. Procedural Regularity ....................................................... 973
C. Deference as Doctrine .......................................................... 976
   1. Method-of-Execution Precedent ...................................... 977
   2. The Risk Standard .......................................................... 980
   3. The Proffer Requirement .................................................. 982
D. Deference as Spin ................................................................. 983
   1. Important Facts Ignored ................................................. 984
      a. The History of Botched Executions ............................ 984
      b. The Agony of Potassium Chloride .............................. 987
   2. Gratuitous or Questionable Facts Included ...................... 988
      a. “Guerrilla War Against the Death Penalty” ............... 988
      b. The Condemned’s Crimes ......................................... 993

III. EXPLANATIONS AND IMPLICATIONS ...................................... 994
A. Explanations ................................................................. 994
   1. Discouraging Frivolous Litigation ................................. 994
   2. Protecting State Penological Interests ......................... ..... 995
B. Implications ................................................................. 996
   1. Death Penalty Implications .......................................... 996
      a. Lethal Injection Litigation ........................................ 996
      b. Lethal Injection Practices ......................................... 999
   2. Judicial Implications .................................................... 1002

CONCLUSION ........................................................................... 1003
INTRODUCTION

I recently found myself chatting at a party with an anesthesiology professor at an elite university hospital. A couple of weeks earlier the Supreme Court had handed down its decision in *Glossip v. Gross*, 1 so I asked him about lethal injection. He raised his hand gently but authoritatively.

“I know some people like to say that lethal injection is of necessity painful,” he said, but it’s very easy to kill somebody painlessly. Seventeen million patients a year are rendered unconscious and without pain during the cutting and sewing of tissue during surgery with greater than 99.9% reliability. Any trained anesthesiologist has the technical skills to render someone insensate or dead with a minimum of discomfort if provided with the proper drugs and equipment.

I asked him if he was familiar with the details of the Oklahoma execution procedure at issue in *Glossip*. He was not, so I summarized it quickly. Three drugs: midazolam to anesthetize, followed by a paralytic, followed by potassium chloride, which creates an excruciating burning sensation in the veins on its way to stopping the heart. He shook his head. I had made a mistake.

“Midazolam’s not a general anesthetic,” he explained. “They shouldn’t be using that. It will not reliably produce unconsciousness or relief of pain.”

I assured him that I had the drug sequence correct—and that the Supreme Court had rejected a constitutional challenge to it.

“Midazolam?” he asked, incredulously.

I nodded.

His cousin, a nurse with many years’ experience in the operating room, wandered over, and he summarized our conversation for her.

“Midazolam?! But that’s crazy!” she said.

“And the Supreme Court said that that’s OK,” the anesthesiologist repeated in disbelief.

“That . . . is . . . crazy!”

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They both stared at me for longer than a moment, as if the Court’s bizarre medical conclusions were an indictment of my entire profession . . . as if to say, “What is it with you lawyers?!?”

*Lethal injection returned to the U.S. Supreme Court recently in* *Glossip v. Gross.* A group of death row inmates contended that Oklahoma’s new lethal injection protocol created too great a risk of excruciating pain in violation of the Eighth Amendment’s prohibition on “cruel and unusual punishments.” The crux of their case was that the protocol’s first drug, midazolam, fails to anesthetize against the agony the second and third drugs indisputably cause.

The Court rejected the plaintiffs’ arguments and upheld the Oklahoma protocol. In a sense, this outcome was predictable. The Supreme Court has never held that a state’s method of execution violates the Eighth Amendment, and, in this case, the Court was merely reviewing the district court’s factual findings for clear error. Moreover, as the Court emphasized, states have had increasing difficulty obtaining drugs for lethal injection procedures, and the Court did not want to make their task even harder. From that perspective, the *Glossip* decision is unsurprising.

A closer look, however, raises serious questions about the Court’s approach. In particular, the Court premised its holding on various sorts of deference. First, the Court deferred to the trial court’s factual findings because it determined they were not clearly erroneous. Second, the Court deferred to the Oklahoma Department of Corrections (DOC), emphasizing that the judiciary’s own epistemic limitations made it the wrong institution to disrupt the judgment of state officials who had designed the execution procedure. Third, the Court crafted a deferential doctrinal test raising a high Eighth Amendment bar for condemned inmates seeking to challenge a lethal injection procedure. Fourth, the Court emphasized certain questionable “facts” in its analysis and completely ignored others. In this way, the Court offered a spin that ostensibly justified its outcome.

These kinds of deference, to be sure, are very different from each other (and the fourth, strictly speaking, is not really “deference” at all).

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2. Conversation with Dr. Ian Carroll, Assistant Professor of Anesthesiology, Stanford School of Medicine, in Scituate, Mass. (July 9, 2015).
3. U.S. CONST. amend. VIII.
4. See Brief for Petitioners at 25–26, Glossip, 135 S. Ct. 2726 (No. 14-7955) [hereinafter Petitioners’ Brief].
5. See Glossip, 135 S. Ct. at 2739.
That said, they each discourage the Court from inquiring too seriously into the challenged policy. Each cuts in favor of judicial passivity so that the Court will not second-guess the State’s chosen policy or the district court’s findings.

In some cases, judicial deference is perfectly appropriate, but the Court’s deference determinations in *Glossip* were highly questionable. To begin, the majority’s deference to the trial court’s factual findings was problematic both formally and contextually. From a formal standpoint, the Court treated the question as a pure issue of “adjudicative,” case-specific fact triggering “clear-error” review. Upon closer examination, the Court should have at least entertained the argument that the relevant scientific facts should have been reviewed under the *de novo* standard applicable to more generalizable (i.e., non-case specific) “legislative” facts. Moreover, *Glossip* considered a question of *constitutional* fact, which also triggers more searching review. From this perspective, the Court rushed too quickly to apply the clear-error standard.

Even assuming, however, that the clear-error standard was formally appropriate, the district court refused to hold a full trial, permitting only a limited evidentiary hearing. The plaintiffs at this hearing did not even have the opportunity to offer evidence rebutting the State’s expert witness. These procedural anomalies render the Court’s deferential standard of review even more problematic.

The Court also applied this already deferential standard with even more deference, upholding the district court’s dubious assessment of the record. The Court, for instance, accepted the district court’s conclusion that midazolam could sufficiently anesthetize inmates against

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7. See infra notes 77–96 and accompanying text.

8. See infra notes 97–105 and accompanying text.

9. See infra Part II.A.2. The district court and Tenth Circuit cases were captioned “*Warner v. Gross*.” Before the Supreme Court’s decision, Oklahoma executed Charles Warner, despite four Justices’ votes for a stay of execution. See *Warner v. Gross*, ___ U.S. ___, 135 S. Ct. 824 (Jan. 15, 2015) (No. 14-7955) (Sotomayor, J., dissenting) (dissenting from denial of stay of execution). The execution of the case’s lead plaintiff required a change in the litigation’s caption. For ease of presentation, I refer herein to the case by the Supreme Court caption, *Glossip v. Gross*, except in footnotes citing the district court record. (I also cite the defendant’s name in my title to facilitate a shameless pun).

excruciating pain. This conclusion, however, was based on the testimony of one expert, who based his views on a questionable website for a lay audience, not on peer-reviewed medical scholarship. The other testifying experts, who did cite medical journals and textbooks to bolster their assertions, contended that midazolam cannot produce unconsciousness and maintain anesthesia against painful stimuli.

Nor was the Court’s institutional deference any more sound. The majority emphasized its own epistemic limitations, noting that “challenges to lethal injection protocols test the boundaries of the authority and competency of federal courts.” This sort of deference to state actors premised on the judiciary’s institutional limitations is questionable if the state institution itself suffers from serious limitations. When the state agency lacks both political and epistemic authority, the notion that courts ought not get involved because they lack these qualities is far less persuasive. After all, judges can study the relevant evidence, and, in this instance, Oklahoma officials did not even do that.

The Court also articulated a new and extremely deferential Eighth Amendment standard. Unlike the first two examples of deference, which were external to the doctrinal test, the Court baked this deference into the constitutional doctrine itself. Ignoring important language from earlier cases, the Court required inmates to establish that the challenged lethal injection procedure be “sure or very likely” to cause great pain. The result appears to be that even dangerous execution procedures will pass constitutional muster if they are not “sure or very likely” to result in excruciating suffering. Framed this way, a lethal injection plaintiff armed even with favorable factual findings is likely to lose. This doctrinal move essentially transformed the Eighth Amendment in this context from an individual rights clause to a federalism provision protecting states.

Finally, the Court offered its own spin on important facts surrounding the case. The Court did not explain how these facts were legally

12. See infra notes 139–47 and accompanying text.
13. See Glossip, 135 S. Ct. at 2740.
16. See Glossip, 135 S. Ct. at 2737 (quoting Baze v. Rees, 128 S. Ct. 1520, 1523 (2008)).
relevant, but its factual portrait helped create an atmosphere ostensibly justifying its other highly deferential moves. For example, the Court inaccurately blamed the drug shortage bedeviling lethal injection states on anti-death penalty activists and suggested that the inmates should not benefit from a situation they have helped create. Accordingly, the Court implied, the judiciary owes states the benefit of the doubt.

Along similar lines, Justice Alito described each of the inmate’s crimes. While these crimes were horrific and arguably justify the imposition of capital punishment, they are nonetheless irrelevant to the question of whether the State’s protocol violates the Eighth Amendment. By contrast, the Court did not once mention the fact that the protocol’s third drug, potassium chloride, indisputably causes searing pain in the improperly anesthetized. Nor did the majority engage meaningfully with the long history of botched executions, which help demonstrate that many state officials do not know or care enough to design humane lethal injection protocols. The Court, in short, highlighted irrelevant facts at the expense of relevant ones, thereby crafting an opinion uniquely sensitive to state interests.

Of course, the Court had reasons for its approach. Many capital inmates will challenge any method of execution, no matter how humane, clogging courts and delaying the administration of justice. Impatient with such litigation, the majority tried to make it more difficult for capital inmates to bring lethal injection challenges at all. In this way, the Court sought to discourage frivolous litigation while simultaneously protecting states’ prerogative to design and implement execution protocols.

The problem is that the Court’s opinion failed to distinguish safe lethal injection procedures from dangerous ones. It did not even attempt to do so. Indeed, the Court was so concerned about frivolous litigation that it crafted an opinion that tries to shut the door on meritorious cases as well. And, while there likely are frivolous lethal injection claims, there also certainly are meritorious ones. States have repeatedly made serious mistakes when designing and implementing lethal injection protocols, thereby greatly heightening the risk that the condemned will suffer an excruciating death. Oklahoma, in fact, is one of the worst

17. See infra Part II.D.2.a.
offenders, as the horrific botched 2014 execution of Clayton Lockett well demonstrates.\textsuperscript{19}

The Court’s approach in \textit{Glossip} creates serious problems for the law of lethal injection. \textit{Glossip} strongly implies that law that might interfere with executions should take a back seat to the imperative of carrying out death sentences. Lethal injection, then, operates in a strange legal grey hole in which the politics of capital punishment apparently trumps the Constitution.\textsuperscript{20} To be sure, the Eighth Amendment ostensibly protects inmates from excruciating execution procedures. However, as a practical matter, the Court applies the law so deferentially that those protections are only illusory.\textsuperscript{21}

\textit{Glossip} also has broader implications beyond the death penalty. In particular, it illustrates that deference in its various forms is easily manipulated. This Article seeks to illustrate some of these many deference determinations at the Court’s disposal. It does not offer a meta-theory for each variant; each type of deference is itself rich and complicated enough to merit individual treatment.\textsuperscript{22} But by examining deference in \textit{Glossip}, we can better understand how poorly the Court sometimes justifies its constitutional decisions. To this extent, \textit{Glossip}’s under-theorized deference reflects more generally the Court’s ability to utilize various stealth determinations to steer outcomes in constitutional cases.\textsuperscript{23}

Many states, including Oklahoma, have repeatedly shown they do not understand the drugs and their risks, and that they cannot be trusted to employ competent persons to carry out lethal injection’s many complicated steps safely.\textsuperscript{24} \textit{Glossip}’s quadruple deference turns a blind eye to this history, giving the benefit of the doubt that many lethal injection states, including Oklahoma, do not deserve. This is not to say

\begin{itemize}
\item \textsuperscript{19} See generally Jeffrey E. Stern, \textit{The Cruel and Unusual Execution of Clayton Lockett}, \textit{The Atlantic} (June 2015), http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/ [https://perma.cc/8K63-NT7Y].
\item \textsuperscript{20} See Adrian Vermeule, \textit{Our Schmittian Administrative Law}, 122 Harv. L. Rev. 1095, 1096 (2009) (“Grey holes . . . arise when there are some legal constraints on executive action—it is not a lawless void—but the constraints are so insubstantial that they pretty well permit government to do as it pleases.”).
\item \textsuperscript{21} Cf. id. at 1118 (“The problem with grey holes . . . is that the apparent constraints on executive action mask the lack of actual constraints.”).
\item \textsuperscript{22} In earlier work, I offered such a treatment for judicial review of agency action allegedly violating individual rights. See generally Berger, supra note 14.
\item \textsuperscript{24} See infra Part II.B.2.
\end{itemize}
that appellate deference to trial court factual findings or judicial deference to governmental action is never warranted. The point, rather, is that the Court’s under-theorized deference allowed it to bless extremely haphazard, secretive, and unprofessional governmental actions. By rushing to defer in *Glossip v. Gross* and attempting to foreclose future method-of-execution challenges, the Court abdicated its responsibility to safeguard constitutional rights. Regardless of one’s views on capital punishment, such reflexive deference determinations collectively amount to gross error.

Part I of this Article briefly summarizes the relevant background. It opens with a short history of lethal injection before turning to the Oklahoma protocol at issue in *Glossip*. It then recounts the district court’s proceedings and the Supreme Court opinion.

Part II examines the various kinds of deference at issue. It first looks at the Court’s deference to the trial court factual findings and contends that the Court failed to discuss important factors militating against clear-error review. It then turns to the Court’s institutional deference to the Oklahoma DOC. Though the Court raised valid concerns about its own epistemic limitations, it completely ignored the lack of expertise and care that has repeatedly plagued lethal injection in Oklahoma and elsewhere. Next, the Article examines the Court’s highly deferential Eighth Amendment standard, arguing that this new articulation of the doctrine is in tension with relevant precedent and core Eighth Amendment norms. Finally, this Part considers deference as atmospheric spin, considering important facts that the Court ignored and other factually questionable or legally irrelevant points that the Court emphasized.

Part III considers motives for and implications of the Court’s exceptionally deferential approach. In particular, it focuses on the Court’s concern that frivolous lethal injection litigation may clog courts and obstruct states’ administration of justice. The Article concludes that while these concerns are valid, the Court inappropriately ignored numerous other factors militating for more careful judicial review here. Indeed, the history of botched executions well demonstrates that the Court’s great deference to states in this area is undeserved. Moreover, under-theorized deference yields decisions that read more like partisan advocacy briefs than impartial court opinions, thus compromising judicial legitimacy.
I. BACKGROUND

A. Lethal Injection Generally

In 1977 Oklahoma became the first state to adopt lethal injection when it devised a three-drug protocol.\(^\text{25}\) Over thirty states subsequently copied Oklahoma’s approach, and some still retain it today in name.\(^\text{26}\) This protocol began with sodium thiopental, a barbiturate to anesthetize the inmate. The second drug, pancuronium bromide, was a paralytic that inhibits muscle movement. The third drug, potassium chloride, stopped the heart. It was undisputed that a successfully delivered adequate dose of thiopental would fully anesthetize the inmate within two-and-a-half minutes.\(^\text{27}\) It was further undisputed that if the thiopental failed to take full effect, the potassium chloride would cause excruciating pain as it burns its way through the inmate’s veins.\(^\text{28}\) The paralytic, however, would conceal that agony—and also cause the torturous sensation of suffocation by paralyzing the inmate’s diaphragm.\(^\text{29}\)

The safety and constitutionality of this three-drug protocol, therefore, hinged on the successful delivery of thiopental.\(^\text{30}\) Unfortunately, states often entrusted the procedure to unqualified personnel. Indeed, the doctor who initially designed the protocol for Oklahoma subsequently expressed shock that individuals with little understanding of the drugs’ dangers typically implement it.\(^\text{31}\)

Inmates in various states challenged the constitutionality of their states’ three-drug protocols. Many contended that various problems with


\(^{26}\) In practice, states today cannot find thiopental for their protocols and have replaced it with other drugs. See id. at 78; infra notes 41–46, 392–401 and accompanying text.


\(^{28}\) See id.

\(^{29}\) See id.

\(^{30}\) See Baze v. Rees, 553 U.S. 35, 53 (2008) (Roberts, C.J.) (plurality opinion) (“It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.”). A “safe” execution procedure is one that does not pose a substantial risk of serious pain. Obviously, to the extent these procedures cause the death of a human being, they are not “safe” in the conventional sense of the word. See Eric Berger, Lethal Injection Secrecy and Eighth Amendment Due Process, 55 B.C. L. REV. 1367, 1370 n.11 (2014).

\(^{31}\) See Harbison v. Little, 511 F. Supp. 2d 872, 875 (M.D. Tenn. 2007) (citing Email from A. Jay Chapman, Forensic Pathologist, Santa Rosa, Cal., to Deborah W. Denno, Professor of Law, Fordham Law Sch. (Jan. 18, 2006)).
their states’ procedures heightened the risk that they would not receive a proper dose of thiopental and therefore would suffer an excruciating death. Some plaintiffs persuaded courts that particular states’ procedures were unconstitutional.\(^\text{32}\) However, in 2008, the United States Supreme Court upheld Kentucky’s three-drug protocol in \textit{Baze v. Rees}.\(^\text{33}\) \textit{Baze} considered only the constitutionality of Kentucky’s procedure, and the record in that case was sparse, so the Court’s decision did not determine the constitutionality of other states’ procedures.\(^\text{34}\) Moreover, because \textit{Baze} was a fractured decision and even the plurality opinion could be read as identifying different Eighth Amendment legal standards, the case left much unsettled.\(^\text{35}\) Nevertheless, because the Supreme Court had indicated that procedures “substantially similar” to Kentucky’s would pass Eighth Amendment muster,\(^\text{36}\) other states felt confident that they could continue with the three-drug protocol.

