

GROSS ERROR

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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.

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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!”

1. __ U.S. __, 135 S. Ct. 2726 (2015).

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!?"²

* * *

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."³ 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.⁴

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.⁵ 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).

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.⁶ 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.⁷ Moreover, *Glossip* considered a question of *constitutional* fact, which also triggers more searching review.⁸ 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.⁹ The plaintiffs at this hearing did not even have the opportunity to offer evidence rebutting the State's expert witness.¹⁰ 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

6. See generally Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942).

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).

10. See Transcript of Pretrial Conference Hearing (Dec. 15, 2014), at 15, *Warner v. Gross*, 776 F.3d 721 (W.D. Okla. 2014) (No. 14-665) (noting that plaintiffs will not have opportunity to rebut defendant's witness) [hereinafter *Warner* Pretrial Conference].

excruciating pain.¹¹ 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.¹²

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."¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶ 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

11. See *Glossip v. Gross*, __ U.S. __, 135 S. Ct. 2726, 2739 (2015).

12. See *infra* notes 139–47 and accompanying text.

13. See *Glossip*, 135 S. Ct. at 2740.

14. See Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2067–69 (2011).

15. See *id.* at 2032–37, 2074–77; Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 39–59 (2010).

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.¹⁷ 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.¹⁸ 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.

18. *See infra* Part III.A.1.

offenders, as the horrific botched 2014 execution of Clayton Lockett well demonstrates.¹⁹

The Court's approach in *Glossip* creates serious problems for the law of lethal injection. *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.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.²¹

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.²² But by examining deference in *Glossip*, we can better understand how poorly the Court sometimes justifies its constitutional decisions. To this extent, *Glossip*'s under-theorized deference reflects more generally the Court's ability to utilize various stealth determinations to steer outcomes in constitutional cases.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.²⁴ *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

19. See generally Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC (June 2015), <http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/> [<https://perma.cc/8K63-NT7Y>].

20. See Adrian Vermeule, *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.").

21. Cf. *id.* at 1118 ("The problem with grey holes . . . is that the apparent constraints on executive action mask the lack of actual constraints.").

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.

23. See Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 494–98 (2013).

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

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.²⁵ Over thirty states subsequently copied Oklahoma's approach, and some still retain it today in name.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.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.²⁸ The paralytic, however, would conceal that agony—and also cause the torturous sensation of suffocation by paralyzing the inmate's diaphragm.²⁹

The safety and constitutionality of this three-drug protocol, therefore, hinged on the successful delivery of thiopental.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.³¹

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

25. See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 65 (2007).

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.

27. See Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 *YALE L. & POL'Y REV.* 259, 265 (2009).

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.³² However, in 2008, the United States Supreme Court upheld Kentucky's three-drug protocol in *Baze v. Rees*.³³ *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.³⁴ Moreover, because *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.³⁵ Nevertheless, because the Supreme Court had indicated that procedures "substantially similar" to Kentucky's would pass Eighth Amendment muster,³⁶ other states felt confident that they could continue with the three-drug protocol.

Events on the ground changed quickly.³⁷ Despite *Baze*, an Ohio state court held in *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."³⁸ The court ordered Ohio to adopt a one-drug protocol using only an anesthetic, a change that Ohio ultimately adopted by statute.³⁹ Several other states soon followed suit, adopting one-drug procedures using overdoses of anesthetics like thiopental and pentobarbital.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 *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), *rev'd* 487 F.3d 1072 (8th Cir. 2007); *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1046 (N.D. Cal. 2006).

33. *Baze*, 553 U.S. at 63.

34. See *Berger*, *supra* note 27, at 273.

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

36. See *Baze*, 553 U.S. at 61.

37. See *Denno*, *supra* note 35, at 1354.

38. *State v. Rivera*, No. 04CR065940, 2008 WL 2784679, at *5 (Ohio Ct. Com. Pl. June 10, 2008).

39. See Adam Liptak & Adam B. Ellick, *Judge Orders Ohio to Alter Its Method of Execution*, N.Y. TIMES (June 11, 2008), <http://www.nytimes.com/2008/06/11/us/11death.html?r=0&pagewanted=print> [<https://perma.cc/G65Q-NP3N>].

40. See *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.⁴¹ Other drugs were also in short supply for reasons unconnected to the death penalty.⁴²

In response to these drug shortages, states have taken desperate steps to procure drugs.⁴³ Some states have sought to purchase drugs from unregistered overseas dealers in defiance of federal law, which prohibits the importation of such unapproved drugs.⁴⁴ Other states have turned to compounding pharmacies, though those facilities often lack the basic infrastructure and technology to produce reliable drugs.⁴⁵ Still other states changed their protocol to include different drugs, such as a three-drug protocol replacing thiopental with pentobarbital as the anesthetic.⁴⁶ 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

41. See James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L.J. 1215, 1236–39 (2015).

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

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

44. See *Cook v. FDA*, 733 F.3d 1, 11–12 (D.C. Cir. 2013); Owen Bowcott, *London Firm Supplied Drugs for US Executions*, THE GUARDIAN (Jan. 6, 2011), <http://www.theguardian.com/world/2011/jan/06/london-firm-supplied-drugs-us-executions> [https://perma.cc/3P7Z-ZJN8]; Amanda Holpuch, *Nebraska's Attempt to Import Lethal Injection Drugs from India Failed*, THE GUARDIAN (Sept. 17, 2015), <http://www.theguardian.com/us-news/2015/sep/17/nebraska-lethal-injection-drugs-india-failed> [https://perma.cc/7EG8-NF8R] (explaining that Nebraska attempted to illegally obtain lethal injection drugs from overseas).

45. See Berger, *supra* note 30, at 1383; Bette Hileman, *Drug Regulation, Compounding Pharmacies Pose Unrecognized Dangers, Expand Beyond FDA Restrictions*, CHEMICAL & ENGINEERING NEWS (Apr. 12, 2004), <http://pubs.acs.org/email/cen/html/041204145623.html> [https://perma.cc/ALN5-QEQG]; Ed Silverman, *Safety Issues at Compounding Pharmacy Underscore Oversight Problems*, STAT (Apr. 8, 2016), <https://www.statnews.com/pharmalot/2016/04/08/compounding-pharmacy-drug-safety-fda/> [https://perma.cc/K996-RQ7R].

46. See Denno, *supra* note 35, at 1376; *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> [https://perma.cc/7LF8-PHXQ].

from the gurney, “I feel my whole body burning.”⁴⁷ Oklahoma initially planned no changes to its protocol,⁴⁸ but the State’s plans changed in mid-March 2014 when a deal with a pharmacy supplying pentobarbital “fell through.”⁴⁹ Oklahoma, thus, rescheduled executions for Clayton Lockett and Charles Warner for late April and set to work on a new execution protocol.⁵⁰

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.⁵¹ Just four days after announcing the drug shortage, the State adopted a new three-drug protocol that substituted midazolam as the anesthetic.⁵²

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.⁵³ After a doctor declared Lockett unconscious, the State administered the paralytic, vecuronium bromide, and potassium chloride.⁵⁴ Lockett’s body then began to twitch, and he tried to rise off the gurney in visible distress.⁵⁵ As Mr. Lockett continued to mumble, strain, and writhe in agony, the State drew the blinds, blocking witnesses’ views.⁵⁶ Lockett did ultimately die, but the State postponed the Warner execution.⁵⁷

47. See Charlotte Alter, *Oklahoma Convict Who Felt “Body Burning” Executed with Controversial Drug*, TIME, (Jan. 10, 2014), <http://nation.time.com/2014/01/10/oklahoma-convict-who-felt-body-burning-executed-with-controversial-drug/> [https://perma.cc/R9V7-T8AR].

48. See Ashton Edwards, *Oklahoma Dept. of Corrections: No Plans to Review Lethal Injection Protocol*, KFOR NEWSCHANNEL4, (Jan. 28, 2014), <http://kfor.com/2014/01/28/oklahoma-dept-of-corrections-no-plans-to-review-lethal-injection-protocol/> [https://perma.cc/J69W-7AUV].