Events on the ground changed quickly.\(^\text{37}\) Despite \textit{Baze}, an Ohio state court held in \textit{State v. Rivera} that the State’s use of pancuronium bromide and potassium chloride “creates an unnecessary and arbitrary risk that the condemned will experience an agonizing and painful death.”\(^\text{38}\) The court ordered Ohio to adopt a one-drug protocol using only an anesthetic, a change that Ohio ultimately adopted by statute.\(^\text{39}\) Several other states soon followed suit, adopting one-drug procedures using overdoses of anesthetics like thiopental and pentobarbital.\(^\text{40}\)

The one-drug protocol ostensibly eliminated the risk of severe pain. By removing the two drugs that created the primary risk of pain, some

\(^{32}\) See \textit{Harbison}, 511 F. Supp. 2d at 884 (“The new protocol poses a substantial risk that Mr. Harbison will not be unconscious when the second and third drugs are administered.”); Taylor v. Crawford, No. 05-4173, 2006 WL 1779035, at *7-8 (W.D. Mo. June 26, 2006), \textit{rev’d} 487 F.3d 1072 (8th Cir. 2007); Morales v. Hickman, 415 F. Supp. 2d 1037, 1046 (N.D. Cal. 2006).

\(^{33}\) \textit{Baze}, 553 U.S. at 63.

\(^{34}\) See \textit{Berger}, supra note 27, at 273.

\(^{35}\) See \textit{Baze}, 553 U.S. at 71 (Stevens, J., concurring) (noting that the plurality’s opinion, far from settling the issue, will generate further debate); \textit{id}. at 94 (Thomas, J., concurring) (arguing that the plurality opinion “casts constitutional doubt on long-accepted methods of execution”); Deborah W. Denno, \textit{Lethal Injection Chaos Post-Baze}, 102 \textit{Geo. L.J.} 1332, 1347–48 (2014) (arguing that \textit{Baze} refers to several risk standards).

\(^{36}\) See \textit{Baze}, 553 U.S. at 61.


\(^{40}\) See \textit{Berger}, supra note 30, at 1380.
states were now relying solely on drugs intended to protect inmates from pain. However, states with both one- and multi-drug procedures soon ran into problems obtaining the drugs. In particular, some pharmaceutical companies, responding partially to pressure from European governments, stopped selling their products to states for use in executions. Other drugs were also in short supply for reasons unconnected to the death penalty.

In response to these drug shortages, states have taken desperate steps to procure drugs. Some states have sought to purchase drugs from unregistered overseas dealers in defiance of federal law, which prohibits the importation of such unapproved drugs. Other states have turned to compounding pharmacies, though those facilities often lack the basic infrastructure and technology to produce reliable drugs. Still other states changed their protocol to include different drugs, such as a three-drug protocol replacing thiopental with pentobarbital as the anesthetic. Thus, whereas most state lethal injection protocols resembled each other when the Court decided Baze in 2008, today there is an array of different protocols across the country.

B. Lethal Injection in Oklahoma

Oklahoma’s lethal injection procedure has been especially problematic. When the State executed Michael Lee Wilson with a three-drug protocol beginning with pentobarbital in January 2014, he cried out

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42. See infra notes 402–406 and accompanying text.

43. See Berger, supra note 30, at 1381.


from the gurney, “I feel my whole body burning.”

Oklahoma initially planned no changes to its protocol, but the State’s plans changed in mid-March 2014 when a deal with a pharmacy supplying pentobarbital “fell through.”

Oklahoma, thus, rescheduled executions for Clayton Lockett and Charles Warner for late April and set to work on a new execution protocol.

Rather than carefully exploring its options, Oklahoma officials rushed to throw something together. Oklahoma delegated the design of the new protocol to a team of lawyers working under enormous time pressure.

Just four days after announcing the drug shortage, the State adopted a new three-drug protocol that substituted midazolam as the anesthetic.

Serious problems arose immediately. The State planned to execute both Lockett and Warner with this new protocol on the same evening in April 2014, but Lockett’s execution was horribly botched.

As Mr. Lockett continued to mumble, strain, and writhe in agony, the State drew the blinds, blocking witnesses’ views.

Lockett did ultimately die, but the State postponed the Warner execution.


50. See infra Parts II.B.1.b & II.B.2.


53. Id. The differences between vecuronium and pancuronium bromide are not significant for purposes of lethal injection litigation. Cf. O.M. Rashkovsky, Interaction Between Pancuronium Bromide and Vecuronium Bromide, 57 BR. J. ANAESTH. 1063, 1063 (1985) (noting that vecuronium and pancuronium bromide are “closely related” and work similarly in many, but not all, respects).


55. See Interview by Captain Damon Tucker & Lieutenant Brent Jones, Okla. Dep’t of Pub. Safety, Okla. Highway Patrol, with Gary Elliott, Assistant Gen. Counsel, Okla. Dep’t of Corr., in
Following this botch, Oklahoma again revised its protocol. Instead of replacing midazolam with another drug, the State merely increased the dosage of midazolam from 100 to 500 milligrams. When Oklahoma finally executed Warner using this protocol, his last words were, “My body is on fire.”

C. District Court Proceedings

Twenty-one Oklahoma capital inmates filed a civil rights action in federal district court under 42 U.S.C. § 1983 challenging the constitutionality of this same protocol. Four of these inmates subsequently filed a motion for a preliminary injunction barring their executions until the court could resolve their Section 1983 claim. The district court held a three-day preliminary injunction hearing focused, inter alia, on midazolam’s properties. If midazolam cannot anesthetize inmates against the excruciating pain caused by potassium chloride, then the Oklahoma protocol would manifestly violate the Eighth Amendment. If midazolam, by contrast, were a suitable anesthetic that could reliably anesthetize inmates against such pain, then Oklahoma’s three-drug protocol would not constitute a per se violation of the Eighth Amendment, though the procedure may still be unconstitutional if the

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Oklahoma City, Okla., Transcript at 10 (May 27, 2014) [hereinafter Elliott Interview]; Interview by Captain Jason Holt & Trooper Kevin Logan, Okla. Dep’t of Pub. Safety, Okla. Highway Patrol, with Robert Patton, Dir., Okla. Dep’t of Corr., in Oklahoma City, Okla., Transcript at 32 (June 3, 2014) [hereinafter Patton Interview].


59. See OKLAHOMA PROTOCOL, supra note 58, at 3.


61. Warner v. Gross, 776 F.3d 721 (10th Cir.), aff’d sub nom. Glossip v. Gross, __ U.S. __, 135 S. Ct. 2726 (2015). Oklahoma’s protocol allows the DOC to choose from four different drug combinations, but the State indicated that it planned to use a three-drug protocol consisting of midazolam, a paralytic, and potassium chloride. Glossip, 135 S. Ct. at 2734.


63. See Petitioners’ Brief, supra note 4, at 25.
State’s administration of it did not sufficiently assure that the inmate would be anesthetized.

The plaintiffs offered three expert witnesses, Dr. David Lubarsky, Dr. Larry Sasich, and Dr. Eric Katz, each of whom testified that midazolam could not reliably anesthetize the inmates against the intense pain inflicted by potassium chloride. The State’s witness, Dr. Roswell Evans, contended that midazolam could in fact anesthetize the inmates. After hearing the evidence, the district court denied the plaintiffs’ motion for a preliminary injunction, because the plaintiffs had failed to establish the likelihood of success on the merits. It rested this holding on two independent reasons. First, the district court faulted the plaintiffs for failing to identify a known and available alternative method of execution that substantially lessened the risk of pain. Second, the court concluded that the plaintiffs had failed to prove that the Oklahoma protocol “presents a risk that is ‘sure or very likely to cause serious illness and needless suffering.’” On appeal, the Tenth Circuit, without holding oral argument, affirmed.

D. The Supreme Court Decision

The United States Supreme Court, by a 5–4 vote, also affirmed. The majority opinion by Justice Samuel Alito reiterated the district court’s rationales. First, the Court affirmed “based on petitioners’ failure to satisfy their burden of establishing that any risk of harm was substantial when compared to a known and available alternative method of execution.” Second, the Court held that the district court had not committed clear error “when it found that midazolam is highly likely to render a person unable to feel pain during an execution.”

In elaborating on this second point, Justice Alito placed great weight on the standard of review, emphasizing that the “clear error” standard does not entitle appellate courts “to overturn a finding ‘simply because [they are] convinced that [they] would have decided the case differently.’”

65. See id. at 629–78.
67. See id. at 65.
69. Glossip, 135 S. Ct. at 2738.
70. Id. at 2739.
differently.”71 In her dissent, Justice Sonia Sotomayor contended that an appellate court should find clear error when it “is left with the definite and firm conviction that a mistake has been committed.”72 Given the testimony at the evidentiary hearing and voluminous scientific literature detailing midazolam’s properties, Justice Sotomayor was persuaded that the district court had committed such a mistake.

II. GLOSSIP’S QUADRUPLE DEFERENCE

This Part examines Glossip’s four layers of deference. Section A argues that the Court failed to discuss important factors militating against the clear-error review it selected. It further contends that the Court applied this deferential standard of review too deferentially, heightening the plaintiffs’ burden beyond the law’s requirements. Section B then turns to the Court’s institutional deference to the Oklahoma DOC, arguing that the Court improperly ignored the State’s manifest lack of expertise, care, transparency, and oversight. Section C examines the Court’s creation of a highly deferential Eighth Amendment standard, arguing that this new doctrine is inconsistent with important language in key Eighth Amendment precedent. Finally, section D considers deference as spin, examining important facts that the Court ignored and other factually questionable or legally irrelevant points that the Court emphasized.

A. Deference as Appellate Standard of Review

1. Formal Problems: The Propriety of Clear-Error Review

The majority concluded that the district court had not committed clear error in finding that midazolam “is highly likely to render a person unable to feel pain during an execution.”73 The majority emphasized this deferential standard of review at several turns, but the application of this standard was questionable. The inmate petitioners, for their part, contended that the question of midazolam’s pharmacological properties should be reviewed de novo.74 To be sure, appellate courts usually defer

71. Id. (quoting Anderson v. Bessemer City, 470 U.S. 564, 573 (1985)).
72. Id. at 2786 (Sotomayor, J., dissenting) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)).
73. Id. at 2739.
74. See Petitioners’ Brief, supra note 4, at 32.
to district court findings of fact, unless they are clearly wrong.\footnote{75} And though the dissent disagreed with most of the majority’s factual and legal analyses, it did agree on the appropriateness of the clear error standard.\footnote{76} That said, there are good reasons to think that the Court should have considered a more searching standard.

Professor Kenneth Culp Davis famously distinguished between “legislative facts,” on the one hand, and “adjudicative facts,” on the other.\footnote{77} Adjudicative facts “deal with particular circumstances, relating the actions of the parties.”\footnote{78} These factual questions typically deal with “what the parties did, what the circumstances were, what the background conditions were.”\footnote{79} Trial courts typically answer these questions by following “procedures designed to ensure rigorous adversarial testing.”\footnote{80}

By contrast, legislative facts “are general facts which help the tribunal decide questions of law and policy and discretion.”\footnote{81} Legislative facts usually “transcend individual disputes and would likely recur in different cases involving similar subjects.”\footnote{82} Contrary to their name, legislative facts need not be found by a legislature,\footnote{83} though Congress often relies upon its own factual findings when it passes legislation.\footnote{84}

Admittedly, the line between adjudicative and legislative facts can be blurry.\footnote{85} The consequences of the distinction, however, are significant. Whereas the Federal Rules of Civil Procedure dictate that appellate


\footnote{76} \textit{See} Glossip, 135 S. Ct. at 2786 (Sotomayor, J., dissenting).

\footnote{77} \textit{See} Davis, supra note 6, at 402–03.


\footnote{79} Davis, supra note 6, at 402.


\footnote{81} David L. Faigman, \textit{Fact-Finding in Constitutional Cases, in How Law Knows} 162 (Austin Sarat et al. eds., 2007) (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT § 7.03, at 160 (3d ed. 1972)).

\footnote{82} \textit{See} id.

\footnote{83} \textit{See} KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL 75 (2015) (“[C]alling these legislative facts is a terrible (but hopelessly entrenched) misnomer.”).


\footnote{85} \textit{See} McGinnis & Mulaney, supra note 84, at 75.
courts accept trial court findings of adjudicative facts that are not “clearly erroneous,”86 appellate courts often find legislative facts for themselves.87

Neither the Glossip majority nor the dissent discussed the distinction between legislative and adjudicative facts. Both instead treated the key facts at issue as adjudicative, triggering clear-error review. Upon closer examination, however, it is far from obvious that the clearly erroneous standard should apply.88 Midazolam’s pharmacological properties are not unique to the Glossip litigation, or even to lethal injection litigation more generally. To the contrary, they always apply. Like other scientific facts, they are universally true.

Our system assumes that trial courts are better situated than appellate courts to find facts,89 but trial courts’ systemic advantages are less obvious for scientific facts. Trial courts often credit or discredit witnesses based on their demeanor. The clear error standard exists, in part, because appellate judges do not enjoy this opportunity to assess witness credibility.90

Scientific evidence, however, is less suited to credibility determinations.91 An expert’s witness-stand demeanor is often not a good reason to credit her science over a competing expert’s.92 Some witnesses may seem convincing but be scientifically mistaken.93 Others may seem awkward or nervous but be correct. Furthermore, the oral presentation of complicated scientific evidence can be confusing or misleading.94 Additionally, unlike many other kinds of factual testimony

86. FED. R. CIV. P. 52(a)(6).
87. See Borgmann, supra note 84, at 1188 (“Although nothing in [Rule 52(a)(6)] exempts social facts from its scope, it is widely believed that social facts are not subject to the rule and that appellate courts should review them independently.”); Alison Orr Larsen, Confronting Supreme Court Fact Finding, 98 Va. L. Rev. 1255, 1266 (2012).
88. See Lockhart v. McCree, 476 U.S. 162, 168 n.3 (1986) (questioning whether the clear error standard should apply to social science “fact”).
89. See Gorod, supra note 80, at 4–6.
92. See, e.g., id.; John Monahan & Laurens Walker, Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law, 134 U. Pa. L. Rev. 477, 496 (1986) (contending that witness demeanor can be more distracting than helpful when empirical claims are at issue).
93. See Cheng, supra note 91, at 1104 (“This ‘deference’ model of expert testimony is rife with danger, particularly since relying on traditional cues for assessing witness credibility is not necessarily a sound method for assessing scientific experts.”).
94. See Monahan & Walker, supra note 92, at 496.
(e.g., did the witness see the defendant set fire to his barn?), much scientific testimony can be independently corroborated or undermined by published scientific studies.

One would think, therefore, that the cogency of an expert’s explanation and the existence of reputable studies confirming or contradicting her opinion would be better measures of a scientific expert’s reliability than the district judge’s intuitions about that witness’s credibility. From this perspective, an appellate judge reviewing a transcript and scientific sources can make this judgment as accurately as the trial judge who heard the expert in person. Appellate judges may even be better situated to review scientific facts, because they usually have more time than trial judges to consider the scientific evidence carefully.

Even more importantly, the Court did not address reasons to think that the case presented not simply a factual question, but rather a mixed question of fact and constitutional law, which is usually freely reviewable. Glossip considered whether Oklahoma’s three-drug protocol created an unconstitutional risk of excruciating pain. The Court’s ruling affected not just Oklahoma but other states using or contemplating the same protocol. It is strange to think that a nationwide constitutional rule should hinge on a single district court’s possibly idiosyncratic factual findings, but that is essentially what the Court’s deferential approach would permit.

To this extent, even if the Court were generally correct to apply clear-error review to scientific facts, its analysis ignored the question of how


96. See Keasler & Cramer, supra note 95, at 361–62.


98. Cf. Norris v. Alabama, 294 U.S. 587, 589–90 (1935) (“That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied.”).