49. See Brief of Former State Attorneys General as Amici Curiae Supporting Petitioners at 6, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955) [hereinafter State AG Brief].

50. See Alter, *supra* note 47.

51. See *infra* Parts II.B.1.b & II.B.2.

52. See State AG Brief, *supra* note 49, at 7.

53. See Erik Eckholm, *One Execution Botched, Oklahoma Delays the Next*, N.Y. TIMES (Apr. 29, 2014), <http://www.nytimes.com/2014/04/30/us/oklahoma-executions.html> [https://perma.cc/U893-N4ST].

54. *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 bormide are “closely related” and work similarly in many, but not all, respects).

55. See Eckholm, *supra* note 53; Katie Fretland, *Oklahoma Execution: Clayton Lockett Writhes on Gurney in Botched Procedure*, THE GUARDIAN (Apr. 30, 2014), <http://www.theguardian.com/world/2014/apr/30/oklahoma-execution-botched-clayton-lockett> [https://perma.cc/Z7SF-HDTW] (providing eyewitness account of Lockett execution).

56. 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.⁵⁸ Instead of replacing midazolam with another drug, the State merely increased the dosage of midazolam from 100 to 500 milligrams.⁵⁹ When Oklahoma finally executed Warner using this protocol, his last words were, “My body is on fire.”⁶⁰

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.⁶¹ Four of these inmates subsequently filed a motion for a preliminary injunction barring their executions until the court could resolve their Section 1983 claim.⁶² 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.⁶³ 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

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].

57. See Eckholm, *supra* note 53; Ariane de Vogue, *New Documents Reveal Botched Oklahoma Execution Details*, CNN POL. (Mar. 16, 2015), <http://www.cnn.com/2015/03/16/politics/clayton-lockett-oklahoma-execution/> [https://perma.cc/3A5M-UKEH].

58. See generally OKLA. DEP’T OF CORR., PREPARATION AND ADMINISTRATION OF CHEMICALS (2014) [hereinafter OKLAHOMA PROTOCOL]; *Oklahoma Unveils New Execution Procedures*, USA TODAY (Sept. 30, 2014), <http://www.usatoday.com/story/news/nation/2014/09/30/oklahoma-execution-procedures/16508213/> [https://perma.cc/T74P-6LFN].

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

60. See Andrew Buncombe, *Charles Warner Execution: Oklahoma Inmate’s Last Words Are ‘My Body Is on Fire’ as State Carries out First Death Penalty in Nine Months*, INDEP. (Jan. 15, 2015), <http://www.independent.co.uk/news/world/americas/charles-warner-execution-my-body-is-on-fire-9981842.html> [https://perma.cc/9GZT-XS43].

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.

62. See Motion for Preliminary Injunction at 4, Warner v. Gross, No. CIV-14-0665-F (W.D. Okla. Dec. 22 2014).

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.⁶⁴ The State's witness, Dr. Roswell Evans, contended that midazolam could in fact anesthetize the inmates.⁶⁵ 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.⁶⁶ 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.'"⁶⁷ On appeal, the Tenth Circuit, without holding oral argument, affirmed.⁶⁸

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."⁶⁹ 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."⁷⁰

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

64. See Transcript of Preliminary Injunction Hearing (Dec. 17-19, 2014), at 102–53, 333–94, 555–604, *Warner*, No. CIV-14-0665-F [hereinafter *Warner PI Hearing*].

65. See *id.* at 629–78.

66. See Transcript of Court's Ruling (Dec. 22, 2014), at 67, *Warner*, No. CIV-14-0665-F [hereinafter *Warner Ruling*].

67. See *id.* at 65.

68. See *Warner v. Gross*, 776 F.3d 721, 724 n.1, 736 (10th Cir.), *aff'd sub nom.* *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726 (2015).

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.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.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.⁷⁷ Adjudicative facts “deal with particular circumstances, relating the actions of the parties.”⁷⁸ These factual questions typically deal with “what the parties did, what the circumstances were, what the background conditions were.”⁷⁹ Trial courts typically answer these questions by following “procedures designed to ensure rigorous adversarial testing.”⁸⁰

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

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

75. See FED. R. CIV. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous”); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

76. See *Glossip*, 135 S. Ct. at 2786 (Sotomayor, J., dissenting).

77. See Davis, *supra* note 6, at 402–03.

78. Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 640 (1966).

79. Davis, *supra* note 6, at 402.

80. See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 11 (2011).

81. David L. Faigman, *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)).

82. See *id.*

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

84. Some commentators prefer other nomenclature. See, e.g., Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CAL. L. REV. 1185, 1233 (2013) (using the term “social facts”); John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 71 (2008). Because Professor Davis’s term “legislative fact” has been widely, though not universally, accepted, I follow his usage.

85. 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.

90. J. Jonas Anderson, *Specialized Standards of Review*, 18 STAN. TECH. L. REV. 151, 159 (2014).

91. See Edward K. Cheng, *Scientific Evidence as Foreign Law*, 75 BROOK. L. REV. 1095, 1096 (2010) (“scientific facts are rarely ever unique to the case at hand”).

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.⁹⁵ 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.⁹⁶

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.⁹⁷ *Glossip* considered whether Oklahoma's three-drug protocol created an unconstitutional risk of excruciating pain.⁹⁸ 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,⁹⁹ but that is essentially what the Court's deferential approach would permit.¹⁰⁰

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

95. See Hon. Michael E. Keasler & Cathy Cramer, *Appellate Courts Must Conduct Independent Research of Daubert Issues to Discover "Junk Science"*, 52 S. TEX. L. REV. 359, 361 (2011) ("[T]rial judges are in no better position than appellate judges to assess the validity of a scientific theory."); David L. Faigman, *The Supreme Court's Confused Empirical Jurisprudence*, 15 EXER 303 (2015), <http://www.jurilytics.com/downloads/bna/SupremeCourtConfusedJurisp.pdf> [<https://perma.cc/7KEZ-FG7W>].

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

97. See 9C ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 2589, at 473 (3d ed. 2008).

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.").

99. Cf. DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 56–62 (2008) (distinguishing between reviewable facts and case-specific facts).

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.¹⁰¹ 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.”¹⁰² Accordingly, where a constitutional right is at stake, appellate courts typically apply more searching review to district court factual findings.¹⁰³ For these collective reasons, the Court should have at least considered more searching review,¹⁰⁴ especially given that the district court’s limited evidentiary hearing did not permit full development of the relevant facts anyway.¹⁰⁵

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.¹⁰⁶ 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,¹⁰⁷ but such freelancing might undermine our adversarial judicial system.¹⁰⁸ Additionally, though

101. See FAIGMAN, *supra* note 99, at 62.

102. *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 501 n.17 (1984).

103. *See, e.g.*, *Miller v. Fenton*, 474 U.S. 104, 116 (1985); *Bose*, 466 U.S. at 510–11; *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.”).

104. 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).

105. *See infra* Part II.A.2.

106. *See* Gorod, *supra* note 80, at 39.

107. *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 . . .”).

108. *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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ 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.¹¹² 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.¹¹³ Additionally, the court did not even permit the plaintiffs to offer evidence rebutting the State's expert witness after he had testified.¹¹⁴ To this extent, the district court's factual

109. See, e.g., *Teva Pharm. USA, Inc. v. Sandoz*, __ U.S. __, 135 S. Ct. 831, 835–36 (2015) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)) (noting that Rule 52(a)(6) sets out a “clear command” and does not exclude certain categories of factual findings).

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

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

112. See *Warner* Ruling, *supra* note 66, at 4, (noting that the “compressed” schedule was “necessitated” by scheduled executions). The district court, in fact, initially hoped to avoid *any* hearing. See Transcript of Motion to Stay (Sept. 18, 2014), at 19–21, *Warner v. Gross*, No. 14-665 (W.D. Okla. Dec. 22, 2014).

113. See Transcript of Motion for Contempt (Nov. 13, 2014), at 81–84, *Warner*, No. 14-665 (denying request for more time to prepare experts for expedited preliminary injunction hearing).

114. See *Warner* Pretrial Conference, *supra* note 10, at 15; *Glossip v. Gross*, __ U.S. __, 135 S. Ct. 2726, 2792 (2015) (Sotomayor, J., dissenting).

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.

118. *See Warner PI Hearing*, *supra* note 64, at 10. In a decision reminiscent of Yossarian's idiosyncratic theory of censorship, the judge permitted the redaction of the transcript page numbers. *See Order* at 3–4, *Warner*, No. 14-665 (W.D. Okla. Dec. 22, 2014); JOSEPH HELLER, *CATCH-22* 16 (1996). Consequently, my pin cites to DPS interviews refer to the PDF pagination of the relevant documents.

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).

120. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 26 (2008) (refusing to defer to district court ruling on preliminary injunction where the district court's consideration was "cursory"); *cf. Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining

from those in, say, patent cases,¹²¹ to which companies are usually willing and able to devote tremendous resources.¹²² 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.¹²³

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."¹²⁴ This factual proposition was crucial to the Court's holding that Oklahoma's protocol was not "sure or very likely" to cause suffering.¹²⁵ However, significant scientific literature suggests otherwise. Midazolam is not a barbiturate, but a benzodiazepine.¹²⁶ A leading medical textbook explains that this class of drugs does "not cause a true general anesthesia because awareness usually persists"¹²⁷ Midazolam's primary

that judicial review of agency action asks whether the agency has thoroughly considered the problem); Berger, *supra* note 14, at 2069–70 (arguing that administrative law norms are relevant to constitutional decision-making).

121. See *Teva Pharm. USA, Inc. v. Sandoz*, 135 S. Ct. 831, 838 (2015) (stating that practical considerations and precedent support application of the "clearly erroneous" standard).

122. See Richard Finger, *The Patent Millionaires: Striking it Rich with High Stakes Litigation*, FORBES (Oct. 22, 2012), <http://www.forbes.com/sites/richardfinger/2012/10/22/the-patent-millionaires-striking-it-rich-with-high-stakes-litigation/#2715e4857a0b363c88234d9b> [https://perma.cc/7BCH-52TT] (discussing the substantial resources dedicated to patent litigation).

123. Indeed, the limited district court proceedings call into question the wisdom of the certiorari grant. Given the importance of the underlying factual questions, the Court should have waited to accept a similar case with more extensive district court proceedings and findings before issuing a decision with nationwide Eighth Amendment implications.

124. *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2739 (2015).

125. See *id.* at 2736 (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)); *infra* Part IIC.2.

126. See LAURENCE L. BRUNTON ET AL., GOODMAN & GILMAN'S THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 403 (11th ed. 2006).

127. *Id.* at 404.

clinical uses are to reduce anxiety, produce mild sedation, and relax muscles, often prior to the induction of anesthesia.¹²⁸ Accordingly, much of the medical literature squarely addressing the issue states that “[m]idazolam cannot be used alone . . . to maintain adequate anesthesia.”¹²⁹ To the contrary, as another leading textbook explains, midazolam, like other benzodiazepines, “must be used with other anesthetic drugs to provide sufficient analgesia”¹³⁰

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.¹³¹ However, as Justice Sotomayor explained, “Dr. Evans identified no scientific literature to support” this view.¹³² Instead, Dr. Evans relied on the website *drugs.com*,¹³³ which another expert described as “out of date, incomplete, and of general low editorial quality.”¹³⁴ It is highly questionable whether a website designed to provide basic information about medicine to a lay audience,¹³⁵ rather than a medical journal or textbook, should be acceptable to corroborate a controversial point about a drug’s properties.¹³⁶ 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).

133. *See* Expert Report of Dr. R. Lee Evans (Dec. 2, 2014) at 6, *Warner v. Gross*, No. 14-665 (W.D. Okla. Dec. 22, 2014).

134. Post-Hearing Declaration by Larry D. Sasich (Jan. 8, 2015) at 2, *Warner*, No. 14-665; *see also Warner PI Hearing*, *supra* note 64, at 336.

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”).

136. *See* Annie Waldman, *Key Expert in Supreme Court Lethal Injection Case Did His Research on Drugs.com*, PRO PUBLICA (Apr. 28, 2015, 12:31 PM), https://www.propublica.org/article/key-expert-in-supreme-court-lethal-injection-case-did-research-drugs.com?utm_source=et&utm_medium=email&utm_campaign=dailynewsletter&utm_content=&utm_name [<https://perma.cc/7BCH-52TT>] (quoting doctors criticizing Dr. Evans’ reliance on websites rather than “primary literature” for midazolam’s properties).

drugs.com cautioned that midazolam “should not be used alone for maintenance of anesthesia”¹³⁷ The trial court, in other words, relied on an expert whose testimony was undermined by the very (questionable) source upon which he relied.¹³⁸

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.¹³⁹ The district court, however, heard extensive evidence about midazolam’s ceiling effect, above which an increase in dosage produces no discernible effect.¹⁴⁰ 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.¹⁴¹ Medical literature similarly indicates that increased doses of benzodiazepines like midazolam will not increase the drug’s pharmacological effects.¹⁴² 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.¹⁴³

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

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.”¹⁴⁴ Unlike Dr. Evans, the plaintiffs’ experts *did* point to medical literature bolstering this conclusion.¹⁴⁵ 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.”¹⁴⁶ 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.¹⁴⁷

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.¹⁴⁸ 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.¹⁴⁹

Once again, the Court applied excessive deference. To be sure, civil rights plaintiffs usually do bear the burden of proof.¹⁵⁰ “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).¹⁵¹ 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).

145. See, e.g., Lubarsky Report, *supra* note 141, at 3–4 (citing medical journal studies about midazolam); Expert Report of Dr. Larry D. Sasich (Nov. 26, 2014) at 3–4, Warner, No. 14-665 (same).

146. *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2742 (2015).

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.*

150. See, e.g., *Crawford-El v. Britton*, 523 U.S. 574, 589 (1998) (noting “the plaintiff’s burden of proving a constitutional violation”).

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 preponderance 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

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.”).

155. *See Ethical Guidelines for Pain Research in Humans*, INT’L ASS’N FOR THE STUDY OF PAIN, <http://www.iasp-pain.org/Education/Content.aspx?ItemNumber=1213> [<https://perma.cc/M2E7-HPZW>].

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. ANAESTHESIA 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.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰

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.¹⁶¹ But beyond Dr. Evans' poorly supported testimony, the evidence in the record and a neutral amicus brief in support of neither party¹⁶² pointed strongly to the opposite conclusion.¹⁶³ The Court's

(1978); Gordon M. Wyant & Lavern J. Studney, *A Study of Diazepam (Valium®) for Induction of Anaesthesia*, 17 CAN. ANAESTHESIA SOC. J. 166, 170 (1970).

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.¹⁶⁴ 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.¹⁶⁵ 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,¹⁶⁶ 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,¹⁶⁷ 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."¹⁶⁸ 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.¹⁶⁹

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.

167. *See* *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985).

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.”¹⁷⁰ As it turned out, the letter in question was sent not to Oklahoma’s DOC, but Texas’s.¹⁷¹ 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 *does* continue to get that drug.¹⁷²

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,¹⁷³ 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.”¹⁷⁴ 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.¹⁷⁵ 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 2016.¹⁷⁶

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

170. See Brief for Respondents at 11, *Glossip*, 135 S. Ct. 2726 (No. 14-7955); Chris McDaniel, *Oklahoma’s Attorney General Misled Supreme Court About Letter On Execution Drug Availability*, BUZZFEED (May 13, 2015), <http://www.buzzfeed.com/chrismdaniel/oklahomas-attorney-general-misled-supreme-court-about-letter#.giYWPM40A0> [https://perma.cc/3TLZ-D8XE].

171. See McDaniel, *supra* note 170.

172. See, e.g., Mark Berman, *Texas Finds More Lethal Injection Drugs After All*, WASH. POST (Mar. 25, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/03/25/texas-finds-more-lethal-injection-drugs-after-all/> [https://perma.cc/HSU5-3J4G].