100. Admittedly, a future district court rendering different factual findings could, in theory, hold the same protocol unconstitutional, but most district judges in practice would be unlikely to issue a ruling seemingly at odds with the Court’s Glossip ruling. See infra notes 442–444 and accompanying text. To this extent, Glossip essentially sends the signal that states adopting midazolam-based three-drug protocols like Oklahoma’s are constitutional.
appellate courts should treat constitutional facts, which will effectuate a nationwide constitutional rule, as opposed to narrower, case-specific facts, which only affect the litigation at hand.\footnote{See FAKMAN, supra note 99, at 62.} As the Court itself once explained, “Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact.”\footnote{Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 501 n.17 (1984).} Accordingly, where a constitutional right is at stake, appellate courts typically apply more searching review to district court factual findings.\footnote{See, e.g., Miller v. Fenton, 474 U.S. 104, 116 (1985); Jacobellis v. Ohio, 378 U.S. 184, 189 (1964); Norris, 294 U.S. at 590; MILLER ET AL., supra note 97, § 2571, at 227–32 (“[A] reviewing court may subject the factual findings of the trial court to a more searching review when First Amendment or other constitutional issues have been raised.”); id. § 2585, at 408 (“[T]he reviewing court’s mandate is more complex and its examination of the evidence more extensive when constitutional issues are implicated.”); Henry P. Monaghan, Constitutional Fact Review, 85 COLUM. L. REV. 229, 264 (“Bose insists that appellate courts must exercise independent judgment with respect to constitutional facts relevant to first amendment law application.”).} For these collective reasons, the Court should have at least considered more searching review,\footnote{Though the principle dissent agreed with the majority that clear-error review should apply, it did explain that “[e]specially when important constitutional rights are at stake, federal district courts must carefully evaluate the premises and evidence on which scientific conclusions are based, and appellate courts must ensure that the courts below have in fact carefully considered all the evidence presented.” Glossip v. Gross, ___ U.S. ___, 135 S. Ct. 2726, 2786 (2015) (Sotomayor, J., dissenting).} especially given that the district court’s limited evidentiary hearing did not permit full development of the relevant facts anyway.\footnote{See infra Part II.A.2.}

To be sure, there are also arguments in favor of applying the clearly erroneous standard here, though the majority did not rehearse them. For one, legislative facts often refer to common knowledge, not to more specialized scientific facts.\footnote{See Gorod, supra note 80, at 39.} To this extent, scientific facts do not fit comfortably within the realm of either legislative or adjudicative facts. Furthermore, if scientific facts were legislative facts, then appellate courts would have wide-ranging authority to do scientific research unaided by experts or the parties. Not only do most appellate judges lack the expertise to perform such inquiries well,\footnote{See Joëlle Anne Moreno, Einstein on the Bench?: Exposing What Judges Do Not Know About Science and Using Child Abuse Cases to Improve How Courts Evaluate Scientific Evidence, 64 OHIO ST. L.J. 531, 533 (2003) (“[M]any judges, speaking candidly, consider themselves ill-suited to the task of evaluating scientific evidence . . . .”).} but such freelancing might undermine our adversarial judicial system.\footnote{Cf. Gorod, supra note 80, at 53.}
the Supreme Court has not consistently provided clear guidance on these issues, in other contexts, such as patent law, it has subjected scientific facts to clear-error review. Moreover, though lower courts will very likely follow the Supreme Court’s ruling on midazolam in future lethal injection cases, its decision technically does not bind lower courts in other cases, because it was tethered to the district court’s factual findings in this case. From this perspective, the argument that a constitutional fact was at issue is hardly a slamdunk.

Significantly, though, Glossip did not engage with any of these issues, perhaps in part because the majority wanted lower courts to treat its decision as binding. Accordingly, the Court deferred to the district court without examining whether such deference was due, even though the petitioners had argued for a different standard. To this extent, even if justifiable, the Court’s application of the clear-error standard was badly under-theorized.

2. Contextual Problems: The Truncated Evidentiary Hearing

The Court also ignored issues unique to Glossip that militated for less deferential review. Appellate courts usually defer to trial court findings of adjudicative fact, but in Glossip, there was no trial. The district court, cognizant of the State’s interest in carrying out lawfully imposed sentences expeditiously, held only an abbreviated hearing on the plaintiffs’ motion for a preliminary injunction. These limited proceedings occurred less than three months after Oklahoma issued its midazolam-based protocol, despite the plaintiffs’ request for more time to find and prepare expert witnesses. Additionally, the court did not even permit the plaintiffs to offer evidence rebutting the State’s expert witness after he had testified. To this extent, the district court’s factual

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110. See infra notes 442–44 and accompanying text.

111. See Brief for Petitioners, supra note 4, at 32–33.


findings about midazolam were based on an incomplete and hastily assembled record. 115

These hurried proceedings deprived not only the plaintiffs the opportunity to present their case fully but also the judge the chance to master the record. For example, after the botched Lockett execution, the Oklahoma Department of Public Safety (DPS) conducted dozens of interviews with persons connected with Oklahoma’s lethal injection procedure. The interview transcripts, amounting to over 3,000 pages, detail the adoption and implementation of the State’s lethal injection protocol. 116 These interviews identified the manifest lack of professionalism underlying Oklahoma’s execution protocol and also made clear that the State selected midazolam without serious study of its properties. 117 The plaintiffs, however, did not receive these documents until about a month before the evidentiary hearing, and the court did not admit them into the record until five days before its decision. 118 The district judge did not reference these documents in his ruling and likely did not have time to consider them carefully or at all. 119

Even if clear-error review were otherwise appropriate, these procedural anomalies cast serious doubt on the propriety of that standard in this case. 120 The scientific findings in Glossip were very different

115. The Court’s analysis accounted for these limited proceedings only insofar as it explained that the plaintiffs needed to satisfy the standard for obtaining a preliminary injunction. This analysis, too, proved to be deferential. Though the Court articulated the four traditional, preliminary-injunction factors—likelihood of success on the merits, irreparable harm, balance of equities, and the public interest—it did not weigh these factors collectively on a sliding scale. Rather, the Court affirmed the denial of the preliminary injunction solely because it determined (controversially) that the plaintiffs had not demonstrated a likelihood of success on the merits. See Glossip, 135 S. Ct. at 2736–38 (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). To the extent the other factors (especially irreparable harm) may tip in the inmates’ favor, this less flexible approach to preliminary injunctions reflects yet another deferential determination in the State’s favor. See The Supreme Court – Leading Cases: Eighth Amendment – Death Penalty – Preliminary Injunctions – Glossip v. Gross, 129 HARV. L. REV. 271, 280 (2015).

116. See infra note 118.

117. See infra Part II.B.2.


119. See Warner Ruling, supra note 66, at 7–8 (praising the 29 page report summarizing the DPS findings, noting that a more complete report would have been several hundred pages, and implying that, given the circumstances, the DPS summary was sufficient).

from those in, say, patent cases, to which companies are usually willing and able to devote tremendous resources. Trial courts in patent cases are likely to have heard complete accounts of the facts from both sides. By contrast, the Glossip district court heard only a partial presentation of the facts. Clear-error review, even if otherwise applicable, is less appropriate under these circumstances.

3. The Court’s Questionable Factual Analyses

a. Factual Findings About Midazolam

The Glossip Court not only selected a contestable standard of review but also applied that deferential standard extremely deferentially. The Court extended great deference to the district court’s factual findings about midazolam, despite the fact that those findings rested almost entirely on the deeply flawed testimony of the state’s sole expert witness. In other words, even assuming the propriety of the clear-error standard in this case, the Court applied that standard questionably.

The Court accepted the trial court’s finding that “midazolam is highly likely to render a person unable to feel pain during an execution.” This factual proposition was crucial to the Court’s holding that Oklahoma’s protocol was not “sure or very likely” to cause suffering. However, significant scientific literature suggests otherwise. Midazolam is not a barbiturate, but a benzodiazepine. A leading medical textbook explains that this class of drugs does “not cause a true general anesthesia because awareness usually persists . . .” Midazolam’s primary 121, 122, 123, 124, 125, 126, 127
clinical uses are to reduce anxiety, produce mild sedation, and relax muscles, often prior to the induction of anesthesia. Accordingly, much of the medical literature squarely addressing the issue states that “[m]idazolam cannot be used alone... to maintain adequate anesthesia.” To the contrary, as another leading textbook explains, midazolam, like other benzodiazepines, “must be used with other anesthetic drugs to provide sufficient analgesia...”

In affirming the lower court, the Supreme Court emphasized that the district court had credited Dr. Evans’ testimony that midazolam could serve as a reliable anesthetic. However, as Justice Sotomayor explained, “Dr. Evans identified no scientific literature to support” this view. Instead, Dr. Evans relied on the website drugs.com, which another expert described as “out of date, incomplete, and of general low editorial quality.” It is highly questionable whether a website designed to provide basic information about medicine to a lay audience, rather than a medical journal or textbook, should be acceptable to corroborate a controversial point about a drug’s properties. In all events, even

128. See id. at 410–11; RONALD D. MILLER ET AL., MILLER’S ANESTHESIA 837, 841 (8th ed. 2015) (“In the clinical practice of daily anesthesia, midazolam is often used immediately before induction of anesthesia.”); U. Khanderia & SK Pandit, Use of Midazolam Hydrochloride in Anesthesia, 6 CLIN. PHARM. 533, 533 (1987) (noting that midazolam’s primary use is as a pre-operative sedative or pre-medicant); Brief of Sixteen Professors of Pharmacology as Amici Curiae in Support of Neither Party at 11, Glossip, 135 S. Ct. 2726 (No. 14-7955) [hereinafter Pharmacologists’ Brief].

129. J. G. Reves et al., Midazolam: Pharmacology and Uses, 62 ANESTHESIOLOGY 310, 318 (1985); see also Pharmacologists’ Brief, supra note 128, at 11 (“But while midazolam produces sleep and amnesia, with a short duration of activity, it cannot be used to render a person unconscious or to maintain general anesthesia.”).

130. MILLER ET AL., supra note 128, at 842.

131. See Warner Ruling, supra note 66, at 43 (finding that Dr. Evans “testified persuasively”); Glossip, 135 S. Ct. at 2741 (citing Dr. Evans’ testimony).

132. Glossip, 135 S. Ct. at 2786 (Sotomayor, J., dissenting).


135. See About Us, DRUGS.COM, http://www.drugs.com/support/about.html [https://perma.cc/4TLH-XJZ6] (describing mission statement as “to empower patients with the knowledge to better manage their own healthcare”).

drugs.com cautioned that midazolam “should not be used alone for maintenance of anesthesia . . . .” The trial court, in other words, relied on an expert whose testimony was undermined by the very (questionable) source upon which he relied.

Dr. Evans justified his view that midazolam could maintain unconsciousness throughout an execution by explaining that higher doses of the drug, such as the 500 milligrams required by Oklahoma’s new protocol, will cause unconsciousness where a lower dose would not. The district court, however, heard extensive evidence about midazolam’s ceiling effect, above which an increase in dosage produces no discernible effect. While the plaintiffs’ experts admitted uncertainty about precisely how much midazolam meets the drug’s ceiling, they estimated that it was after about 40 or 50 milligrams—that is, ten times less than Oklahoma’s dose. Medical literature similarly indicates that increased doses of benzodiazepines like midazolam will not increase the drug’s pharmacological effects. Moreover, Oklahoma’s large dose is not given in any clinical setting, so Dr. Evans’ conclusions were based on conjecture rather than experience or scientific study.

The plaintiffs’ experts directly contradicted Dr. Evans’ testimony. These experts testified that midazolam at any dose cannot keep a person unconscious.

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137. Glossip, 135 S. Ct. at 2786 (Sotomayor, J., dissenting) (quoting record).
138. To this extent, there is an argument that Dr. Evans’ testimony should not have been admitted at all, because it was not scientific valid. See Daubert v. Merrell Dow Pharma, Inc., 509 U.S. 579, 592–93 (1993). The district court, however, rejected the plaintiffs’ Daubert motion. See Warner Ruling, supra note 66, at 34–40.
139. See Warner PI Hearing, supra note 64, at 639–40.
140. See id. at 108–113, 127, 130–32, 137–39, 145, 342–46, 358 (testimony of Dr. Lubarsky and Dr. Sasich).
141. See id. at 137 (testimony of Dr. Lubarsky); Expert Report of Dr. David A. Lubarsky (Nov. 26, 2014) at 3, Warner v. Gross, No. 14-665 (W.D. Okla. Dec. 22, 2014) [hereinafter Lubarsky Report] (“Oklahoma’s 500 milligram dosage will not rapidly or reliably produce a deep level of anesthesia or coma, and further supports the existing published data that there is a ceiling effect with midazolam and that higher dose [sic] of the drug do not equate to a deeper level of unconsciousness.”).
142. See GEORGE M. BRENNER & CRAIG W. STEVENS, PHARMACOLOGY 192 (2013) (explaining that whereas barbiturates’ anesthetic effect increases with dosage, benzodiazepines’ effect does not after a certain amount); Pharmacologists’ Brief, supra note 128, at 20 (“[T]he response to benzodiazepines cannot be further enhanced to unconsciousness and beyond by increasing the dose.”).
143. See Waldman, supra note 136 (quoting Dr. Kelly Standifer, Chair of the Department of Pharmaceutical Sciences at the University of Oklahoma College of Pharmacy, as saying, “These kinds of doses [used by Oklahoma] are not given by any clinician. To say that they would know what this dose would do? I don’t think anyone can say that.”).
“insensate and immobile in the face of... noxious stimuli.” Unlike Dr. Evans, the plaintiffs’ experts did point to medical literature bolstering this conclusion. The Supreme Court, of course, credited the trial court’s finding that a 500-milligram dose of midazolam is “many times higher than a normal therapeutic dose.” However, that dosage increase is irrelevant if midazolam is incapable at any dose of rendering a person unconscious and insensate to pain, and most of the district court record on the topic indicated precisely that.

The majority responded to these concerns by invoking yet another layer of deference. It stressed that the plaintiffs bore the burden of establishing that midazolam even at very high doses cannot sufficiently anesthetize inmates. Specifically, the Court emphasized that the plaintiffs’ experts could not point to studies definitively corroborating their view that a 500-milligram dose of midazolam cannot induce unconsciousness and maintain anesthesia against excruciating stimuli.

Once again, the Court applied excessive deference. To be sure, civil rights plaintiffs usually do bear the burden of proof. “Burden” is a slippery term, but it typically means either that a party (usually the plaintiff) must present evidence supporting her claim to move forward with litigation, or that the fact-finder must break an evidentiary “tie” by ruling against the party bearing the burden (or both). The Court, however, used the term instead to heighten the plaintiffs’ evidentiary

144. See Warner PI Hearing, supra note 64, at 126 (testimony of Dr. Lubarsky).
147. See Warner PI Hearing, supra note 64, at 106–07 (testimony of Dr. Lubarsky) (noting that midazolam is used “virtually never” to induce anesthesia “because it doesn’t work very well in that regard”); id. at 342–43 (testimony of Dr. Sasich) (explaining that midazolam has “no analgesic effect” and may even increase the perception of pain); id. at 587–88 (testimony of Dr. Katz) (noting that Clayton Lockett regained consciousness despite administration of 100 milligrams of midazolam); Lubarsky Report, supra note 141, at 2 (“Although midazolam can be used to induce anesthesia, it has no analgesic properties, and without the addition of pain-relieving drugs, does not render one insensate to noxious stimuli and is not suitable as a form of anesthesia as a single drug.”).
148. See Glossip, 135 S. Ct. at 2739.
149. See id.
151. See 21B KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5122. For example, in a civil case where the plaintiff bears the burden and must prove her case by a propensity of the evidence, the fact-finder must rule in favor of the defendant where the weight of the evidence on each side is genuinely equal.
burden, requiring the plaintiffs to “prove their case beyond dispute.”\(^{152}\)
So phrased, the majority erects still another hurdle for the plaintiffs, requiring not only that the plaintiffs establish “an unacceptable risk of pain” under the Eighth Amendment, but that they establish that risk “beyond dispute.”\(^{153}\) The law does not support imposing this kind of heightened evidentiary burden on civil rights plaintiffs like the death row inmates here.\(^{154}\)

This move, once again highly deferential to the State, permitted the Court to explain away the plaintiffs’ powerful evidence about midazolam. The Court’s “burden” argument, indeed, makes it nearly impossible to challenge the suitability of an unsuitable drug. Because the consensus view is that midazolam, without the assistance of other drugs, cannot maintain anesthesia in humans against surgical-level stimuli, it would likely be unethical to design a study testing on humans whether it can in fact do so.\(^{155}\) But by faulting the plaintiffs’ experts for not pointing to such a study,\(^{156}\) the Court erected a nearly insurmountable wall of deference, effectively nullifying the Eighth Amendment right. If states can select drugs for purposes that cannot be ethically tested and if courts can discount plaintiffs’ experts for failing to identify a study definitively discrediting the states’ unusual use of a drug, the Eighth Amendment does almost nothing to protect against the states’ dangerous drug choices.

In fairness to the majority, some medical literature does suggest that midazolam can produce unconsciousness.\(^{157}\) Such evidence provides

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\(^{152}\) Glossip, 135 S. Ct. at 2741 (emphasis added).

\(^{153}\) See id. In a separate questionable move, the Court also offered a very deferential articulation of the Eighth Amendment risk standard, see infra Part II.C, thus permitting it to pile deference upon deference.

\(^{154}\) See Crawford-El, 523 U.S. at 594 (“Neither the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provide any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself.”).


\(^{156}\) See Glossip, 135 S. Ct. at 2741 (“[P]etitioners’ own experts effectively conceded that they lacked evidence to prove their case beyond dispute.”).

\(^{157}\) See, e.g., D. Al-Khudhairi et al., Haemodynamic Effects of Midazolam and Thiopentone During Induction of Anaesthesia for Coronary Artery Surgery, 54 BRIT. J. ANAESTHESIA 831, 832–33 (1982); Peter S. Glass et al., Bispectral Analysis Measures Sedation and Memory Effects of Propofol, Midazolam, Isoflurane, and Alfentanil in Healthy Volunteers, 86 ANESTHESIOLOGY 836, 836 (1997); Z. Hussain Khan et al., The Dilemma of Hemodynamic Instability During Induction of Anesthesia: Can Midazolam Serve as a Suitable Substitute for Thiopentone?, 16 MED. J. ISLAMIC REP. OF IRAN 183, 186 (2003); J. G. Reves et al., Comparison Of Two Benzodiazepines For Anaesthesia Induction: Midazolam and Diazepam, 25 CAN. ANAESTHESIATS’ SOC. J. 211, 213
some support for the Supreme Court’s factual conclusions. Most of these studies, however, define “unconsciousness” as the point where the subject stops responding to verbal commands and do not purport to study the crucial question of whether midazolam can maintain anesthesia against excruciating stimuli like surgery. One of these studies also included other potent drugs, so it did not measure whether midazolam on its own could maintain anesthesia against painful stimuli. Nevertheless, these sources, if considered, presumably could provide some support for upholding the district court’s findings about midazolam, especially under the clear error standard. Significantly, though, the Supreme Court appears not to have considered (or known about) these studies.