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

174. Letter from Patrick R. Wyrick, Solicitor General of Oklahoma, to Scott S. Harris, Clerk, Supreme Court of the United States (May 13, 2015) (source on file with author).

175. See *Execution List 2016*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2016> [https://perma.cc/32ZH-AABB] ; *Execution List 2015*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2015> [https://perma.cc/KB46-QRZU]; *Execution List 2014*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2014> [https://perma.cc/E9LH-WVLV].

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.¹⁷⁷ 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.¹⁷⁸ Furthermore, given that states sometimes share execution drugs,¹⁷⁹ 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.'"¹⁸⁰ Lethal injection cases, the Court continued, "test the boundaries of the authority and competency of federal courts."¹⁸¹ 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

177. See Ty Alper, *Why the Execution Drug Shortage Won't Go Away*, L.A. TIMES (Apr. 13, 2015), <http://www.latimes.com/nation/la-oe-alper-lethal-injection-shortages-20150414-story.html> [https://perma.cc/A32H-2SNC]; Manny Fernandez, *Delays as Death-Penalty States Scramble for Execution Drugs*, N.Y. TIMES (Oct. 8, 2015), <http://www.nytimes.com/2015/10/09/us/death-penalty-lethal-injection.html> [https://perma.cc/AE6H-5U6Y].

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").

179. See, e.g., Gibson & Lain, *supra* note 41, at 1222; *Texas Prison Officials Send Virginia Sought-After Drug for Execution This Week*, N.Y. TIMES (Sept. 26, 2015), http://www.nytimes.com/2015/09/27/us/texas-prison-officials-send-virginia-sought-after-drug-for-execution-this-week.html?_r=0 [https://perma.cc/5RLR-4R5U].

180. *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2740 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 51 (2008)).

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.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.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,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.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.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.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.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

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).

183. See, e.g., Complaint (June 25, 2014) at 14–18, Warner v. Gross, No. 14-665 (W.D. Okla. Dec. 22 2014); State AG Brief, *supra* note 49, at 5–23.

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

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

186. See Berger, *supra* note 14, at 2058–74.

187. See *id.* at 2074–79.

188. For a discussion of why these factors should help guide the deference determination, see generally *id.* at 2054–58.

hire each others' officials,¹⁸⁹ 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.¹⁹⁰ Consequently, judicial deference to governmental actors in constitutional cases is often premised on the political branches' ostensibly superior democratic accountability.¹⁹¹ 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.¹⁹²

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.¹⁹³ 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.¹⁹⁴ Indeed, the whole legitimacy of delegation is premised on the legislature

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

190. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

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).

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

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

194. See, e.g., Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 409 (1989) (characterizing modern legislation as instructions to administrative agencies).

delegating with a sufficiently “intelligible principle.”¹⁹⁵ 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.”¹⁹⁶

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.¹⁹⁷

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.¹⁹⁸ Oklahoma statutes, for example, say nothing about midazolam.¹⁹⁹ 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.

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

196. ELY, *supra* note 191, at 132.

197. *Cf.* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 545–46 (2000) (noting that despite agencies’ considerable power, they are not “directly accountable to the electorate.”).

198. *See, e.g.*, Berger, *supra* note 27, at 301–14 (discussing lethal injection political process failures); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 116–25 (2002) (discussing state delegation of lethal injection protocols).

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.²⁰⁰ 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.²⁰¹ 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.²⁰²

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.”²⁰³

Nor did other officials engage meaningfully in the process. Warden Anita Trammell, who admitted she was “responsible” for the execution protocol,²⁰⁴ conceded that she knew nothing about midazolam.²⁰⁵ Though she admitted to signing the protocol, she played no role in designing it and did not even know who did.²⁰⁶ “I signed the damn thing,” Trammell said. “I did not write that policy. I did not choose those drugs.”²⁰⁷

200. See Berger, *supra* note 14, at 2063–65.

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 occurs “at some remove from the political appointees”).

202. Berger, *supra* note 14, at 2063.

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.

207. Samantha Vicent, *Oklahoma State Penitentiary Warden Retires as State Investigation into Executions Continues*, TULSA WORLD (Oct. 30, 2015), http://www.tulsaworld.com/news/state/oklahoma-state-penitentiary-warden-retires-as-state-investigation-into-executions/article_cab7f149-91b3-56f9-a9f7-27a59b16482f.html [<https://perma.cc/6AD8-WYRS>].

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

208. See Interim Report No. 14 at 96, In the Matter of the Multicounty Grand Jury, No. GJ-2014-1 (D. Ct. Okla., May 19, 2016) [hereinafter Oklahoma Interim Report].

209. See *id.* at 99.

210. Cary Aspinwall et al., *Records Raise Questions About Who Is in Charge of Oklahoma Executions*, FRONTIER (Oct. 9, 2015), <https://www.readfrontier.com/investigation/records-raise-questions-about-who-is-in-charge-of-oklahoma-executions/> [https://perma.cc/Z4LC-FEZD].

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 . . .”).

213. See Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 448 (2010); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1271 (2009).

214. See Berger, *supra* note 14, at 2065–67.

the gurney, state officials closed the blinds to the execution chamber.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.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.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.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.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.²²⁰ As a result, it is virtually impossible for inmates to know whether the state has safe drugs, proper equipment, and qualified personnel.

215. See Elliott Interview, *supra* note 56, at 9; Samantha Vicent & Barbara Hoberock, *Emails from Gov. Fallin's Office Show State Agencies' Struggle to Respond to Scrutiny over Execution*, TULSA WORLD (Oct. 12, 2015), http://www.tulsaworld.com/homepagelatest/emails-from-gov-fallin-s-office-show-state-agencies-struggle/article_b059a1f2-03db-5618-bb33-fbe2f158f23a.html [<https://perma.cc/DHK2-S984>].

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.

217. See *supra* note 19 and *infra* notes 361–364 and accompanying text.

218. See Berger, *supra* note 30, at 1391–92.

219. See ARK. CODE ANN. § 5-4-617 (West 2013); LA. STAT. ANN. § 15:570 (2012); OKLA. STAT. ANN. tit. 22 § 1015(B) (West 2011); S.D. CODIFIED LAWS § 23A-27A-31.2 (2013); TENN. CODE ANN. § 40-20-206 (West 2014).

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.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.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.²²³ Of course, Oklahoma *did* publish a report summarizing its mistakes,²²⁴ but it did so only *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 *identities* of its execution team members. Oklahoma, however, also refuses to disclose their *qualifications* and *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.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.²²⁶ In rushing to defer to the DOC, the Court did not examine these concerns at all.

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.”).

222. *See* Berger, *supra* note 30, at 1432; Denno, *supra* note 35, at 1348.

223. *See* Berger, *supra* note 30, at 1433; *infra* Part II.B.2.

224. *See* OKLA. DEP’T OF PUB. SAFETY, THE EXECUTION OF CLAYTON D. LOCKETT (2014), <http://www.dps.state.ok.us/Investigation/14-0189SI%20Summary.pdf> [<https://perma.cc/WT2U-8WYS>] [hereinafter Lockett Execution Report]. This report was part of the district court record. *See* Exhibit and Witness List, Warner v. Gross, 776 F.3d 721 (W.D. Okla. 2014) (No. 14-665), 2014 WL 7671680.

225. *See, e.g.*, Jackson v. Danberg, 656 F.3d 157, 161–63 (3d Cir. 2011) (Delaware); Beatty v. Brewer, 791 F. Supp. 2d 678, 686 (D. Ariz. 2011) (Arizona); Pavatt v. Jones, 627 F.3d 1336, 1337–38 (10th Cir. 2010) (Oklahoma); ARIZ. DEP’T OF CORR., DEPARTMENT ORDER 710, 1 (2015), https://corrections.az.gov/sites/default/files/policies/700/0710_-_effective_10-23-15.pdf [<https://perma.cc/S45P-R6JH>] (giving discretion to DOC Director to deviate from written execution protocol); OKLA. DEP’T OF CORR., EXECUTION PROCEDURES 2 (2015), <https://www.ok.gov/doc/documents/op040301.pdf> [<https://perma.cc/T2F3-ZV6N>] (giving discretion to DOC Director to deviate from written execution protocol).

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

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).

228 See Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1078 (2008).

229 See, e.g., Berger, *supra* note 15, at 64–65.

230 See Berger, *supra* note 27, at 330.

231 See Denno, *supra* note 35, at 1360–76.

232 See Denno, *supra* note 25, at 64–117.

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,²³⁵ who tried in vain to find “phenobarbital.”²³⁶

This team faced substantial political pressure “to make the decision, get it done, hurry up about it.”²³⁷ After just four days, the State adopted a new execution protocol including midazolam.²³⁸ 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. . . .”²³⁹ This understanding is plainly wrong, as midazolam lacks analgesic properties and, unlike pentobarbital, is not a barbiturate.²⁴⁰

Nor did the team of lawyers consult reputable sources about the drug.²⁴¹ 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. . . .”²⁴² 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.²⁴³

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

236. See Interview by Okla. Dep’t of Pub. Safety with Mike Oakley, Former Gen. Couns., Okla. Dep’t of Corr., in Okla. City, Okla., Transcript at 7, (June 10, 2014) [hereinafter Oakley Interview] (noting that “Phenobarbital is the first drug in the protocol” and that it was “going to be very difficult to locate”) (emphasis added). Phenobarbital, a slow-acting barbiturate, is used commonly to treat certain kinds of seizures. See, e.g., Deb K. Pal, *Phenobarbital for Childhood Epilepsy: Systematic Review*, 7 PAEDIATRIC PERINATAL DRUG THERAPY 31, 31 (2006). It appears that Oakley mistakenly called “pentobarbital” by the wrong name, though it is possible Oklahoma officials considered substituting “phenobarbital” in their protocol. See Plaintiffs’ Proposed Findings of Facts and Conclusions of Law at 4 n.4, *Warner v. Gross*, 776 F.3d 721 (W.D. Okla. 2014) (No. 14-665), 2014 WL 7671680 [hereinafter Proposed Findings of Facts].

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.

238. See State AG Brief, *supra* note 49, at 7; Eric Berger, *The Executioners’ Dilemmas*, 49 U. RICH. L. REV. 731, 739 (2015); Associated Press, *State Prepares to Resume Executions, but Questions Linger*, MUSKOGEE PHOENIX (Oct. 5, 2014), http://www.muskogeephoenix.com/news/oklahoma_news/article_e26c0b36-4c4c-11e4-8666-17ea756064ce.html [https://perma.cc/X5PY-6AY7].

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.

242. State AG Brief, *supra* note 49, at 10 (quoting record).

243. See Oklahoma Interim Report, *supra* note 208, at 77–93.

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.²⁴⁴ Though the protocol included a doctor and paramedic, neither had attended training sessions.²⁴⁵ Consequently, they did not have practice interacting with the team, and the other team members never received the benefit of their professional expertise.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."²⁴⁷ The execution team also lacked basic but crucial information, such as how quickly the midazolam would take effect.²⁴⁸ Nor did it have "training protocols or contingency plans on how to proceed with an execution if complications occur during the process."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.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.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

244. See Interview by Okla. Dep't of Pub. Safety with Paramedic, in Okla. City, Okla., Second Interview, Transcript at 22 (July 31, 2014).

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].

246. See Lockett Execution Report, *supra* note 224, at 20–22.

247. Oklahoma Interim Report, *supra* note 208, at 62.

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").

249. Lockett Execution Report, *supra* note 224, at 22.

250. See *id.* at 16; Expert Report of Dr. Eric D. Katz (Nov. 26, 2014), at 3, Warner v. Gross, 776 F.3d 721 (W.D. Okla. 2014) (No. 14-665), 2014 WL 7671680.

251. See Lockett Execution Report, *supra* note 224, at 11.

accurately.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.”²⁵³

Oklahoma’s next execution of Charles Warner was also problematic. Warner’s last words were, “My body is on fire.”²⁵⁴ The State later admitted that it had injected Warner with the wrong third drug.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.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.”²⁵⁷

Other states’ track records are no more encouraging.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.²⁵⁹ Missouri also entrusted its procedure to a dyslexic doctor, who later admitted he had

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

253. Physician Interview, *supra* note 245, at 56.

254. See Buncombe, *supra* note 60.

255. See Mahita Gajanan, *Oklahoma Used Wrong Drug in Charles Warner’s Execution, Autopsy Report Says*, GUARDIAN (Oct. 8, 2015), <http://www.theguardian.com/us-news/2015/oct/08/oklahoma-wrong-drug-execution-charles-warner> [<https://perma.cc/X2J7-KTV9>] (explaining that Oklahoma injected potassium acetate instead of potassium chloride).

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-arizon#.nodRW3G9w> [<https://perma.cc/T7GE-ULTE>].

257. See *id.*

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.”).

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.

261. See Chris McDaniel, *Pharmacy That Mixed Executions Drugs Is Being Sold After Admitting Numerous Violations*, BUZZFEED NEWS (April 21, 2016), https://www.buzzfeed.com/chrismcDaniel/pharmacy-that-mixed-execution-drugs-is-being-sold-after-disc?utm_term=.llwQLER87#.kdqwwZdjz [<https://perma.cc/5FZP-VM89>].

262. See, e.g., Plaintiff's Complaint at 2, *Taylor v. Apothecary Shoppe*, No. 14-CV-063-TCK-TLW (N.D. Okla. Feb. 11, 2014).

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

264. See *id.* at 1369–71.

265. See Chris McDaniel, *This is the Man in India Who Is Selling States Illegally Imported Execution Drugs*, BUZZFEED NEWS (Oct. 20, 2015), <http://www.buzzfeed.com/chrismcDaniel/this-is-the-man-in-india-who-is-selling-states-illegally-imp#.pbkLb8nky> [<https://perma.cc/HS33-4G2W>].

266. See Bruce Einhorn & Matt Stroud, *Questions Surround Supply of Nebraska's Lethal Injection Drugs*, BLOOMBERG NEWS (May 27, 2015), <http://www.bloomberg.com/news/articles/2015-05-27/questions-surround-supply-of-nebraska-s-lethal-injection-drugs> [<https://perma.cc/B8X4-VMMT>] (listing issues Nebraska failed to investigate before paying over \$54,000 for drugs it could not legally import); McDaniel, *supra* note 261.

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.²⁶⁸ At least three other states made similar mistakes, paying Harris for drugs they could not legally import.²⁶⁹

Other states also have had difficulties employing qualified people to set the catheter and equip the execution chamber.²⁷⁰ When Florida execution team members misplaced Angel Diaz's IV line, the drugs spilled into the surrounding tissue, causing excruciating pain.²⁷¹ During the botched execution of Joseph Wood, Arizona injected fifteen times the standard dose of its drug.²⁷² As one professor of anesthesiology remarked afterwards, "[t]hey're making this up as they go along."²⁷³

States' failure to acknowledge their mistakes only deepens these concerns further. After Wood's two-hour execution, Arizona denied that the execution had been botched.²⁷⁴ State officials refused to answer a reporter's question, "How is a two-hour execution *not* botched?"²⁷⁵ After Lockett's gruesome execution, Oklahoma Governor Mary Fallin implausibly claimed that Lockett had remained unconscious throughout the whole procedure.²⁷⁶ Indeed, rather than concede the obvious problems, Oklahoma officials threatened to impeach Oklahoma Supreme

268. See *Cook v. FDA*, 733 F.3d 1, 11–12 (D.C. Cir. 2013).

269. See *McDaniel*, *supra* note 261.

270. 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).

271. 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.").

272. 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>].

273. See *id.* (quoting Dr. Joel Zivot, Assistant Professor of Anesthesiology and Surgery at Emory University Hospital).

274. See *Arizona Prison Chief Says Execution Wasn't Botched*, KSN.COM (July 24, 2014), <http://ksn.com/2014/07/24/arizona-prison-chief-says-execution-wasnt-botched/> [<https://perma.cc/XW6G-XEYC>].