To the contrary, the Court relied on its conclusion that the lower court’s acceptance of the State’s lone expert witness was not clearly erroneous. But beyond Dr. Evans’ poorly supported testimony, the evidence in the record and a neutral amicus brief in support of neither party pointed strongly to the opposite conclusion. The Court’s

158. See, e.g., Glass et al., supra note 157, at 838 (describing stimuli on subjects as “moderate speaking voice,” “physical shaking,” or “trapezius squeeze”); Khan et al., supra note 157, at 184 (studying the effects of midazolam when used in conjunction with other drugs including a paralytic and a potent opioid analgesic); J. G. Reves et al., supra note 157, at 211 (defining loss of consciousness as “loss of lid reflex and failure to respond to oral commands”) (emphasis in original); Wyant & Studney, supra note 157, at 166 (studying diazepam in procedures not involving surgical stimuli).

159. See, e.g., Al-Khudhairi et al., supra note 157, at 831 (discussing other drugs patients received).

160. Another study notes that midazolam is frequently used as an induction agent for intubation (the placement of a flexible plastic tube in the trachea to maintain an open airway). See, e.g., Mark J. Sagarin et al., Underdosing of Midazolam in Emergency Endotracheal Intubation, 10 ACAD. EMERG. MED. 329, 329 (2003). Intubation can actually be more stimulating than skin incision. See Miller et al., supra note 128, at 1234. To this extent, this source would also lend some support to the Court’s conclusions. However, the Sagarin study included a neuromuscular blocker and concluded that “[b]ecause the patients appear unresponsive as a result of their complete neuromuscular blockade, many physicians do not appreciate that the patient may actually remain awake.” Sagarin et al., supra, at 335. Accordingly, this study does not convincingly support the use of midazolam to induce and maintain unconsciousness against surgical stimuli. Moreover, neither the district court nor the Supreme Court appears to have relied on or even known about this article, so it does not help justify the Court’s acceptance of the district court’s factual findings.

161. See Glossip, 135 S. Ct. at 2741 (relying on Dr. Evans’ testimony).

162. See Pharmacologists’ Brief, supra note 128, at 11 (contending that midazolam “cannot induce unconsciousness”).

163. See Glossip, 135 S. Ct. at 2788 (Sotomayor, J., dissenting) (“[Dr. Evans’] conclusions were entirely unsupported by any study or third-party source, contradicted by the extrinsic evidence
consideration of the evidence before it, then, suggests that it adopted a standard even more deferential than the clear-error standard it purported to apply.

b. Factual Findings About the Availability of Other Drugs

The majority also deferred to the district court’s finding that alternative methods of execution were not available to the Oklahoma DOC. The plaintiffs had suggested that Oklahoma use either sodium thiopental or pentobarbital instead of midazolam as its first drug. The Court discounted this proffer, crediting the lower court’s acceptance of Oklahoma’s assertion that it could not obtain either. Putting aside the legal question of whether the Eighth Amendment, properly understood, requires plaintiffs to proffer an alternative even when the challenged execution procedure causes excruciating pain, the Court was once again too quick to accept these findings.

The Court was correct to review this factual finding for clear error. The availability of a particular drug is an adjudicative fact specific to the litigation. But the Court again applied the standard too deferentially. Even clear-error review requires some consideration of the underlying facts, and the Court provided virtually none.

Justice Alito stated that “the record shows that Oklahoma has been unable to procure [sodium thiopental or pentobarbital] despite a good-faith effort to do so.” Strikingly, however, the Court did not cite a specific source, event, or page of the record. It is therefore unclear what facts support this conclusion.

The Court’s unquestioning acceptance of Oklahoma’s story is especially troubling because the Court knew that Oklahoma had misled it on this point. In arguing that it had attempted and failed to obtain pentobarbital, the State’s brief cited a redacted letter claiming that the State’s source of pentobarbital had stopped providing the drug because proffered by petitioners, inconsistent with the scientific understanding of midazolam’s properties, and apparently premised on basic logical errors.”).

164. See id. at 2738.
165. See id.
166. See infra Part II.C.3.
168. Glossip, 135 S. Ct. at 2738.
169. The DOC Director did testify that his agency could not get pentobarbital or thiopental, but he did not elaborate. See Warner PI Hearing, supra note 64, at 547–49 (testimony of Robert Patton).
of “intense pressure.” As it turned out, the letter in question was sent not to Oklahoma’s DOC, but Texas’s. The letter, therefore, does not bolster Oklahoma’s assertion that it could not get pentobarbital, especially given that the recipient of the letter, Texas, actually continues to get that drug.

To this extent, Oklahoma’s claim that it could not get pentobarbital rested on misleading evidence. The petitioners explained this to the Court in its Reply Brief, and Oklahoma, to its credit, wrote a separate letter to the Court informing the Justices that the State “had inadvertently cited a letter as having been sent to the Oklahoma Department of Corrections.” Nevertheless, the Court unquestioningly accepted Oklahoma’s initial assertion that it could not get the drug.

Belying the Court’s conclusion is the fact that other states regularly execute inmates with pentobarbital. From the start of 2014 to mid-May 2016, there have been sixty-one executions in the United States using pentobarbital. Texas and Missouri alone executed eighteen people using pentobarbital in 2015, and Texas executed six more people using that drug in just the first four months of 2016.

In fairness, it is plausible that Oklahoma is now unable to obtain pentobarbital from its old supplier. Many states are having difficulty procuring drugs for their protocols, and the Court was highly sensitive to


171. See supra note 170.


173. See Reply Brief for Petitioners at 19, Glossip, 135 S. Ct. 2726 (No. 14-7955).


176. See id.; Glossip, 135 S. Ct. at 2796 (Sotomayor, J., dissenting) (describing as “reasonable” the plaintiffs’ assumption that pentobarbital was “available” given that Texas and Missouri both continue to use it in executions); Manny Fernandez & John Schwartz, Confronted on Execution, Texas Proudly Says it Kills Efficiently, N.Y. TIMES (May 12, 2014), http://www.nytimes.com/2014/05/13/us/facing-challenge-to-execution-texas-calls-its-process-the-gold-standard.html [https://perma.cc/J872-XP6Z] (explaining that Texas’ one-drug protocol has posed far fewer problems than many states’ three-drug protocols).
this concern. Nevertheless, given that Oklahoma’s neighboring states still have access to pentobarbital for executions, the Court’s unstudied acceptance of the State’s story suggests that it was uninterested in facts that might complicate its narrative. Furthermore, given that states sometimes share execution drugs, the Court’s conclusion that Oklahoma could not get a drug other states consistently use was highly questionable.

B. Deference as Institutional Analysis

The Glossip majority also emphasized the institutional deference the judiciary owed the Oklahoma Department of Corrections (DOC). The Court insisted that it had no business interfering with state lethal injection procedures, noting that “federal courts should not ‘embroil [themselves] in ongoing scientific controversies beyond their expertise.’” Lethal injection cases, the Court continued, “test the boundaries of the authority and competency of federal courts.” The Court, thus, indicated that federal courts are less well institutionally suited to judge lethal injection procedures than the agencies that design them.

Glossip’s analysis on this count was both under-theorized and mistaken. Given that deference in these terms is essentially an institutional determination, one would think that the Court should couch such deference in comparative institutional analyses. The Court, however, offered virtually none. To be sure, courts have their own institutional limitations, which may largely explain the Court’s reluctance to interfere. But just because courts are not the ideal


178. See Corinna Lain, On Glossip, PRAWFSBLAWG (June 29, 2015), http://prawfsblawg.blogs.com/prawfsblawg/2015/06/on-glossip.html [https://perma.cc/S34M-KGKG] (noting that pentobarbital was used in 15 of the last 17 executions “so someone’s getting it”).


181. Id.; see also Baze, 553 U.S. at 51 (plurality opinion) (emphasis added) (warning that courts should not “substantially intrude on the role of state legislatures in implementing their execution procedures”).
institutions to assess the safety of a lethal injection procedure does not mean that DOCs are actually better.\textsuperscript{182}

To the contrary, as both the plaintiffs and amici emphasized throughout the litigation, the Oklahoma DOC in particular and state departments of corrections more generally have made well-documented mistakes with their lethal injection protocols.\textsuperscript{183} While courts do not have intrinsic scientific expertise, they can hear from experts about drug choices and related issues. To the extent that the Oklahoma DOC did not consult experts,\textsuperscript{184} federal courts, for all their limitations, enjoy some advantages. An inexpert appellate court carefully reviewing scientific evidence may be preferable to an inexpert agency relying on no scientific evidence at all.\textsuperscript{185}

As I have argued elsewhere, courts considering whether an administrative agency deserves deference in individual rights cases should look to see how the agency has actually behaved.\textsuperscript{186} After all, if governmental action lacks democratic pedigree and professionalism, its legitimacy is seriously compromised. Of course, this inquiry is not decisive in an individual rights case.\textsuperscript{187} Courts hearing a lethal injection challenge, for instance, must apply the Eighth Amendment precedent to the execution procedure at issue. Institutional deference, then, usually operates as a lens through which the Court applies its substantive analysis.

This section examines the propriety of Glossip’s institutional deference by considering the DOC’s democratic legitimacy, epistemic authority, and procedural regularity.\textsuperscript{188} This Article focuses on Oklahoma, but, where relevant, also notes other states’ practices, because those states’ mistakes further undermine the Court’s assumption that states can be trusted in this area. Moreover, to the extent that states often copy each other’s lethal injection practices and sometimes even

\textsuperscript{182} Cf. Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy 197 (1994) (criticizing institutional analysis that fails to compare the political branches with the judiciary).


\textsuperscript{184} See infra Part II.B.2.

\textsuperscript{185} Of course, this also raises questions about how courts review scientific evidence. See supra Part II.A.

\textsuperscript{186} See Berger, supra note 14, at 2058–74.

\textsuperscript{187} See id. at 2074–79.

\textsuperscript{188} For a discussion of why these factors should help guide the deference determination, see generally id. at 2054–58.
hire each others’ officials, one state’s errors can help observers recognize problems that may arise elsewhere.

1. Democratic Legitimacy

Much anxiety over judicial review stems from the recognition that “judicial review is a counter-majoritarian force,” which allows unelected judges to override democratically enacted policy decisions. Consequently, judicial deference to governmental actors in constitutional cases is often premised on the political branches’ ostensibly superior democratic accountability. But if public officials are not accountable, judicial deference on that rationale rests on shakier ground. To be sure, courts also lack democratic legitimacy, but if an administrative actor does too, then the judiciary’s relative democratic deficit is far more modest. Of course, judicial deference might still be appropriate on some other ground, but where an agency is largely unaccountable, courts should not premise deference on the agency’s political authority.

Glossip deferred to the DOC without examining its democratic legitimacy. This sub-section examines democratic legitimacy by considering legislative guidance, oversight, and transparency. Though not exhaustive, these factors shed substantial light on whether an agency has acted with democratic legitimacy worthy of judicial deference.

a. Legislative Guidance

Consideration of an agency’s democratic accountability starts with the issue of legislative guidance. After all, the unelected administrator takes her marching orders from the elected legislature, so the clarity and precision of the relevant statutes help determine the strength of the link between politically accountable officials and agency action. Indeed, the whole legitimacy of delegation is premised on the legislature

189. See Denno, supra note 35, at 1341.


191. See id. at 17–19 (“[T]he policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system.”); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 77–78 (1980).


193. See Berger, supra note 14, at 2061–63.

delegating with a sufficiently “intelligible principle.” As Professor Ely argued, legislatures sometimes vaguely delegate matters to unaccountable lower-level officials precisely because they seek to escape “the sort of accountability that is crucial to the intelligible functioning of a democratic republic.”

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

Lethal injection provides a case in point. While there is democratic support for capital punishment in some states, the particulars of execution procedures are usually beyond the contemplation of state legislators and the general public. Oklahoma statutes, for example, say nothing about midazolam. The legislature, then, had nothing to do with the drug selection.

Of course, there is some democratic legitimacy here, given that the legislature has selected lethal injection as the method of execution. To this extent, this factor is somewhat equivocal. Moreover, the legislature’s delegation of the drug selection to the DOC seems reasonable, given the legislature’s own lack of expertise and the fast-changing drug market. However, that said, the legislature of Oklahoma provided no guidance to bureaucrats selecting the drugs, so the resulting protocol cannot be said to have significant democratic authority, especially given the lack of oversight and transparency.

196. ELY, supra note 191, at 132.
199. OKLA. STAT. tit. 22, § 1014 (2014) (“The punishment of death shall be carried out by the administration of a lethal quantity of a drug or drugs . . . .”)
b. Oversight

Once legislatures have delegated authority to agencies, they can maintain some political accountability by proper oversight. Many governmental departments are large enough that officials far down the chain of command—and far removed from the chief executive’s political appointments—wield significant policymaking authority that can impact individual rights. As a result, political accountability hinges substantially on communication both within the agency and between the agency and politically accountable actors. In other words, agencies ideally should try to maintain a link both between the agency leader and elected officials and also among the various administrators operating at different levels of the administrative bureaucracy.

Elected officials in Oklahoma did maintain some connection to the redesigned lethal injection protocol, but it can hardly be deemed “oversight.” The Attorney General ostensibly oversaw a team of lawyers who designed the new protocol, but rather than encourage the team to review the options carefully, he only exhorted it to act quickly. One lawyer involved in the process explained that “we would get word from the Attorney General’s Office that we better hurry up and do something.”

Nor did other officials engage meaningfully in the process. Warden Anita Trammell, who admitted she was “responsible” for the execution protocol, conceded that she knew nothing about midazolam. Though she admitted to signing the protocol, she played no role in designing it and did not even know who did. “I signed the damn thing,” Trammell said. “I did not write that policy. I did not choose those drugs.”

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201. See PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 130 (2d ed. 2002) (explaining that “the detailed understanding and actual implementation” of many agency programs occur “at some remove from the political appointees”).
203. Warner PI Hearing, supra note 64, at 289–90 (testimony of Michael Oakley, General Counsel, Oklahoma DOC).
204. See id. at 90 (testimony of Anita Trammell, Warden, Oklahoma State Penitentiary).
205. See id. at 91.
206. Id. at 90.
An investigation similarly concluded that a different warden “carelessly assumed others would fulfill his own oversight responsibility. . . .” 208 The Department of Corrections, the Governor’s office, and the Attorney General’s office all also failed on different occasions to review execution documents to avoid errors. 209 Indeed, Oklahoma’s administrative hierarchy was so ill-defined that one news story concluded that “when it comes to Oklahoma’s executions, it’s unclear who is really running the show.” 210 The result was chaos. This record hardly suggests substantial political oversight of the relevant administrative actors. Nevertheless, though the record contained ample evidence of the DOC’s disarray, 211 the Court appears not to have considered it when it deferred to the State.

c. Transparency

The Court also failed to consider the DOC’s transparency. Governmental accountability is premised on popular monitoring of governmental activities; if the people cannot know what their government is doing, accountability is severely compromised. 212 The risk of inadequate transparency is heightened in the agency setting, where officials are usually unelected and where the layers of bureaucracy and technical nature of the subject matter often shield a department’s affairs from public scrutiny. 213 While this problem is probably impossible to eliminate, transparency allows the people and legislators to monitor agency action more carefully. 214

The Oklahoma protocol fares even worse under this metric. Oklahoma (like other states) quite literally conceals executions when things start to go wrong. When Clayton Lockett started convulsing on


209. See id. at 99.


211. See, e.g., text accompanying notes 116–17 (discussing DPS interviews).

212 See ELY, supra note 191, at 125 (“[P]opular choice will mean relatively little if we don’t know what our representatives are up to.”); Peter M. Shane, Legislative Delegation, the Unitary Executive, and the Legitimacy of the Administrative State, 33 HARV. J.L. & PUB. POL’Y 103, 108 (2010) (“The essence of accountability lies in the transparency of government actions . . . .”).


the gurney, state officials closed the blinds to the execution chamber.\textsuperscript{215} Agency policy can hardly be said to have democratic legitimacy when the government tries to conceal its mistakes.

Oklahoma, like many states, also uses a paralytic in its lethal injection procedure to try to conceal any pain the inmate might feel. The paralytic makes it much harder to determine whether an inmate is dying an excruciating death, unless something goes horribly wrong.\textsuperscript{216} Oklahoma botched the Lockett execution so badly that the paralytic failed to take effect, but the paralytic likely conceals pain from public view during other executions.\textsuperscript{217}

States’ uses of blinds and paralytics are symptomatic of a broader lack of transparency in lethal injection. Many states design and implement their lethal injection procedures behind a veil of secrecy, which makes it extremely difficult for inmates to know how they will be executed. Most states release some facts, such as the drugs they plan to use, but many conceal other crucial details.\textsuperscript{218} Indeed, some states have passed lethal injection secrecy laws that deem execution procedures a state secret, sometimes explicitly exempting them from state Freedom of Information Act inquiries.\textsuperscript{219} Oklahoma’s statute, for instance, conceals not only the identities of persons who participate in executions or who supply “the drugs, medical supplies, or medical equipment” for execution procedures, but also exempts other important information from otherwise applicable state law.\textsuperscript{220} As a result, it is virtually impossible for inmates to know whether the state has safe drugs, proper equipment, and qualified personnel.


\textsuperscript{216} See Warner PI Hearing, supra note 64, at 678 (statement by state’s witness conceding that a conscious person “would not be able to move from the paralytic”); Berger, supra note 30, at 1374.

\textsuperscript{217} See supra note 19 and infra notes 361–364 and accompanying text.

\textsuperscript{218} See Berger, supra note 30, at 1391–92.


\textsuperscript{220} See OKLA. STAT. § 22-17-1015(B) (2011) (“The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.”).
This secret information bears directly on the safety of execution procedures.\textsuperscript{221} When states operate behind closed doors, it is much easier for them to cut corners and make mistakes. In the lethal injection setting, these mistakes can greatly heighten the risk of pain.\textsuperscript{222} Similarly, when states hide the credentials of their execution team members, they heighten the risk that states will employ under-qualified persons, who will make serious mistakes, such as those that resulted in the botched Lockett execution.\textsuperscript{223} Of course, Oklahoma \textit{did} publish a report summarizing its mistakes,\textsuperscript{224} but it did so only \textit{after} the media had exposed its mistakes anyway.

To be clear, secrecy is sometimes legitimate. For example, states have a legitimate interest in concealing the \textit{identities} of its execution team members. Oklahoma, however, also refuses to disclose their \textit{qualifications} and \textit{training}, crucial information for assessing the procedure’s safety. Some states, including Oklahoma, also explicitly give officials discretion to make last-minute changes to their protocols without giving condemned inmates notice of such deviations.\textsuperscript{225} As a result, states can substitute dangerous or illegal drugs at the last minute without providing any opportunity for either inmates or neutral chemical testers to verify the drugs’ quality and efficacy.\textsuperscript{226} In rushing to defer to the DOC, the Court did not examine these concerns at all.

\textsuperscript{221} See, e.g., Lopez v. Brewer, 680 F.3d 1068, 1075 (9th Cir. 2012) (“[T]he inability of the class of condemned prisoners to procure details about the execution process is troubling.”).

\textsuperscript{222} See Berger, \textit{supra} note 30, at 1432; Denno, \textit{supra} note 35, at 1348.

\textsuperscript{223} See Berger, \textit{supra} note 30, at 1433; \textit{infra} Part II.B.2.


\textsuperscript{226} See First Amended Complaint at 31–35, Wood v. Ryan, No. CV-14-1447-PHX-NVW J, 2014 WL 3385115, at *1 (D. Ariz. July 10, 2014) (“Although witnesses did not know that Defendants secretly were improvising with the amounts of drugs they were giving to Wood, it became clear to everyone that something was wrong.”).
2. **Expertise**

Whereas agencies’ political authority is often weak, their epistemic authority is ostensibly strong. Administrative agencies exist in large part to bring specialized expertise to complicated problems.\(^{227}\) Accordingly, deference to agency action often rests substantially on the agency’s presumptive expertise.\(^{228}\)

In practice, however, agencies like the Oklahoma DOC do not always possess actual expertise over subjects they administer. Correctional officials may have expertise in prison security, but they rarely have the kind of medical training helpful for designing and implementing safe lethal injection procedures.\(^{229}\) Cognizant of this shortcoming, officials often delegate lethal injection protocols down the chain of command to other prison personnel, but those people *also* lack such training.\(^{230}\) While many states incorporate medical personnel at some stage in the procedure, the actual protocols are often designed by administrative officials who demonstrate little understanding of the drugs’ risks.\(^{231}\)

Many states are remarkably unconcerned with their own epistemic shortcomings. Historically, most states adopted lethal injection procedures by copying Oklahoma’s 1977 three-drug protocol without actually studying it.\(^{232}\) For several decades, many states did not require the execution teams to include trained personnel, even though the protocol created serious risks if implemented inexpertly.\(^{233}\) Years later, the Oklahoma medical examiner who initially designed the protocol explained, “it never occurred to me when we set this up that we’d have complete idiots administering the drugs.”\(^{234}\)

This inexpert approach continues today in several states, including Oklahoma. When Oklahoma realized that it did not have enough pentobarbital to proceed with executions, it sought a solution so that it could restart executions. However, instead of turning to doctors or

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227. *See, e.g.,* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 8–29 (1985) (explaining that much impetus for the creation of administrative agencies is desire for expert rather than lay or political judgment).


233. *See, e.g.,* Denno, *supra* note 198, at 90–120.

234. Harbison v. Little, 511 F. Supp. 2d 872, 875 (M.D. Tenn. 2007) (quoting E-mail from A. Jay Chapman, Forensic Pathologist, Santa Rosa, Cal., to Deborah W. Denno, Professor of Law, Fordham Law Sch. (Jan. 18, 2006)).
scientists, the State delegated the task to a team of lawyers, who tried in vain to find “phenobarbital.”

This team faced substantial political pressure “to make the decision, get it done, hurry up about it.” After just four days, the State adopted a new execution protocol including midazolam. It is quite clear that the lawyers involved did not understand midazolam’s shortcomings. One team member testified that “we knew midazolam had the same properties as pentobarbital.” This understanding is plainly wrong, as midazolam lacks analgesic properties and, unlike pentobarbital, is not a barbiturate.

Nor did the team of lawyers consult reputable sources about the drug. A former General Counsel for the Oklahoma DOC explained that he had done his own independent research, including looking “online, past the key Wiki leaks, Wiki leaks or whatever it is.” Though it is difficult to discern exactly what these lawyers consulted, it seems clear that they did not consult medical textbooks, journals, or professionals. A multicounty grand jury ultimately concluded that the new protocol was “vague and poorly drafted” and lacked several important safeguards.

235. See Patton Interview, supra note 56, at 56.


237. See Oakley Interview, supra note 236, at 19 (referencing the “pressure” to “get it done”); Warner PI Hearing, supra note 64, at 289–90 (testimony of Mike Oakley) (acknowledging “political pressure” to “get it done and get it in place”); Aspinwall, supra note 210.


239. Warner PI Hearing, supra note 64, at 287 (testimony of Mike Oakley).

240. See supra Part II.A.3.a.

241. See Stern, supra note 19.


Expertise problems also extended to the procedure’s administration, thereby further heightening the risk that the State’s selected drugs would inflict excruciating pain. Oklahoma officials, indeed, admitted that there had been “an atmosphere of apprehension” before the Lockett execution, because they realized that execution-team training had been inadequate.\textsuperscript{244} Though the protocol included a doctor and paramedic, neither had attended training sessions.\textsuperscript{245} Consequently, they did not have practice interacting with the team, and the other team members never received the benefit of their professional expertise.\textsuperscript{246} A warden later explained that “everyone knew their specific job, but they didn’t know anybody else’s job, so if I had an employee leave, we didn’t know what that person did.”\textsuperscript{247} The execution team also lacked basic but crucial information, such as how quickly the midazolam would take effect.\textsuperscript{248} Nor did it have “training protocols or contingency plans on how to proceed with an execution if complications occur during the process.”\textsuperscript{249}

This lack of expertise caused Lockett’s botched execution. The doctor failed to set the catheter properly, even though Lockett’s veins were “good” for IV access.\textsuperscript{250} Compounding that mistake, this same physician mistakenly judged Lockett to be fully anesthetized and permitted the injection of the second and third drugs, only for Lockett to awaken and suffer agonizing pain.\textsuperscript{251} While it may seem encouraging that Oklahoma employed a doctor for its procedure, doctors without training in anesthesiology lack the expertise to monitor someone’s anesthetic depth

\textsuperscript{244} See Interview by Okla. Dep’t of Pub. Safety with Paramedic, in Okla. City, Okla., Second Interview, Transcript at 22 (July 31, 2014).
\textsuperscript{245} See Interview by Okla. Dep’t of Pub. Safety with Paramedic, in Okla. City, Okla., First Interview, Transcript at 6 (May 23, 2014) [hereinafter Paramedic First Interview]; Interview by Okla. Dep’t of Pub. Safety with Physician, in Okla. City, Okla., Transcript at 12 (May 27, 2014) [hereinafter Physician Interview].
\textsuperscript{246} See Lockett Execution Report, supra note 224, at 20–22.
\textsuperscript{247} Oklahoma Interim Report, supra note 208, at 62.
\textsuperscript{248} See Sean Murphy, Oklahoma Prisons Director Who Presided Over Botched Executions Announces Resignation, U.S. News (Dec. 4, 2015), http://www.usnews.com/news/us/articles/2015/12/04/oklahoma-prisons-boss-resigns-amid-execution-investigation [https://perma.cc/9Q8U-WYX7]; Interview by Okla. Dep’t of Pub. Safety with Anita Trammell, Warden, Okla. State Penitentiary, in Okla. City, Okla., Transcript at 97 (June 2, 2014) [hereinafter Trammell Interview] (“with this new drug [midazolam] and not knowing if there was enough left or if there was enough in his system. You know it just didn’t know—just didn’t know what to do on it.”).
\textsuperscript{249} Lockett Execution Report, supra note 224, at 22.
\textsuperscript{251} See Lockett Execution Report, supra note 224, at 11.
accurately.\textsuperscript{252} Similarly, a doctor who has not set a catheter recently may not be able to do so properly. In fact, the participating physician later said, that he “wasn’t wanting to do the IV access in the first place.”\textsuperscript{253}

Oklahoma’s next execution of Charles Warner was also problematic. Warner’s last words were, “My body is on fire.”\textsuperscript{254} The State later admitted that it had injected Warner with the wrong third drug.\textsuperscript{255} Oklahoma, however, learned slowly from this mistake, as it subsequently suspended its next scheduled execution of Richard Glossip when doctors discovered at the last minute that the State had again obtained the wrong drug.\textsuperscript{256} This mistake, on its own, likely does not increase the risk of serious pain; after all, the correct third drug already causes excruciating pain. Nevertheless, the litany of errors hardly suggests that the State had expertise worthy of deference. As one reporter editorialized, “[t]he head of Oklahoma’s Department of Corrections has overseen three scheduled executions during his brief time in Oklahoma. Each time, there was a major screw-up.”\textsuperscript{257}

Other states’ track records are no more encouraging.\textsuperscript{258} When Missouri still used the three-drug protocol, it instructed its executioners to inject the drugs as quickly as possible, mistakenly believing that its first drug, thiopental, renders a person fully unconscious within fifteen seconds. In reality it takes two-and-a-half minutes.\textsuperscript{259} Missouri also entrusted its procedure to a dyslexic doctor, who later admitted he had

\textsuperscript{252} See Taylor Trial Transcript at 71, Taylor v. Crawford, No. 05-4173 (June 26, 2006) 2006 WL 1779035 (testimony of expert anesthesiologist).

\textsuperscript{253} Physician Interview, supra note 245, at 56.

\textsuperscript{254} See Buncombe, supra note 60.


\textsuperscript{256} See Chris McDaniel, Execution Mistakes Followed Corrections Director from Arizona to Oklahoma, BUZZFEED NEWS (Nov. 11, 2015), http://www.buzzfeed.com/chrismdaniel/execution-mistakes-followed-corrections-director-from-arizona#nodRW3C9w [https://perma.cc/T7GE-ULTE].

\textsuperscript{257} See id.

\textsuperscript{258} See, e.g., Morales v. Tilton, 465 F.2d 972, 979 (N.D. Cal. 2006) (“[T]he [California] team members almost uniformly have no knowledge of the nature or properties of the drugs that are used or the risks or potential problems associated with the procedure.”).

\textsuperscript{259} Deposition of Larry Crawford at 129–31, Taylor v. Crawford, 2006 WL 1779035 (W.D. Mo. June 26, 2006) rev’d 487 F.3d 1072 (8th Cir. 2007) (No. 05-4173) (containing explanation by DOC Director that drugs are injected in rapid succession); Berger, supra note 30, at 1437.
been unable to calculate how much anesthetic he had prepared for executions.²⁶⁰

Some states also have demonstrated that they do not know or care enough to find legal and safe drugs. For example, Missouri purchased and used drugs from an Oklahoma compounding pharmacy that subsequently admitted to 1,892 violations of state pharmacy regulations.²⁶¹ Though Missouri capital inmates had objected that the pharmacy’s facilities were not FDA-approved and created a substantial risk that the pentobarbital compounded there would be of unreliable “sterility, identity, purity, potency, and efficacy,”²⁶² the State pressed on with executions. When the initial Oklahoma pharmacy finally agreed not to provide drugs for future executions, it appears that Missouri simply found another under-regulated compounding pharmacy.²⁶³ Rather than make an effort to find safe drugs, the Missouri focused instead on trying to keep its drug choices secret.²⁶⁴

States have also looked for questionable drugs abroad. Nebraska repeatedly tried to purchase sodium thiopental from Chris Harris, an American salesman in India without a pharmaceutical background.²⁶⁵ Nebraska paid over $54,000 to Harris for drugs without ever investigating his qualifications or the legality of importing those drugs.²⁶⁶ A reporter subsequently discovered that Harris’ ostensible manufacturing facility was an empty apartment near Calcutta from which Harris had moved away two years earlier.²⁶⁷ Given these

²⁶⁰ See Taylor, 2006 WL 1779035 at *7; Dr. John Doe Deposition at 20–25, Taylor, 2006 WL 1779035.


²⁶³ See Berger, supra note 30, at 1369–70.

²⁶⁴ See id. at 1369–71.


²⁶⁷ See McDaniel, supra note 261.
circumstances, it seems doubtful that Harris had access to uncontaminated, safe thiopental, but, even if he did, federal law clearly prohibits its importation anyway.\footnote{See Cook v. FDA, 733 F.3d 1, 11–12 (D.C. Cir. 2013).} At least three other states made similar mistakes, paying Harris for drugs they could not legally import.\footnote{See McDaniel, supra note 261.}

Other states also have had difficulties employing qualified people to set the catheter and equip the execution chamber.\footnote{See, e.g., Lopez v. Brewer, 680 F.3d 1068, 1074–75 (9th Cir. 2012) (noting Arizona’s numerous problems with setting the IV line).} When Florida execution team members misplaced Angel Diaz’s IV line, the drugs spilled into the surrounding tissue, causing excruciating pain.\footnote{See Fla. Governor’s Comm’n on Admin. of Lethal Injection, Final Report with Findings and Recommendations 8 (2007) (finding “[f]ailure of the training of the [Florida] execution team members.”).}

During the botched execution of Joseph Wood, Arizona injected fifteen times the standard dose of its drug.\footnote{See Fernanda Santos, Executed Arizona Inmate Got Fifteen Times Standard Dose, Lawyers Say, N.Y. TIMES (Aug. 1, 2014), http://www.nytimes.com/2014/08/02/us/executed-arizona-man-given-15-times-standard-dose-lawyers-say.html?_r=0 [https://perma.cc/H7UK-9FHC].} As one professor of anesthesiology remarked afterwards, “[t]hey’re making this up as they go along.”\footnote{See id. (quoting Dr. Joel Zivot, Assistant Professor of Anesthesiology and Surgery at Emory University Hospital).}

Court justices who voted to stay an execution so that the court could examine a challenged execution procedure.  

When governmental officials do not recognize or admit serious mistakes, deference to them on account of their epistemic authority is deeply misplaced. In his Baze concurrence, Justice Stevens made a related argument, observing that states designing and implementing lethal injection procedures usually operate “with no specialized medical knowledge and without the benefit of expert assistance or guidance.” Consequently, contended Justice Stevens, DOC officials’ choices “are not entitled to the kind of deference afforded legislative decisions.” The Glossip majority, by sharp contrast, turned a blind eye to these concerns. The record in Glossip was replete with examples of Oklahoma’s incompetence, and yet the Court proceeded as though the State possessed genuine expertise deserving of deference.

3. Procedural Regularity

A final consideration relevant to institutional deference involves agency procedures. When agencies do not follow established procedures, they are more likely to engage in arbitrary behavior undeserving of deference. Once again, Oklahoma’s lethal injection protocol does not fare well under this measure.

As noted above, Oklahoma’s procedures for selecting the drug midazolam were haphazard. Its procedures for injecting the drugs were no better. In at least one case, Oklahoma failed to follow its own execution protocol and injected the wrong drug. Subsequent
investigation demonstrated that the State had lacked the kind of careful administrative procedures necessary to prevent such a mistake.\textsuperscript{285} Additionally, during the Lockett execution, the State deviated from its own protocol in several ways.\textsuperscript{286} For example, one paramedic execution team member admitted that his syringe contained a smaller amount of the second and third drugs than it had had for previous executions.\textsuperscript{287} This team member speculated that the State’s unusual decision to attempt two executions in the same evening likely contributed to this confusion.\textsuperscript{288}

Similarly, the State did not have the proper equipment available, so the warden had to borrow needles and syringes at the last minute “from our medical.”\textsuperscript{289} As a result, the doctor did not have the proper needle for the femoral catheter insertion he attempted and also lacked other equipment to do the job correctly.\textsuperscript{290} These equipment problems surely contributed to the doctor’s mistakes.\textsuperscript{291} To make matters worse, the execution team members did not mention the various problems to each other or their superiors “until after everything went — gone wrong.”\textsuperscript{292}

State officials also did not know what procedures applied when problems arose. As Lockett’s execution became increasingly gruesome, state officials decided to stop it, but they did not know what procedures to use to halt the execution.\textsuperscript{293} In the meantime, Lockett died.\textsuperscript{294}

Indeed, Oklahoma execution team officials often departed from written procedures. During some Oklahoma executions, the Director of the DOC modified the execution protocol without authority to do so.\textsuperscript{295} The procedural anomalies were so egregious that the Oklahoma Attorney General, to his credit, ultimately acknowledged that “a number
of individuals responsible for carrying out the execution process were careless, cavalier and in some circumstances dismissive of established procedures that were intended to guard against the very mistakes that occurred.\footnote{296}

Other lethal injection states have also historically had difficulty following their own written lethal injection protocols.\footnote{297} Missouri, for example, has permitted haphazard deviations from its protocol,\footnote{298} sometimes injecting less anesthetic than its protocol required.\footnote{299} A federal judge concluded that California’s protocol had suffered, \textit{inter alia}, from inconsistent screening of execution team members, inadequate training, and inconsistent record keeping.\footnote{300} Arizona, too, permitted several deviations from state law and internal procedures. For instance, its execution team members lacked the qualifications required by the state protocol.\footnote{301}

Time and again Oklahoma and other lethal injection states have demonstrated that they do not consistently follow the rules that should bind them, as though ordinary procedures do not apply when states implement the death penalty. States also commonly follow each other’s practices and even hire each other’s officials, so one state’s practices can be quite probative of another’s. Indeed, the official responsible for Arizona’s deviations from its protocol subsequently took over Oklahoma’s procedure. Once there, he made similar mistakes and

\footnote{296. Press Release from Okla. Attorney Gen. Scott Pruitt (May 19, 2016), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=258&article_id=21802 [https://perma.cc/T2F3-ZV6N]. In fairness, the Court in \textit{Glossip} did not have the benefit of this admission or the related May 19, 2016 Interim Report. Nevertheless, the plaintiffs still presented substantial evidence of Oklahoma’s unprofessional approach to lethal injection throughout the litigation, and yet the Court ignored it. \textit{See}, e.g., Proposed Findings of Facts, \textit{supra} note 236, at 1–50; State AG Brief, \textit{supra} note 49, at 5–23; Lockett Execution Report, \textit{supra} note 224, at 14–19, 20–25; Oakley Interview, \textit{supra} note 236; Trammell Interview, \textit{supra} note 248. To this extent, the Multicounty Grand Jury’s findings merely corroborated arguments the plaintiffs had already made based on available evidence.