275. See Corinna Barrett Lain, *The Politics of Botched Executions*, 49 RICH. L. REV. 825, 837 (2015).

276. See Greg Botelho & Dana Ford, *Oklahoma Stops Execution After Botching Drug Delivery; Inmate Dies*, CNN (Apr. 30, 2014), <http://www.cnn.com/2014/04/29/us/oklahoma-botched-execution/> [<https://perma.cc/8YTL-NB9M>].

Court justices who voted to stay an execution so that the court could examine a challenged execution procedure.²⁷⁷

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.”²⁷⁸ Consequently, contended Justice Stevens, DOC officials’ choices “are not entitled to the kind of deference afforded legislative decisions.”²⁷⁹ 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,²⁸⁰ 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.²⁸¹ When agencies do not follow established procedures, they are more likely to engage in arbitrary behavior undeserving of deference.²⁸² 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.²⁸³ 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.²⁸⁴ Subsequent

277. See Andrew Cohen, *Oklahoma Just Neutered Its State Supreme Court*, THE WEEK (Apr. 29, 2014), <http://theweek.com/article/index/260632/oklahoma-just-neutered-its-state-supreme-court> [<https://perma.cc/9LPH-58WB>].

278. *Baze v. Rees*, 553 U.S. 35, 75 (2008) (Stevens, J., concurring).

279. *Id.*

280. See generally State AG Brief, *supra* note 49, at 5–23 (detailing Oklahoma’s lack of expertise and careful processes in adopting midazolam); see *supra* notes 116–17 and accompanying text. Of course, there may well be competent, well-intentioned people involved in Oklahoma’s lethal injection protocol, but numerous factors often make it difficult for state officials to design workable execution procedures. See Berger, *supra* note 238, at 741–58.

281. Cf. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

282. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1680 (1975) (discussing checks on agencies that “promote formal justice in order to protect private autonomy”).

283. See *supra* notes 235–243 and accompanying text.

284. See Matt Ford, *An Oklahoma Execution Done Wrong*, THE ATLANTIC (Oct. 8, 2015), <http://www.theatlantic.com/politics/archive/2015/10/an-oklahoma-execution-done-wrong/409762/> [<https://perma.cc/JTM8-X7Z8>]. Admittedly, Oklahoma’s use of the wrong drug did not become

investigation demonstrated that the State had lacked the kind of careful administrative procedures necessary to prevent such a mistake.²⁸⁵ Additionally, during the Lockett execution, the State deviated from its own protocol in several ways.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.²⁸⁷ This team member speculated that the State's unusual decision to attempt two executions in the same evening likely contributed to this confusion.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."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.²⁹⁰ These equipment problems surely contributed to the doctor's mistakes.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."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.²⁹³ In the meantime, Lockett died.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.²⁹⁵ The procedural anomalies were so egregious that the Oklahoma Attorney General, to his credit, ultimately acknowledged that "a number

public until after the Court had decided *Glossip*, but the Lockett botch and other errors had already come to light, and the Court paid them little attention.

285. See Oklahoma Interim Report, *supra* note 208, at 33–37.

286. See Lockett Execution Report, *supra* note 224, at 14.

287. See Paramedic First Interview, *supra* note 245, at 15 (admitting that the amounts of some drugs in the syringes were less for one execution than they had been for others).

288. See *id.* ("[W]e didn't know what the game plan was . . .").

289. See Trammell Interview, *supra* note 248 at 95.

290. See Physician Interview, *supra* note 245, at 7 ("The only thing they had was a, was a short 1/4" needle which is pretty, kind of marginal."); Lockett Execution Report, *supra* note 224, at 16.

291. See Lockett Execution Report, *supra* note 224, at 16.

292. Paramedic First Interview, *supra* note 245, at 17.

293. See Interview by Okla. Dep't of Pub. Safety with Steve Mullins, General Counsel to Governor, in Okla. City, OK at 19, (May 15, 2014).

294. See *id.* at 21.

295. See Oklahoma Interim Report, *supra* note 208, at 1–2.

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.”²⁹⁶

Other lethal injection states have also historically had difficulty following their own written lethal injection protocols.²⁹⁷ Missouri, for example, has permitted haphazard deviations from its protocol,²⁹⁸ sometimes injecting less anesthetic than its protocol required.²⁹⁹ A federal judge concluded that California’s protocol had suffered, *inter alia*, from inconsistent screening of execution team members, inadequate training, and inconsistent record keeping.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.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

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 *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. *See, e.g.*, Proposed Findings of Facts, *supra* note 236, at 1–50; State AG Brief, *supra* note 49, at 5–23; Lockett Execution Report, *supra* note 224, at 14–19, 20–25; Oakley Interview, *supra* note 236; Trammell Interview, *supra* note 248. To this extent, the Multicounty Grand Jury’s findings merely corroborated arguments the plaintiffs had already made based on available evidence.

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

298. *See* 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.”).

299. *See id.*

300. *See* Morales v. Tilton, 465 F. Supp. 2d 972, 979–80 (N.D. Cal. 2006).

301. *See* 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.”); McDaniel, *supra* note 256.

presided over two botched executions and a third that was called off because the State had purchased the wrong drug.³⁰²

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.

303. See *Glossip v. Gross*, 135 S. Ct. 2726, 2740 (2015); *supra* note 180 and accompanying text.

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 1962,³⁰⁴ 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.³⁰⁵ For that reason, its precedential value for contemporary lethal injection cases is limited.³⁰⁶ 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.³⁰⁷

To add more confusion, the most relevant Supreme Court precedent at issue in *Glossip* was the highly fractured decision in *Baze v. Rees*.³⁰⁸ 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,³⁰⁹ others have questioned this proposition,³¹⁰ including Justice Sotomayor in her *Glossip* dissent.³¹¹ Moreover, even if one accepts the Roberts plurality opinion as the holding of the Court, that

304. See *Robinson v. California*, 370 U.S. 660 (1962).

305. See *In re Kemmler*, 136 U.S. 436, 443 (1890).

306. See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 334 (1997).

307. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 460–61 (1947).

308. *Baze v. Rees*, 553 U.S. 35 (2008).

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”).

311. See *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2793 (2015) (Sotomayor, J., dissenting) (questioning whether the *Baze* plurality's requirement that a lethal injection plaintiff must prove the availability of an alternative method of execution constituted the holding of the Court).

opinion could be read as articulating different legal standards, sowing legal uncertainty.³¹²

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.³¹³ 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.³¹⁴

Kemmler, thus, found the challenged execution method unproblematic, because the evidence indicated that the execution would result in painless death.³¹⁵

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.³¹⁶ 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."³¹⁷ 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."³¹⁸ 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.

314. *In re Kemmler*, 136 U.S. 436, 443–44 (1890) (quoting *People ex rel. Kemmler v. Durston*, 119 N.Y. 569, 579 (1890)).

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 . . .”).

316. See *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality opinion) (quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947) (plurality opinion)).

317. *Resweber*, 329 U.S. at 462.

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 severe 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

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).

322. *Baze v. Rees*, 553 U.S. 35, 50 (2008).

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.³²⁷ In other words, Eighth Amendment precedent differentiates between unforeseeable accidents, on the one hand, and more systemic procedural flaws, on the other.

2. *The Risk Standard*

Glossip's deferential approach ignored these important Eighth Amendment principles. *Glossip* insisted that the plaintiffs had to prove that the challenged protocol is "sure or very likely to cause serious illness or needless suffering."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.'"³²⁹ "[W]hile most humans wish to die a painless death," wrote Justice Alito, "many do not have that good fortune."³³⁰ As though to confirm his articulation of the risk standard, Justice Alito repeated the "sure or very likely" language in four separate places.³³¹

This standard fails to incorporate the precedent's concern for the inmate's pain and attention to the state's level of care.³³² As articulated, the *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.³³³

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

328. *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2736 (2015) (quoting *Baze*, 553 U.S. at 50).