\footnote{297. \textit{See}, e.g., \textit{Jackson v. Danberg}, 594 F.3d 210, 227 (3d. Cir. 2010) (acknowledging Delaware’s “noncompliance” with its own protocol).

\footnote{298. \textit{See} \textit{Taylor v. Crawford}, 2006 WL 1779035, at *7 (W.D. Mo. June 26, 2006) (“[One defendant] also testified that he felt that he had the authority to change or modify the formula as he saw fit. It is apparent that he has changed and modified the protocol on several occasions in the past.”).

\footnote{299. \textit{See} id.


\footnote{301. \textit{See} \textit{West v. Brewer}, 2011 WL 6724628, at *6 (D. Ariz. Dec. 21, 2011) (“ADC Director Charles Ryan has admitted that he conducted the last five executions with full knowledge that at least one of the Medical Team members did not hold a medical license and did not administer IVs in his current employment.”); \textit{McDaniel}, \textit{supra} note 256.}}
presided over two botched executions and a third that was called off because the State had purchased the wrong drug. Just like the lack of expertise, these procedural shortcomings substantially heighten the risk that lethal injection procedures will cause excruciating pain. Even if midazolam were a suitable anesthetic, Oklahoma’s protocol would raise serious constitutional concerns, because the State implements the protocol too haphazardly to protect against agonizing deaths. Had the Court grappled with these serious procedural shortcomings, it would have been much harder to justify the deference that pervaded the entire opinion.

* * *

In short, Oklahoma’s DOC developed lethal injection protocols haphazardly. It acted with modest legislative guidance, minimal oversight, and even less transparency, expertise, and procedural regularity. Collectively, these factors should cut against deference.

To be clear, the point is not that the Court should have applied the exact institutional analysis offered here. Nor is it that these factors should be legally decisive. Rather, the point is that lethal injection states, especially Oklahoma, have demonstrated that they do not deserve courts’ benefit of the doubt. The Court, however, ignored this record of alarming incompetence and instead offered great deference on the theory that courts should not interfere with the states in these kinds of matters. 303

C. Deference as Doctrine

The Court also reformulated the Eighth Amendment test for method-of-execution cases to offer significantly more deference to states than earlier formulations had. Unlike the last two forms of deference, this one is built into the doctrine itself. Just as the rational basis test in equal protection (and other) cases approaches governmental action deferentially, so too does Glossip’s articulation of the Eighth Amendment standard. This subsection begins by summarizing the relevant precedent. It then turns to Glossip’s articulation of the Eighth Amendment risk standard and the requirement that plaintiffs proffer an available alternative.

302. See McDaniel, supra note 256; Murphy, supra note 248.
1. Method-of-Execution Precedent

Method-of-execution cases comprise only a small subset of Supreme Court Eighth Amendment decisions, and the precedent does not fully answer questions that arise in lethal injection cases today. In part because the Court did not incorporate the Eighth Amendment to apply against the states until 1962, the early cases provide only marginally helpful dicta. For example, though In re Kemmler examined New York’s electrocution procedure, it held that the Eighth Amendment did not apply to the states and therefore rejected the challenge. For that reason, its precedential value for contemporary lethal injection cases is limited. Similarly, though courts and commentators still cite Louisiana ex rel. Francis v. Resweber frequently, that case presented the unusual question of whether it would be cruel and unusual for a state to electrocute a capital inmate after the initial electrocution attempt failed.

To add more confusion, the most relevant Supreme Court precedent at issue in Glossip was the highly fractured decision in Baze v. Rees. That case resulted in seven separate opinions, none of which garnered more than three votes. Though some courts and commentators (including this author) have treated Chief Justice Roberts’ plurality opinion as controlling, others have questioned this proposition, including Justice Sotomayor in her Glossip dissent. Moreover, even if one accepts the Roberts plurality opinion as the holding of the Court, that

305. See In re Kemmler, 136 U.S. 436, 443 (1890).
309. See Berger, supra note 27, at 279. See generally Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”).
310. See Justin F. Marceau, Lifting the Haze of Baze: Lethal Injection, the Eighth Amendment, and Plurality Opinions, 41 ARIZ. ST. L.J. 159, 213–17 (2009) (arguing “there is . . . , no justification for affording a non-majority standard the imprimatur of the Eighth Amendment”).
opinion could be read as articulating different legal standards, sowing legal uncertainty.  

That said, there are certain principles animating these decisions. Prior to Glossip, Supreme Court method-of-execution cases signaled the Eighth Amendment’s protection against excruciating deaths. In Kemmler, for example, the Court quoted the New York Court of Appeals conclusion that there was little to warrant the belief that this new mode of execution [electrocution] is cruel, within the meaning of the constitution . . . . On the contrary, we agree with the court below that it removes every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in painless, death.  

Kemmler, thus, found the challenged execution method unproblematic, because the evidence indicated that the execution would result in painless death.  

Resweber, too, evinced a similar concern for protecting the condemned from pain. Some courts have emphasized Resweber’s statement that “[a]ccidents happen for which no man is to blame,” as though to suggest that courts should excuse painful executions as unfortunate but tolerable. However, some readers miss that, immediately prior to this sentence, Justice Reed explained, “As nothing has been brought to our attention to suggest the contrary, we must and do assume that the state officials carried out their duties under the death warrant in a careful and humane manner.” In other words, the Eighth Amendment forgives the state for unforeseeable accidents but protects the condemned from executions in which state officials have not taken care to assure that death is achieved in “a careful and humane manner.” In Resweber, there was no reason to think that state officials

312. See Denno, supra note 35, at 1347–54.
313. It is beyond the scope of this Article to provide a thorough summary of pre-Glossip method-of-execution cases. For a comprehensive discussion of those cases, see generally Denno, supra note 306, at 333–46.
315. See Kemmler, 136 U.S. at 443–44; see also Wilkerson v. Utah, 99 U.S. 130, 136 (1879) (“[P]unishments of torture . . . and all . . . unnecessary cruelty, are forbidden . . . .”).
318. See id. at 462.
had acted carelessly, but the case quite clearly contemplated that the outcome may be different where state officials do not carry out their duties carefully and humanely.

Though Resweber rejected the inmate’s claim, like Kemmler, it also emphasized the constitutional prohibition of painful executions.\(^{319}\) “The traditional humanity of modern Anglo-American law,” the plurality wrote, “forbids the infliction of unnecessary pain in the execution of the death sentence.”\(^{320}\) The plaintiff’s claim failed, not because the Court tolerated procedures giving rise to substantial risk of excruciating death, but because “[t]here [was] no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution.”\(^{321}\) Resweber, thus, expressed concern for the inmate’s experience during the execution. While the word “necessary” may signal that the law will tolerate some pain inherent in executions (such as, perhaps, the setting of a catheter), the import of Resweber, like Kemmler, is that courts must guard against the infliction of unnecessary pain.

Even the Baze plurality acknowledged that while “an isolated mishap alone does not give rise to an Eighth Amendment violation,”\(^{322}\) execution procedures carrying a “substantial risk of serious harm” do.\(^{323}\) Echoing Resweber, Baze noted that prison officials cannot be deemed “subjectively blameless for purposes of the Eighth Amendment,”\(^{324}\) when an execution procedure’s systemic problems create serious risks of harm. Unforeseeable accidents, in other words, are one thing, but protocols that entail a sufficient “risk of future harm . . . can qualify as cruel and unusual punishment.”\(^{325}\)

Admittedly, this case law only can take us so far. Prior to Baze, the Court said little about risk. That said, Resweber gestured towards that problem when it differentiated between “accidents . . . for which no man is to blame” and cases in which state officials have not “carried out their duties . . . in a careful and humane manner.”\(^{326}\) Baze reasoned

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319. See Kemmler, 136 U.S. at 447 (“Punishments are cruel when they involve torture or a lingering death.”).
320. Resweber, 329 U.S. at 463.
321. Id. at 464 (emphasis added).
323. Id. (quoting Farmer v. Brennan, 511 U.S. 825, 842 (1994)).
324. Id. (quoting Farmer, 511 U.S. at 846 n.9).
325. Id. at 49.
326. Resweber, 329 U.S. at 462.
similarly.\textsuperscript{327} In other words, Eighth Amendment precedent differentiates between unforeseeable accidents, on the one hand, and more systemic procedural flaws, on the other.

2. \textit{The Risk Standard}

\textit{Glossip}'s deferential approach ignored these important Eighth Amendment principles. \textit{Glossip} insisted that the plaintiffs had to prove that the challenged protocol is “sure or very likely to cause serious illness or needless suffering.”\textsuperscript{328} To justify this heightened risk standard, the Court emphasized that “because it is settled that capital punishment is constitutional, ‘it necessarily follows that there must be a [constitutional] means of carrying it out.’”\textsuperscript{329} “[W]hile most humans wish to die a painless death,” wrote Justice Alito, “many do not have that good fortune.”\textsuperscript{330} As though to confirm his articulation of the risk standard, Justice Alito repeated the “sure or very likely” language in four separate places.\textsuperscript{331}

This standard fails to incorporate the precedent’s concern for the inmate’s pain and attention to the state’s level of care.\textsuperscript{332} As articulated, the \textit{Glossip} risk standard appears to tolerate a high risk of excruciating pain. Under this approach, a procedure that caused excruciating suffering 55\% of the time would almost certainly be constitutional, because the pain, though likely, could not be called “very likely.” Under this standard, even a procedure causing great pain in, say, 70\% of executions may pass muster.\textsuperscript{333}

\textsuperscript{327} \textit{Baze}, 553 U.S. at 50 (noting that procedures giving rise to a substantial risk of serious pain would violate the Eighth Amendment).


\textsuperscript{329} \textit{Id.} at 2732–33 (quoting \textit{Baze}, 553 U.S. at 47).

\textsuperscript{330} \textit{See id.} at 2733.

\textsuperscript{331} \textit{See id.} at 2736, 2737, 2739, 2745.

\textsuperscript{332} The Court also does not acknowledge that its “sure or very likely” standard originated in a case about a prisoner’s exposure to secondhand smoke, \textit{see} \textit{Helling} v. \textit{McKinney}, 509 U.S. 25, 33 (1993), or explain why the risk standard in such a prison conditions case ought to apply also in the method-of-execution setting.

\textsuperscript{333} Prior to \textit{Glossip}, some informed commentators had understood the Eighth Amendment standard to weigh the risk of pain, the degree of pain, and the feasibility of alternative execution procedures mitigating that risk. \textit{See, e.g.}, Elisabeth Semel, \textit{Reflections on Justice John Paul Stevens’s Concurring Opinion in \textit{Baze} v. \textit{Rees}: A Fifth Gregg Justice Renounces Capital Punishment}, 43 U.C. \textit{D}AVIS \textit{L.} \textit{R}EV. 783, 851–52 (2010) (“The \textit{Baze} plurality’s choice of a standard turned on what magnitude of pain was permissible, on how great a risk of pain . . . , and on . . . the availability of options that would decrease the risks.”). While one could possibly read \textit{Glossip}'s language that the protocol be very likely to cause necessary suffering as recognition that the availability of alternative methods is still part of the risk calculus, the Court hardly made this
Of course, the Court is surely correct that the Eighth Amendment cannot require states to eliminate all risk of pain. 334 That said, Glossip’s articulation is in tension with Kemmler, Resweber, and even Baze’s concern for the inmate’s suffering. 335 Nor does it square with the Court’s understanding that the Eighth Amendment requires the Court to judge punishments in accord with “evolving standards of decency that mark the progress of a maturing society.” 336

This disregard for inmate suffering not only ignores important language from the Eighth Amendment precedent, but may not even further a legitimate governmental interest. Were the state to showcase brutal executions to deter future crime, there would be a plausible, albeit highly controversial, justification for painful executions. As Foucault famously observed, the public execution emphasizes government’s “emphatic affirmation of power and of its intrinsic superiority.” 337

Significantly, though, American executions today do not advance this interest. Lethal injection sometimes causes excruciating pain, but the state tries to conceal such suffering through a variety of mechanisms, such as paralytic drugs, closed blinds, and a sterile, medicalized setting. 338 Where the state practice seeks to conceal whatever pain it causes, it can hardly be said to derive any deterrent effect from the pain it inflicts. Perhaps there is some retributive effect, but the Eighth Amendment typically does not allow thirst for retribution to justify the infliction of excruciating pain. 339

Of course, constitutional rights are almost never absolute. The First Amendment vigorously protects freedom of speech, but, as Justice Holmes explained, “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a point clear. Moreover, to the extent the Court emphasized its alternate holdings, it seems to separate the risk of pain and the availability of alternatives into discrete inquiries.

334. See Glossip, 135 S. Ct. at 2733.
335. See Semel, supra Part II.A.
338. Cf. Wood v. Ryan, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, J., dissenting) (“[F]iring squads can be messy, but if we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood. If we, as a society, cannot stomach the splatter from an execution carried out by firing squad, then we shouldn’t be carrying out executions at all.”). 339. See OLIVER WENDELL HOLMES, JR., THE COMMON LAW 45 (1938) (arguing retribution is “vengeance in disguise”).
panic.”  

Similarly, though the Court has expressed concern for inmate suffering, Eighth Amendment precedent hardly treats that concern as a categorical prohibition on any infliction of pain. The Court, then, is correct to assign some weight to the states’ interests in carrying out executions. The Court, however, does not adequately justify letting that state interest so thoroughly dominate its Eighth Amendment analysis. In effect, the Court gives the states carte blanche to do what they want, thus effectively shutting the door on Eighth Amendment challenges in this entire area.

3. The Proffer Requirement

_Glossip_ also insisted that the plaintiff identify a “known and available alternative method of execution” presenting a “significantly less severe risk” of pain.  

_Baze_, too, had included such a requirement.  

As with the Eighth Amendment risk standard, however, _Glossip_ recast this requirement to make it even harder for the plaintiff to meet. Whereas _Baze_ had bundled the availability of an alternative method and the risk of harm together, _Glossip_ treated these requirements as logically distinct, emphasizing that each served as an independent ground for affirming the district court.

_Glossip_’s articulation of the proffer encourages courts to uphold even the most dangerous execution procedures so long as they find the plaintiffs’ proffered alternative unavailable. As the dissent explained, under the majority opinion, a court could not invalidate barbaric methods of execution if the plaintiff failed to proffer an alternative or if the court deemed the proffered method unavailable.  

Justice Alito objected to Justice Sotomayor’s arguments that the decision permits prisoners to be “drawn and quartered, slowly tortured to death, or actually burned at the stake,” but it is not clear why. As the dissent pointed out, the majority articulated a categorical rule: if the inmate fails

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342. _See_ _Baze v. Rees_, 553 U.S. 35, 57–61 (2008). One could arguably distinguish _Baze_ on the grounds that the execution method at issue there was concededly constitutional if properly administered, whereas the _Glossip_ plaintiffs contended that the method was always unconstitutional and that they therefore should not have to proffer an alternative at all. _See_ Petitioners’ Brief, _supra_ note 4, at 46–52.
343. _See_ _Baze_, 553 U.S. at 52 (plurality opinion).
345. _See_ id. at 2793 (Sotomayor, J., dissenting).
346. _Id._ at 2746 (quoting id. at 2795 (Sotomayor, J., dissenting)).
to propose a known and available alternative, then the court must rule for the state. The majority’s language offers no exception. Perhaps we are to understand Justice Alito’s accusation that Justice Sotomayor has resorted “to this outlandish rhetoric” as an implicit acknowledgement that the proffer requirement ought not apply when the state’s method of execution crosses a certain line. The majority, however, nowhere expressly articulated this point.

The majority’s treatment of the availability of an alternative method as a logically distinct, independent prong of the doctrine guts the Eighth Amendment in method-of-execution cases. Moreover, the Court’s willingness to accept the state’s word that it cannot find an alternative suggests that states can shut down Eighth Amendment litigation merely by stating that alternative methods are not available. The Court, in other words, uses deference here not just as a shield, but as a sword, preemptively offering states a roadmap to block this kind of litigation altogether.

* * *

Once again, the Court’s approach to these issues is highly deferential to the states. Glossip essentially rewrote the Eighth Amendment as a federalism provision focusing on the states’ difficulties implementing capital punishment, and all but ignoring the inmate’s suffering. It is almost as though the Court forgot that a core constitutional value is to protect the unpopular from governmental abuse.

D. Deference as Spin

The Court also offered its own spin of important facts surrounding the case. The Court did not explain how these facts were legally relevant, but its factual portrait helped create an atmosphere ostensibly justifying its other highly deferential moves. While this spin is not technically a form of legal deference, it nevertheless helped the Court craft a

347. See id. at 2793 (Sotomayor, J., dissenting).
348. Id. at 2746.
349. See supra notes 164–179 and accompanying text.
351. See, e.g., Roper v. Simmons, 543 U.S. 551, 560 (2005) (“By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”); Romer v. Evans, 517 U.S. 620, 634–35 (1996) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”) (quoting Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (emphasis added).
deferential opinion. Like the litigator massaging a case’s background facts to create an atmosphere favorable to her client, the Court downplayed some crucial facts and mischaracterized others.

1. Important Facts Ignored

a. The History of Botched Executions

Botched executions are mostly absent from the Court’s opinion. The majority briefly referenced two but only to minimize their relevance (and without ever using the word “botch”). First, during the statement of fact, the Court recounted the Lockett execution. Like the protocol at issue in Glossip, Oklahoma executed Mr. Lockett with a three-drug protocol beginning with midazolam. However, the Court emphasized that whereas the Lockett protocol included only 100 milligrams of midazolam, the new Oklahoma protocol calls for 500 milligrams. This difference, the majority indicated, rendered the Lockett botch irrelevant for purposes of judging the new protocol.

Second, at the end of its opinion, the majority disputed the relevance of the botched midazolam executions of Lockett and Joseph Wood, who loudly gasped repeatedly and took nearly two hours to die. It noted that investigation into the Lockett execution “concluded that the difficulties were due primarily to the execution team’s inability to obtain an IV access site.” The Court also brushed aside Arizona’s midazolam-based execution of Wood, because it “did not involve the protocol at issue here.” Both executions, therefore, had “little probative value for present purposes.”

The Court, however, failed to consider reasons why these and other botched executions may be probative. To begin, as a general matter, botches indicate that lethal injection does not always proceed as

352. See Glossip, 135 S. Ct. at 2734–35; Botelho & Ford, supra note 276 (“[T]he convulsing got worse, it looked like his whole upper body was trying to lift off the gurney.”).
353. See Glossip, 135 S. Ct. at 2734.
354. See id. at 2746. Notwithstanding the Court’s sanguine assessment of the revised Oklahoma protocol, a subsequent multicounty grand jury report concluded that the execution protocol required further serious revision. See Oklahoma Interim Report, supra note 208, at 101–05.
356. Glossip, 135 S. Ct. at 2746.
357. Id.
358. Id.
planned. In his comprehensive book on execution methods, Austin Sarat calculates that 7.12\% of lethal injection executions have been botched. To be sure, some drug combinations are more dangerous than others, but this research illustrates that the states do not always have the wherewithal to perform lethal injection safely.

Indeed, Professor Sarat’s calculation may be on the low side, given that most lethal injection executions include a paralytic that conceals the inmate’s pain. For example, when Arizona executed Jeffrey Landrigan in 2010, its anesthetic thiopental had likely expired. Landrigan died with his eyes open, quite possibly because he was not anesthetized when the paralytic took effect. Around the same time, Georgia used the same batch of likely expired thiopental in executions of two other men, who also died with their eyes open. The media did not report these executions as botched, but it is quite possible that some or all of these inmates died excruciating deaths.

State execution protocols further raise the likelihood that an inmate will be paralyzed but not anesthetized. Many states usually require a large overdose of the paralytic, so that the paralytic will take effect even if the catheter has slipped out of the vein. As a result, some inmates have likely received an inadequate dose of anesthetic (because some of the intended anesthetic spilled out of the veins into surrounding tissue) but a sufficient dose of paralytic.

Second, the Court tried to explain away the relevance of the Lockett execution by highlighting problems with the IV access point. The problem with Lockett’s execution, the Court emphasized, was not the protocol itself but the fact that the state failed to set the catheter properly. Far from being reassuring, however, this explanation merely highlights systemic problems with lethal injection generally.}

359. See Lain, supra note 275, at 841 (“Botched executions put the state on notice that there was a problem . . . ”).
360. SARAT ET AL., supra note 337, at 177.
362. See id.
363. See id.
365. See Glossip v. Gross, __ U.S. __, 135 Ct. 2726, 2734 (2015) (quoting investigation concluding that “the viability of the IV access point was the single greatest factor” contributing to the problematic Lockett execution).
366. Id. at 2746 (“[T]he difficulties were due primarily to the execution team’s inability to obtain an IV access site.”).
lethal injection execution requires an IV access point. When the (often inexpert) execution team fails to set the catheter properly, a botched execution likely follows. In Lockett’s case, Oklahoma provided inadequate equipment to a reluctant doctor, who attempted a femoral insertion after his attempt to access other veins failed. In other states, personnel have also struggled to insert the catheter properly. Many executions also involve inmates with compromised veins, adding further complications. IV access challenges, then, are part of lethal injection and substantially heighten the already significant risks of pain posed by the states’ selected drugs.

Third, and relatedly, the Court failed to grasp that midazolam’s failure to anesthetize Mr. Lockett helped demonstrate that drug’s dangers in lethal injection. The majority may have been thinking (but did not explain) that the botch was not probative of midazolam’s anesthetic qualities, because Oklahoma improperly set the catheter, so the inmate’s veins never received the full intended dose of midazolam. However, as the record indicated, midazolam takes effect merely by absorbing into a person’s muscle tissue; unlike many drugs, it does not need to enter a person’s veins to work. Accordingly, if midazolam were an acceptable substitute for thiopental or pentobarbital, it would have still rendered Lockett unconscious and insensate to painful stimuli. But though the midazolam did absorb into Lockett’s muscle tissue, it did not maintain unconsciousness. Lockett’s execution, thus, provides a real world example confirming the scientific literature’s view that midazolam cannot maintain anesthesia against excruciating stimuli.


370. See Denno, supra note 35, at 1335.

371. See Warner PI Hearing, supra note 64, at 116 (explaining that midazolam takes effect relatively rapidly whether it enters the body through veins or muscles).

372. See supra Part II.A.3.
Finally, the Court limited its discussion to two botches, ignoring many others, including some involving midazolam. In Ohio, Dennis McGuire gasped and convulsed for ten to thirteen minutes and took twenty-four minutes to die.\textsuperscript{373} To be sure, Ohio, like Arizona, used a different drug combination than Oklahoma. Nevertheless, in 2014 and 2015, there were fourteen executions using midazolam,\textsuperscript{374} of which three (McGuire, Lockett, and Wood) have been obviously botched. A fourth (Warner) called out “[m]y body is on fire.”\textsuperscript{375} Counting Warner, 28.5\% of these midazolam executions have been problematic. Moreover, twelve of the fourteen midazolam executions included a paralytic,\textsuperscript{376} so the lack of other visible botches is hardly conclusive evidence that other inmates did not suffer excruciating deaths. The Court’s casual assessment that other midazolam-based executions “have been conducted without significant problems,”\textsuperscript{377} then, fails to address the history honestly.

Ignoring botched executions when discussing lethal injection is like ignoring accidents when discussing highway safety. Of course, these events may not be comparably tragic, but, like car accidents, botched executions happen. While some protocols may mitigate the risk, it defies reason to assume that a revised protocol will entirely eliminate it. A revised protocol, of course, will \textit{alter} the risks, sometimes marginally, sometimes dramatically. But the Court’s assertion that past botches “have little probative value”\textsuperscript{378} to the possibility of future botches speaks to an approach so deferential that it refuses to grapple with inconvenient facts.

\textbf{b. The Agony of Potassium Chloride}

Also conspicuously absent from the majority opinion is a description of the kind of suffering at issue. The plaintiffs were not objecting to

\textsuperscript{373} See Dana Ford & Ashley Fantz, \textit{Controversial Execution in Ohio Uses New Drug Combination}, CNN (Jan. 17, 2014, 1:01 PM), http://www.cnn.com/2014/01/16/justice/ohio-dennis-mcguire-execution/ [https://perma.cc/3BPE-P3LZ] (“He gasped deeply. It was kind of a rattling, guttural sound. There was kind of a snorting through his nose. A couple of times, he definitely appeared to be choking.”).

\textsuperscript{374} See \textit{Executions in the United States, DEATH PENALTY INFO. CTR.}, http://www.deathpenaltyinfo.org/executions-united-states [https://perma.cc/7LF8-PHXQ].


\textsuperscript{376} See \textit{Executions in the United States}, supra note 374.


\textsuperscript{378} \textit{Id.}
modest pain, such as the insertion of a catheter. Rather, they were
calling the risk of the agonizing pain caused by potassium
chloride. No one doubts that the injection of potassium chloride into
human veins is excruciating. As the dissenting Justices put it, the drug
causes “searing pain” akin to “burning somebody alive.”

The majority made almost no reference to this pain, or to the agony of
suffocation caused by the paralytic. The majority is correct, of course,
that some pain is inherent in lethal injection and that the Eighth
Amendment cannot prohibit all pain. But the agonies created by
potassium chloride and paralytic drugs are extreme.

The Court downplayed this pain and even chided the dissent for its
“groundless suggestion that our decision is tantamount to allowing
prisoners to be . . . burned at the stake.” But notwithstanding Justice
Alito’s insistence that the dissent’s charges are “simply not true,”
the dissent was correct about the potential for excruciating agony. Of course,
whether the inmate actually feels this pain depends on whether he is
anesthetized, and the majority and dissent disagreed on the risk. Even so,
the majority’s indignant response here helps highlight its failure to
acknowledge the degree of suffering potentially at issue. Indeed, the
majority seemed to resent the very existence of a counter-narrative, even
though the dissent’s narrative was largely correct.

2. **Guerilla War Against the Death Penalty**

The *Glossip* majority emphasized that the inmate plaintiffs were
obstructing American capital punishment. In particular, it strongly
suggested that the plaintiffs deserve blame for—or, at least, should
shoulder the consequences of—the drug shortage frustrating states.
The majority’s recitation of the facts emphasized that anti-death penalty
“activists” had pressured pharmaceutical companies to stop selling drugs

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don’t think anybody would dispute [that potassium chloride causes great pain] . . . ”).
*Glossip Oral Argument*].
382. *See Baze*, 553 U.S. at 53; *Berger*, supra note 27, at 266.
384. *Id.* at 2746.
385. *Id.*
386. *See id.* at 2733–35 (recounting state difficulties procuring drugs).
for use in executions and implied that they were using various tactics to prevent states from getting the drugs for their protocols. 387 Justice Alito foreshadowed the gist of the opinion at oral argument when he asked whether the Court ought to “countenance what amounts to a guerilla war against the death penalty . . . to make it impossible for the States to obtain drugs that could be used to carry out capital punishment with little, if any, pain?”388 In short, the majority indicated that anti-death penalty activists have made the bed and that capital inmates must now sleep in it.

As an initial matter, it is far from clear that the Court’s narrative here, even if factually correct, is legally relevant. The Eighth Amendment imposes a bar on excruciating executions and should bind the states regardless of whether surrounding circumstances make it more difficult for states to create safe execution protocols.389 Surely a state could not inject an inmate with only potassium chloride if no anesthetic were available. Thus, just as the Sixth Amendment guarantees a criminal defendant a fair trial even when the defendant himself has retained ineffective counsel, so too does the Eighth Amendment likely prohibit excruciating execution procedures, even when the state has difficulty obtaining the necessary drugs.390

Even if the Court’s narrative were legally relevant, it is still factually mistaken. Death row inmates are not responsible for the current drug shortage.391 The inmates themselves manifestly lack the resources and wherewithal to create a drug shortage. Nor have domestic abolitionist “activists” played much of a role. To the contrary, as Jim Gibson and Corinna Lain recount, the European Union and European governments have imposed strict controls to ensure that exported drugs will not be used for executions.392 For instance, when Hospira tried to manufacture

387. See id. at 2733 (“Activists then pressured both the company and the Italian Government to stop the sale of sodium thiopental for use in lethal injections in this country.”).

388. Glossip Oral Argument, supra note 381, at 14–15 (question of Alito, J.; see also id. at 15 (arguing that some lethal injection drugs “have been rendered unavailable by the abolitionist movement putting pressure on the companies that manufacture them”) (Scalia, J.).


390. See Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) (“[T]he Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant’s entitlement to constitutional protection [against ineffective assistance of counsel].”).

391. See Glossip, 135 S. Ct. at 2796 (Sotomayor, J., dissenting) (“Petitioners here had no part in creating the shortage of execution drugs.”).

thiopental in Italy, Italian authorities threatened legal action if the company could not ensure that the drug would not be used by states in executions. European pharmaceutical companies have internalized these values. For example, the Danish pharmaceutical company Lundbeck was “adamantly opposed” to its product being used in executions. Similarly, the Swiss pharmaceutical company Naari AG was “shocked and appalled by” news that Nebraska planned to use its drugs in executions.

Indeed, the health care industry both at home and abroad—like doctors themselves—is often hesitant to involve itself in the death penalty. Unsurprisingly, some pharmaceutical industry officials believe that use of drugs in executions “contradicts everything we are in business to do[—]provide therapies that improve people’s lives.” The International Academy of Compounding Pharmacists, too, has discouraged its members from providing drugs for use in executions.


393. See Gibson & Lain, supra note 41, at 1240–41.
Even corporate executives and pharmacists without such sentiments might worry that participating in capital punishment would jeopardize their businesses. To be sure, anti-death penalty sentiment contributes to these developments, but the phenomenon runs much deeper than fringe “activism.” To the contrary, it reflects a deeper “transmission of international abolitionist norms” that are not going away.

Additionally, some drug shortages have resulted from events completely disconnected from death-penalty politics. For example, thiopental is in very short supply for reasons that have nothing to do with capital punishment. Anesthesiologists today favor newer anesthetics over thiopental, thus sharply reducing the incentive to manufacture the drug. Compounding the problem, the sole U.S. thiopental manufacturer stopped production of it in 2010 due to an “unspecified raw material supply problem.” The FDA also prohibits its importation, because thiopental is not an “approved” drug and federal law forbids the importation of unapproved drugs. Along similar lines, there is also a shortage of pancuronium bromide, affecting hospitals nationwide.

These episodes demonstrate that the factors behind the drug shortage are numerous. Some are even disconnected from death-penalty politics. Of course, inmates’ lawyers have sought to benefit from these conditions at times, such as challenging states’ efforts to import drugs illegally. But even those efforts have not created the shortage so much as sought to enforce pre-existing federal law, which some states attempted to

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400. See Alper, supra note 177 (citing evidence that “corporate leaders are convinced that using their medical products to induce death does not comport with the mission or financial interests of their companies”).

401. See Gibson & Lain, supra note 41, at 1218.

402. See Petitioners’ Brief, supra note 4, at 5-6.

403. See Denno, supra note 399.


405. See 21 U.S.C. § 381(a) (2012) (stipulating that unapproved drugs “shall be refused admission” into the country); Cook v. FDA, 733 F.3d 1, 4 (D.C. Cir. 2013).


407. See Cook, 733 F.3d at 4.
violates. Glossip’s implication that domestic activists bear the blame for the drug shortage, then, does not withstand scrutiny.

Additionally, the Court was misleading when it implied that the dissent’s approach would have effectively overruled earlier decisions upholding the constitutionality of capital punishment. To the contrary, a ruling for the plaintiffs would have invalidated only the use of midazolam, which is just one of many drugs used in lethal injection protocols. Numerous other protocols would have remained constitutional, including those still used regularly in states like Texas and Missouri. And, of course, some states can and have turned to different methods of execution, such as lethal gas or the firing squad.

To this extent, the majority’s insistence that a holding for the plaintiffs would have been tantamount to a rejection of capital punishment is a canard. The Court’s discussion of the drug shortage, then, perhaps adds rhetorical force to its narrative that states face difficulties carrying out executions, but this spin is neither legally relevant nor factually accurate.

Finally, in addition to misunderstanding the multiple causes of the drug shortage, the Court’s narrative incorrectly suggests that method-of-execution litigation frequently succeeds in forcing states to revise their execution protocols. It usually doesn’t. Not only do many state lethal injection protocols remain deeply problematic, but many courts do not even grant lethal-injection plaintiffs a fair hearing on the merits.

Capital inmates seeking to guard against excruciating executions, in fact, often face a catch-22. When an inmate challenges a lethal injection protocol in advance, courts sometimes dismiss the case as unripe, on the theory that the state may change its protocol before that inmate’s execution date. Oklahoma, in fact, sought to dismiss all the

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408. See Glossip v. Gross, ___ U.S. ___, 135 S. Ct. 2726, 2739 (2015) (“[W]e have time and again reaffirmed that capital punishment is not per se unconstitutional. We decline to effectively overrule these decisions.”) (internal citations omitted).


411. See generally Denno, supra note 35, at 1339–46, 1360–76.

412. See Berger, supra note 27, at 294.

413. See Jones v. Allen, 485 F.3d 635, 639 n.2 (11th Cir. 2007); Alley v. Little, 452 F.3d 621, 625 (6th Cir. 2006) (Martin, J., dissenting); Worthington v. State, 166 S.W.3d 566, 583 n.3 (Mo. 2005); Gonzales v. State, 353 S.W.3d 826, 837 (Tex. Crim. App. 2011); Gallo v. State, 239 S.W.3d 757, 780 (Tex. Crim. App. 2007); Berger, supra note 27, at 294.
Gross Error

Glossip plaintiffs whose executions were not imminent. However, when inmates wait to file their challenges when their execution is imminent, courts usually deny the stay of execution that would permit the litigation to proceed. Similarly, when inmates, as in Glossip, try to challenge a new lethal injection protocol adopted on the eve of a scheduled execution, courts, at best, grant them a limited hearing or, at worst, dismiss their cases as dilatory. These procedural hurdles hardly seem like the hallmark of a fair judicial system, and, in all events, belie the Court’s narrative that the inmates’ litigation strategy has waged a successful “guerilla war” on capital punishment.

b. The Condemned’s Crimes

While the Court neglected to discuss the excruciating pain caused by potassium chloride, it did describe the murders committed by each petitioner. These were horrific crimes, and the persons who committed them deserve very severe penalties. But the nature of the crimes is also irrelevant to Glossip’s Eighth Amendment issue. After all, the Glossip plaintiffs were not filing a petition for a writ of habeas corpus disputing the legitimacy of their sentences. Rather, they were bringing a civil rights action challenging how those sentences could be carried out. Even had they won their case, the plaintiffs still could have been executed by lethal injection, albeit by a somewhat different protocol.