329. *Id.* at 2732–33 (quoting *Baze*, 553 U.S. at 47).

330. *See id.* at 2733.

331. *See id.* at 2736, 2737, 2739, 2745.

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, *see Helling v. 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.

333. Prior to *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. *See, e.g.,* Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in Baze v. Rees: A Fifth Gregg Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783, 851–52 (2010) ("The [*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 *Glossip*'s language that the protocol be very likely to cause *needless* 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.

336. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

337. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 49 (Vintage Books 2d ed. 1995); see also AUSTIN SARAT ET AL., *GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY* 7–8 (2014) (discussing Foucault).

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.”³⁴⁰ 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.³⁴¹ *Baze*, too, had included such a requirement.³⁴² 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,³⁴³ *Glossip* treated these requirements as logically distinct, emphasizing that each served as an independent ground for affirming the district court.³⁴⁴

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.³⁴⁵ 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,”³⁴⁶ but it is not clear why. As the dissent pointed out, the majority articulated a categorical rule: if the inmate fails

340. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

341. *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2737 (2015).

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).

344. *See Glossip*, 135 S. Ct. at 2738–39.

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.³⁴⁷ 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"³⁴⁸ 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.³⁴⁹ 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.³⁵⁰ It is almost as though the Court forgot that a core constitutional value is to protect the unpopular from governmental abuse.³⁵¹

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.

350. *Cf. Glossip*, 135 S. Ct. at 2733–34 (emphasizing difficulties states encountered procuring lethal injection drugs).

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.³⁵² 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.³⁵³ This difference, the majority indicated, rendered the Lockett botch irrelevant for purposes of judging the new protocol.³⁵⁴

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.³⁵⁵ 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."³⁵⁶ The Court also brushed aside Arizona's midazolam-based execution of Wood, because it "did not involve the protocol at issue here."³⁵⁷ Both executions, therefore, had "little probative value for present purposes."³⁵⁸

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 *id.*, 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.

355. See Erik Eckholm, *Arizona Takes Nearly Two Hours to Execute Inmate*, N.Y. TIMES (July 23, 2014), <http://www.nytimes.com/2014/07/24/us/arizona-takes-nearly-2-hours-to-execute-inmate.html> [<https://perma.cc/U893-N4ST>].

356. *Glossip*, 135 S. Ct. at 2746.

357. *Id.*

358. *Id.*

planned.³⁵⁹ In his comprehensive book on execution methods, Austin Sarat calculates that 7.12% of lethal injection executions have been botched.³⁶⁰ 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.³⁶¹ Landrigan died with his eyes open, quite possibly because he was not anesthetized when the paralytic took effect.³⁶² 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.³⁶³ 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,³⁶⁴ 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.³⁶⁵ Far from being reassuring, however, this explanation merely highlights systemic problems with lethal injection generally.³⁶⁶ *Every*

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.

361. See Liliana Segura, *Pfizer's Death Penalty Ban Highlights the Black Market in Execution Drugs*, INTERCEPT (May 19, 2016, 11:04 AM), <https://theintercept.com/2016/05/19/pfizers-death-penalty-ban-highlights-the-black-market-in-execution-drugs/> [<https://perma.cc/ZR37-TLR2>].

362. See *id.*

363. See *id.*

364. See ATUL GAWANDE, BETTER: A SURGEON'S NOTES ON PERFORMANCE 134 (2007).

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 inexperienced) execution team fails to set the catheter properly, a botched execution likely follows.³⁶⁷ 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.³⁶⁸ In other states, personnel have also struggled to insert the catheter properly.³⁶⁹ Many executions also involve inmates with compromised veins, adding further complications.³⁷⁰ 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.³⁷¹ 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.³⁷²

367. See Ben Crair, *Photos from a Botched Execution*, NEW REPUBLIC (May 29, 2016), <https://newrepublic.com/article/117898/lethal-injection-photos-angel-diazs-botched-execution-florida> [<https://perma.cc/9FAX-C5KB>].

368. See Lockett Execution Report, *supra* note 224, at 16–17; *supra* section II.B.2.

369. See, e.g., Berger, *supra* note 27, at 270; Kevin Fagan, *The Execution of Stanley Tookie Williams*, S.F. GATE (Dec. 14, 2005), <http://www.sfgate.com/news/article/THE-EXECUTION-OF-STANLEY-TOOKIE-WILLIAMS-2588632.php> [<https://perma.cc/H98F-SMX7>] (“The first catheter slid in messily . . . spurting so much blood at the needle point that a cotton swab was soaked . . . [A second technician then] had to poke for 11 minutes before her needle hit home.”); Chris McDaniel, *Georgia Executioners Struggled to Set IVs in Recent Lethal Injections*, BUZZFEED NEWS (Feb. 16, 2016), <http://www.buzzfeed.com/chrismcDaniel/georgia-executioners-struggled-to-set-ivs-in-recent-lethal-i#.xsAGoyANK> [<https://perma.cc/P5KX-RJY8>] (detailing Georgia's problems setting IV lines in executions).

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.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,³⁷⁴ of which three (McGuire, Lockett, and Wood) have been obviously botched. A fourth (Warner) called out “[m]y body is on fire.”³⁷⁵ Counting Warner, 28.5% of these midazolam executions have been problematic. Moreover, twelve of the fourteen midazolam executions included a paralytic,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,”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 *alter* the risks, sometimes marginally, sometimes dramatically. But the Court’s assertion that past botches “have little probative value”³⁷⁸ to the possibility of future botches speaks to an approach so deferential that it refuses to grapple with inconvenient facts.

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

373. See Dana Ford & Ashley Fantz, *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.”).

374. See *Executions in the United States*, DEATH PENALTY INFO. CTR. <http://www.deathpenaltyinfo.org/executions-united-states> [<https://perma.cc/7LF8-PHXQ>].

375. See Dana Ford, *Oklahoma Executes Charles Warner*, CNN (Jan. 16, 2015, 6:13 AM), <http://www.cnn.com/2015/01/15/us/oklahoma-execution-charles-frederick-warner/> [<https://perma.cc/M8L7-FPE8>].

376. See *Executions in the United States*, *supra* note 374.

377. *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2746 (2015).

378. *Id.*

modest pain, such as the insertion of a catheter. Rather, they were challenging the risk of the *agonizing* pain caused by potassium chloride.³⁷⁹ 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”³⁸⁰ akin to “burning somebody alive.”³⁸¹

The majority made almost no reference to this pain, or to the agony of suffocation caused by the paralytic.³⁸² The majority is correct, of course, that some pain is inherent in lethal injection and that the Eighth Amendment cannot prohibit all pain.³⁸³ 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.”³⁸⁴ But notwithstanding Justice Alito’s insistence that the dissent’s charges are “simply not true,”³⁸⁵ 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. *Gratuitous or Questionable Facts Included*

a. *“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.³⁸⁶ The majority’s recitation of the facts emphasized that anti-death penalty “activists” had pressured pharmaceutical companies to stop selling drugs

379. See *Baze v. Rees*, 553 U.S. 35, 53 (2008); *Warner PI Hearing*, *supra* note 64, at 353 (“I don’t think anybody would dispute [that potassium chloride causes great pain] . . .”).

380. See *Glossip*, 135 S. Ct. at 2781 (Sotomayor, J., dissenting).

381. See Transcript of Oral Argument at 58, *Glossip*, 135 S. Ct. 2726 (No. 14–7955) [hereinafter *Glossip* Oral Argument].

382. See *Baze*, 553 U.S. at 53; Berger, *supra* note 27, at 266.

383. See *Glossip*, 135 S. Ct. at 2733.

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.).

389. *Cf. Brown v. Plata*, 563 U.S. 493, 510–13 (2011) (holding that a court has a responsibility to remedy an Eighth Amendment violation resulting from prison overcrowding, even if doing so requires the release of some prisoners).

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.”).