Indeed, the Court usually does not reference the inmates’ crimes in other civil rights Eighth Amendment actions, involving, for instance,


415. See, e.g., Sepulvado v. Jindal, 729 F.3d 413, 421 (5th Cir. 2013) (rejecting motion for stay of execution because plaintiff did not bring his claim early enough); Berry v. Epps, 506 F.3d 402, 405 (5th Cir. 2007) (“Our precedent requires the dismissal of ‘eleventh hour’ dilatory claims . . . .”); Grayson v. Allen, 491 F.3d 1318, 1326 (11th Cir. 2007).

416. See Berger, supra note 27, at 293–94.


prison conditions or medical care.\textsuperscript{421} Perhaps the majority reiterated the capital inmates’ crimes to emphasize the propriety of their capital sentences, but the plaintiffs had not challenged their sentences’ legitimacy.\textsuperscript{422} The Court’s willingness to describe these crimes but not the pain associated with potassium chloride further highlights its efforts to paint a portrait sympathetic to the State and hostile to the plaintiffs.

III. EXPLANATIONS AND IMPLICATIONS

A. Explanations

1. Discouraging Frivolous Litigation

Various factors help explain Glossip’s great deference. To begin, the Court approached the case impatiently as symptomatic of an entire class of frivolous litigation that needlessly consumes judicial resources and delays the administration of justice. This impression is partially correct. Many capital inmates will likely challenge any method of execution, including safe ones. To this extent, the Court’s proffer requirement and general skepticism towards lethal injection litigation may not be correct, but it is understandable.

Glossip also reflects concerns about civil rights litigation more generally. Indeed, the opinion is consistent with a broader judicial movement to limit the use of litigation to effect governmental change. Many federal judges today are sensitive to the charge that courts interfere too readily with the democratic branches.\textsuperscript{423} To this extent, Glossip is part of a larger judicial reaction against the use of courts to effect institutional reform.\textsuperscript{424}

A full discussion of the Supreme Court’s attitudes towards civil rights litigation is beyond the scope of this paper, but a few brief examples illustrate the point. In Ashcroft v. Iqbal, the Court heightened the pleading requirement for civil rights suits, making it more difficult for plaintiffs alleging government malfeasance to initiate civil litigation at all.\textsuperscript{425} Iqbal poses a particular problem for litigants in cases (like lethal

\begin{itemize}
\item \textsuperscript{422} See Hill, 547 U.S. at 579–83; Nelson, 541 U.S. at 647.
\item \textsuperscript{423} See Berger, supra note 27, at 296.
\item \textsuperscript{424} See id. at 280–301.
\end{itemize}
injection) where the government controls the relevant information. Specifically, it is difficult for a plaintiff to allege government wrongdoing with sufficient detail when she has access to none of the relevant information.\textsuperscript{426} Along similar lines, the Court has also seemed to heighten standing requirements in recent years.\textsuperscript{427} The Court has also cut back on the availability of civil rights remedies in recent decades.\textsuperscript{428} It has even indicated that \textit{Ex Parte Young} injunctive relief may not always be available against state officials for violations of federal law.\textsuperscript{429} And it has also bolstered the doctrine of state sovereign immunity to protect state officials from suits for money damages.\textsuperscript{430} These developments reflect the Court’s general discomfort with litigants using the federal courts to attack governmental policies. To this extent, \textit{Glossip} is small part of a larger judicial project.\textsuperscript{431}

2. Protecting State Penological Interests

\textit{Glossip} also protected the states’ penological interests in carrying out lawfully imposed sentences of death. Some death penalty states have had difficulty carrying out executions, and the majority understood lethal injection litigation to be part of the problem. \textit{Glossip} tries to make things easier for states that wish to continue executions.

The majority, in fact, insisted that the states’ penological interests must figure heavily in the Eighth Amendment analysis. Justice Alito emphasized that “we have time and again reaffirmed that capital punishment is not per se unconstitutional.”\textsuperscript{432} Thus, “decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, ‘it necessarily follows

\textsuperscript{426} See \textit{Iqbal}, 556 U.S. at 697–98 (Souter, J., dissenting).
\textsuperscript{431} Many of these cases were decided 5–4, so it is possible that the Court’s attitude towards these issues will change when Justice Scalia’s successor is ultimately confirmed.
\textsuperscript{432} \textit{Glossip v. Gross}, \textit{__} U.S. \textit{__}, 135 S. Ct. 2726, 2739 (2015); \textit{see also id. at 2731 (“The death penalty was an accepted punishment at the time of the adoption of the Constitution and the Bill of Rights.”)}. 
that there must be a [constitutional] means of carrying it out.”\footnote{433} The implication, of course, was that courts ought not inquire too rigorously into the safety of state lethal injection procedures, because states need flexibility in order to carry out death sentences.\footnote{434}

While Glossip, of course, focuses specifically on capital punishment, these concerns also reflect broader federalism and separation-of-powers principles. Federal courts are understandably sometimes reluctant to displace state policy choices. Of course, these general principles do not explain the Court’s approach in any given case, because the Court is willing to intervene when it believes that a state has violated the Constitution. But where the Court is suspicious of the plaintiffs to begin with, these structural principles help justify judicial restraint.

B. Implications

1. Death Penalty Implications

a. Lethal Injection Litigation

By ratcheting up the Eighth Amendment standard in method-of-execution cases, Glossip made it even harder for inmates to challenge lethal injection procedures successfully. Glossip, indeed, leaves state lethal injection practices in a kind of legal grey hole, in which the states’ interests in carrying out executions apparently always trumps the inmate’s Eighth Amendment interest in avoiding an excruciating execution.\footnote{435} The Court, to be sure, goes through the motions of hearing the case, but at each step explains why it must defer to the State.

That said, inmates still have some possible arguments in future lethal injection litigation. First, a plaintiff could plausibly contend that the “sure or very likely” standard only applies when plaintiffs request a stay of execution. Glossip itself, after all, applied that standard in the context of a motion to stay an execution,\footnote{436} and federal courts frequently indicate that an execution stay is an “extraordinary remedy.”\footnote{437} Though Glossip

\footnote{433} Id. at 2732–33 (quoting Baze v. Rees, 553 U.S. 35, 47 (2008)).
\footnote{434} See Glossip, 135 S. Ct. at 2733 (“[B]ecause some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain.”).
\footnote{435} See Vermeule, supra note 20, at 1118–31 (providing several examples of grey holes in the administrative state); supra note 20 and accompanying text.
\footnote{436} See Glossip, 135 S. Ct. at 2736 (noting that district court denied the motion for preliminary injunction in part because plaintiffs had not established a “sure or very likely” risk of serious suffering).
\footnote{437} See Sepulvado v. Jindal, 729 F.3d 413, 417 (5th Cir. 2013); Adams v. Thaler, 659 F.3d 312, 317–18 (5th Cir. 2012).}
does not discuss whether its standard applies outside the stay context, there is certainly a colorable argument that an Eighth Amendment challenge not requiring a stay of execution should proceed under a different standard.\(^{438}\)

Second, while *Glossip* seems to require the plaintiff to prove that the procedure is “sure or very likely” to cause great pain, the majority opinion, like the *Baze* plurality, references other standards as well.\(^{439}\) The Court, thus, leaves some wiggle room for inmates to argue that a different standard should apply.\(^{440}\) Given lower courts’ haphazard treatment of *Baze*,\(^{441}\) it is possible, if not terribly likely, that *Glossip* too will engender different standards.

Third, though *Glossip* upheld the Oklahoma procedure, inmates in other states using midazolam could try to create a more favorable record about the drug’s pharmacological properties. The Court emphasized that its holding was closely tied to the district court record.\(^{442}\) To this extent, its statements about midazolam were not rulings on law, so they technically do not bind lower courts.\(^{443}\) In reality, many trial courts may be reluctant to announce factual findings contrary to those in *Glossip* absent a very compelling record,\(^{444}\) but the law permits such contrary findings.

Fourth, there remains great variety in state lethal injection procedures,\(^{445}\) so even under *Glossip*’s onerous standard, courts will still have to assess the risks of a given state’s procedure. Plaintiffs can still try to challenge lethal injection procedures by presenting evidence about a state’s written protocol and its implementation of that protocol. Similarly, as drug companies increasingly object to the use of their products in executions,\(^{446}\) states will likely increasingly seek to procure their drugs from compounding pharmacies, the black market, and other

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\(^{438}\) Cf. Berger, *supra* note 27, at 276 n.86.

\(^{439}\) See *Glossip*, 135 S. Ct. at 2737 (noting that an inmate challenging a protocol must show “there is a substantial risk of severe pain”).

\(^{440}\) See id. (“To prevail on such a claim, there must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment.”) (internal quotation marks omitted).

\(^{441}\) See Denno, *supra* note 35, at 1346–53.

\(^{442}\) See *Glossip*, 135 S. Ct. at 2739–40.


\(^{444}\) See, e.g., Correll v. State, 184 So.3d 478, 487 (Fla. 2015) (“[T]he United States Supreme Court in *Glossip* upheld the use of midazolam in Oklahoma’s three-drug protocol.”).


\(^{446}\) See, e.g., PFIZER, *supra* note 397.
unreliable sources. As evidence of state incompetence and use of unregulated drugs continues to mount, some of these cases may be successful. Indeed, courts should be especially suspicious of state practices where there is good reason to think that the state is using unreliable drugs.

Fifth, a plaintiff may make fact-specific claims that a particular procedure or drug is especially risky for him given particular medical conditions. For example, after Glossip, a Florida inmate contended that the State’s procedure posed special risks given his medical history. Given the proper facts, such an argument might occasionally work, though, admittedly, it usually will be a long shot.

Finally, inmates may consider bringing method-of-execution challenges in state court under state law. States sometimes adopt execution protocols without complying with state law, State courts in those instances may halt executions not because the protocol is too dangerous, but because the state failed to comply with required administrative procedures.

Relatedly, inmates may consider challenging the safety of execution procedures not under the Eighth Amendment but under analogous state constitutional provisions. While some state constitution’ provisions


448. See Correll v. Florida, SC15-147, at 1–2 (Fla. July 23, 2015) (remanding for evidentiary hearing to consider inmate’s claim that the use of midazolam is unconstitutional as applied to him in light of his brain damage and history of chemical dependency).

449. See Correll v. State, 184 So.3d 478, 487–90 (Fla. 2015).


merely track the Eighth Amendment, others, such as those prohibiting “cruel or unusual” punishment, arguably offer broader protection.

Given Glossip’s stingy reading of the Eighth Amendment, inmates may find state constitutional law more protective.

b. Lethal Injection Practices

Glossip made it harder for Eighth Amendment plaintiffs to prevail, but states will likely continue to have difficulty carrying out executions. Though other states after Glossip could choose to mimic Oklahoma’s protocol, so far they have not done so. For example, though South Carolina was having difficulty procuring other drugs, it was reluctant to adopt midazolam. As a South Carolina state official put it, “[S]ome of the folks in other states suffering for almost an hour. We would have to be comfortable that that would not happen.” Of course, since Glossip, some states have adopted midazolam or are contemplating such a

453. See, e.g., Donna E. Blanton, *The State Constitution’s Cruel or Unusual Punishment Clause: The Basis for Future Death Penalty Jurisprudence in Florida*, 20 Fla. St. L. Rev. 229, 229 (1992) (noting the Florida Supreme Court’s “lockstep” approach to interpreting the State’s “cruel or unusual punishment” clause by rarely distinguishing it from its federal counterpart).


Even more importantly, it is hardly clear that either midazolam or other drugs will remain available for executions. As noted above, some drug companies in recent years have sought to restrict states’ access to drugs for lethal injection, and other drugs are in short supply for other reasons. Many states turned from thiopental to pentobarbital, because thiopental became unavailable. As some states now apparently struggle to find pentobarbital, they are turning to midazolam. But midazolam may not always be available either. Akorn, an Illinois-based drug company, requested that Arizona’s Department of Corrections return its supply of midazolam. Akorn also announced that it would no longer ship any of its drugs directly to prisons. The drug also recently appeared on an American Society of Health-System Pharmacists bulletin listing current drug shortages. Even more importantly, Pfizer recently announced sweeping controls to try to ensure that none of its drugs are used in lethal injection. Pfizer manufacturers most of the drugs used in lethal injection protocols. As a result of its announcement, one commentator noted that “all F.D.A.-
approved manufacturers of any potential execution drug have now blocked their sale for this purpose."\footnote{466}

To be sure, states may still be able to get midazolam (or other drugs) on the black market or elsewhere, despite the manufacturing companies’ objections. But some will not. Several states, including Alabama, Arkansas, Mississippi, Ohio, and Virginia, have had difficulties obtaining drugs recently.\footnote{467} To this extent, some states likely will continue to struggle to carry out executions, notwithstanding \textit{Glossip}.

More generally, states are executing fewer people nationwide than they have in years. There were only 28 executions nationwide in 2015, the lowest number in well over two decades.\footnote{468} In the ten years between 1997 and 2006, the nation collectively executed an average of 70 people each year, with a high of 98 executions in 1999.\footnote{469} Since 2006, the country has averaged 40 executions annually.\footnote{470} Executions are clearly on the decline.

Of course, the drug shortage plays some role in this decline, as even states that want to carry out executions are having a difficult time doing so. But the drug shortage is only part of the story. Death sentences have also decreased steadily since the mid-1990s.\footnote{471} Courts have imposed

\footnote{466. See Eckholm, \textit{supra} note 447.}


\footnote{469. See id.}

\footnote{470. See id.}

fewer than 100 capital sentences in each year since 2010, with only 49 such sentences in 2015.  

Seven states have abolished their death penalty since 2007, and Justice Breyer’s Glossip dissent may spur still more debate. In short, the politics and practices of capital punishment in the U.S. appear to be changing substantially. To this extent, Glossip’s practical reach may be quite limited.

2. Judicial Implications

The future of lethal injection post-Glossip may be unclear, but the Court’s approach to various sorts of deference sheds significant light on its willingness to steer its opinions towards outcomes it deems desirable. Throughout the opinion, the majority steered around legal and factual arguments that cut in favor of the plaintiffs. To the extent that some legal precedent and reasoning might have interfered with states’ prerogative to conduct executions, the Court repeatedly insisted that those principles should take a back seat to the imperative of carrying out death sentences. Notably, the Court barely attempted to justify its deference determinations, though there were powerful counter-arguments to the Court’s conclusions on each count. These inadequate justifications, coupled with the Court’s opportunistic spin of other facts, cast a dubious light on the entire opinion. The Court’s use of deference determinations as rhetorical tools makes the opinion read less like the decision of a neutral tribunal and more like the brief of a partisan advocate.

Indeed, the fact that all these different kinds of deference happen to point in the same direction should cause suspicion. The Court’s emphatic marshalling of legally irrelevant facts certainly suggests that the Court was doing more than simply applying the law to the relevant facts. The heightened Eighth Amendment standard should also raise eyebrows, as the Court changed the legal test in this area without admitting that it had done so. Perhaps most troublingly, the Court’s institutional deference ignored the long history of botched executions

472. See id.


and state incompetence in this area. It even ignored voluminous evidence that Oklahoma itself had designed the protocol in question carelessly.

The choice of the clearly erroneous standard is probably Glossip’s most defensible form of deference. After all, this standard typically applies when appellate courts review trial court factual findings, and even the dissent accepted its appropriateness. But the Court’s failure to engage with serious arguments casting doubt on the propriety of that standard, even though the petitioners had argued for a different standard,\textsuperscript{475} suggests further that the Court viewed deference not as a legal issue to be figured out, but rather as a rhetorical arrow in the advocate’s quiver.\textsuperscript{476} Even more importantly, the Court applied this standard so deferentially that it embraced a deeply flawed expert witness, brushed aside crucial evidence from the record, and heightened the plaintiffs’ burden.\textsuperscript{477}

That, of course, is the problem with deference determinations more generally. The Court’s articulation and application of the standards guiding these inquiries are so inconsistent and inchoate that the determinations themselves are stealthy and extremely flexible.\textsuperscript{478} As a result, the Court can twist the deference to meet its goals in a particular case.

CONCLUSION

Glossip’s use of judicial deference seems awfully cynical. Admittedly, some of the Court’s individual deference determinations are defensible, but some are not, and collectively they suggest that a majority of the Court wanted to shut down this entire area of litigation. Over and over again, the Court explained that it owed the benefit of the doubt to the district court and to the defendant state officials without careful (or, at times, any) consideration of counter-arguments, some of which were powerful. Viewed in total, these determinations suggest that a majority of the Court decided the outcome it wanted to reach before it examined the law or the facts.

There is a well-documented history of state incompetence in lethal injection, yet the Court bent over backwards to give states the benefit of the doubt, emphasizing its own epistemic shortcomings and crafting

\textsuperscript{475} See Petitioners’ Brief, \textit{supra} note 4, at 32.
\textsuperscript{476} See Berger, \textit{supra} note 238, at 725–26.
\textsuperscript{477} See Glossip, 135 S. Ct. at 2786 (Sotomayor, J., dissenting).
\textsuperscript{478} See generally Berger, \textit{supra} note 23, at 472–98.
legal tests minimizing the inmate’s constitutional interests. Despite the history of botched executions and state incompetence, the Court still deferred. No wonder that non-lawyers are taken aback when they learn about the Court’s decision.\(^{479}\)

*Glossip* heightens the risk of excruciating executions, but it is also not good for the judiciary. When the Court plays so fast and loose with these kinds of matters, it inevitably triggers questions about its credibility and impartiality. This Article critiques one decision, but the larger point is that the Court’s failure to theorize and defend its various kinds of deference determinations gives it substantial leeway to shape outcomes to its liking.\(^{480}\) To be clear, certain cases present the judiciary with very good reasons to defer. *Glossip*, though, was not such a case. This decision, then, is not a laudable example of judicial restraint but rather an abdication of the judiciary’s constitutional responsibility to safeguard individual rights. It was *Gross* error.

\(^{479}\) See *supra* note 2 and accompanying text.