392. *See Gibson & Lain, supra* note 41, at 1240–45; Juergen Baetz, *America’s Lethal Injection Drug Crisis Starts In Europe*, BUSINESS INSIDER (Feb. 18, 2014, 6:30 AM), <http://www.>

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.³⁹³ Hospira subsequently stopped manufacturing thiopental altogether.³⁹⁴

European pharmaceutical companies have internalized these values. For example, the Danish pharmaceutical company Lundbeck was “adamantly opposed” to its product being used in executions.³⁹⁵ Similarly, the Swiss pharmaceutical company Naari AG was “shocked and appalled by” news that Nebraska planned to use its drugs in executions.³⁹⁶

Indeed, the health care industry both at home and abroad—like doctors themselves—is often hesitant to involve itself in the death penalty.³⁹⁷ 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.”³⁹⁸ The International Academy of Compounding Pharmacists, too, has discouraged its members from providing drugs for use in executions.³⁹⁹

businessinsider.com/americas-lethal-injection-drug-crisis-starts-in-europe-2014-2#ixzz3lB0a7fDq [https://perma.cc/UF66-4PM7]; *EU Imposes Strict Controls on ‘Execution Drug’ Exports*, BBC NEWS (Mar. 5, 2012), <http://www.bbc.com/news/world-europe-16281016> [https://perma.cc/B2UT-3BBW].

393. See Gibson & Lain, *supra* note 41, at 1240–41.

394. See Press Release, Hospira, Inc., Hospira Statement Regarding Pentothal™ Market Exit (Jan. 21, 2011), <http://phx.corporate-ir.net/phoenix.zhtml?c=175550&p=irolnews Article&ID=1518610&print&ID1518610> [https://perma.cc/YWM6-JX5P].

395. See Letter from Staffan Schüberg, President, Lundbeck Inc., to Gary C. Mohr, Dir., Ohio Dep’t of Rehab. & Corr. (Jan. 26, 2011), <http://www.deathpenaltyinfo.org/documents/LundbeckLethInj.pdf> [https://perma.cc/88B8-PPT9] [hereinafter Schüberg Letter]; see also Gibson & Lain, *supra* note 41, at 1227–28; Emma Marris, *Death-Row Drug Dilemma*, NATURE (Jan. 27, 2011), <http://www.nature.com/news/2011/110127/full/news.2011.53.html> [https://perma.cc/QGB5-KBW8].

396. See Associated Press, *Swiss Company Demands Nebraska Return Drug Intended For Use In Lethal Injections*, BUSINESS INSIDER (Nov. 30, 2011), <http://www.businessinsider.com/nebraska-swiss-naari-ag-sodium-thiopental-2011-11> [https://perma.cc/8YEM-DYHJ].

397. See, e.g., *Pfizer’s Position on Use of Our Products in Lethal Injections for Capital Punishment*, PFIZER.COM (Mar. 28, 2016), <http://www.pfizer.com/files/b2b/GlobalPolicyPaperLethalInjection.pdf> [https://perma.cc/2WYN-HZ77] [hereinafter PFIZER]. Doctors and nurses, too, are mostly opposed to involvement in executions. The American Medical Association, the American College of Physicians, the American Public Health Association, and the American Nursing Association have all publicly opposed healthcare professionals’ involvement in executions. See SARAT ET AL., *supra* note 337, at 119.

398. See Schüberg Letter, *supra* note 395.

399. See Deborah Denno, *Symposium: “Groundhog Day” Indeed*, SCOTUSBLOG (June 30, 2015), <http://www.scotusblog.com/2015/06/symposium-groundhog-day-indeed> [https://perma.cc/X3HK-YCRM].

Even corporate executives and pharmacists without such sentiments might worry that participating in capital punishment would jeopardize their businesses.⁴⁰⁰ 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.⁴⁰¹

Additionally, some drug shortages have resulted from events completely disconnected from death-penalty politics.⁴⁰² 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.⁴⁰³ Compounding the problem, the sole U.S. thiopental manufacturer stopped production of it in 2010 due to an “unspecified raw material supply problem.”⁴⁰⁴ The FDA also prohibits its importation, because thiopental is not an “approved” drug and federal law forbids the importation of unapproved drugs.⁴⁰⁵ Along similar lines, there is also a shortage of pancuronium bromide, affecting hospitals nationwide.⁴⁰⁶

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.⁴⁰⁷ But even those efforts have not created the shortage so much as sought to enforce pre-existing federal law, which some states attempted to

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.

404. Carol J. Williams, *Maker of Anesthetic Used in Executions is Discontinuing Drug*, L.A. TIMES (Jan. 22, 2011), <http://articles.latimes.com/2011/jan/22/local/la-me-execution-drug-20110122> [<https://perma.cc/5WKM-HL7J>]; see also Andrew Welsh-Huggins, *Shortage of Drug Holds up Some U.S. Executions*, NBC NEWS (Sept. 27, 2010), http://www.nbcnews.com/id/39385026/ns/health-health_care/t/shortage-drug-holds-some-us-executions/#.Ve8L15fl-7Q [<https://perma.cc/2UJ7-DLBU>].

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).

406. See *FDA Drug Shortages*, FOOD & DRUG ADMIN, http://www.accessdata.fda.gov/scripts/drugshortages/dsp_ActiveIngredientDetails.cfm?AI=Pancuronium%20Bromide%20Injection&st=c&tab=tabs-1 [<https://perma.cc/F32T-D3UG>].

407. See *Cook*, 733 F.3d at 4.

violate. *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.⁴⁰⁸ 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.⁴⁰⁹ And, of course, some states can and have turned to different methods of execution, such as lethal gas or the firing squad.⁴¹⁰ 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,⁴¹¹ 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-22.⁴¹² 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.⁴¹³ Oklahoma, in fact, sought to dismiss all the

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).

409. See *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> [<https://perma.cc/V7YN-6YVN>] (listing state lethal injection protocol information, including numerous states that do not use midazolam).

410. See *Methods of Execution*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/methods-execution> [<https://perma.cc/GJ92-AV36>]; James C. Feldman, Comment, *Nothing Less than the Dignity of Man: The Eighth Amendment and State Efforts to Reinstigate Traditional Methods of Execution*, 90 WASH. L. REV. 1313, 1330–36 (2015).

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.

Glossip plaintiffs whose executions were not imminent.⁴¹⁴ 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.⁴¹⁵ 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.⁴¹⁶ 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.⁴¹⁷ These were horrific crimes, and the persons who committed them deserve very severe penalties.⁴¹⁸ 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.⁴¹⁹ Even had they won their case, the plaintiffs still could have been executed by lethal injection, albeit by a somewhat different protocol.⁴²⁰

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

414. See Defendants' Motion to Dismiss (July 16, 2014), at 11, 14, Warner v. Gross, No. 14-665 (July 16, 2014) 2014 WL 7671680 ("[A] challenge to a specific method or practice set out in a protocol years in advance of a possible execution is not ripe.").

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.

417. See *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2735 (2015).

418. Interestingly, the lead plaintiff, Richard Glossip, may not have been guilty of murder. See Matt Ford, *The Troubling Case of Richard Glossip*, THE ATLANTIC (Sept. 16, 2015), <http://www.theatlantic.com/politics/archive/2015/09/the-troubling-case-of-richard-glossip/405646/> [<https://perma.cc/47UX-VX7V>]; Mark Graber, *Richard Glossip*, BALKINIZATION (July 6, 2015), <http://balkin.blogspot.com/2015/07/richard-glossip.html> [<https://perma.cc/5Z78-77DQ>].

419. Cf. Hill v. McDonough, 547 U.S. 573, 579–83 (2006) (permitting the plaintiff to bring his challenge under § 1983 because "Hill's action if successful would not necessarily prevent the State from executing him by lethal injection.").

420. See *id.*; Nelson v. Campbell, 541 U.S. 637, 647 (2004).

prison conditions or medical care.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.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.⁴²³ To this extent, *Glossip* is part of a larger judicial reaction against the use of courts to effect institutional reform.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.⁴²⁵ *Iqbal* poses a particular problem for litigants in cases (like lethal

421. See generally *Hutto v. Finney*, 437 U.S. 678 (1978); *Estelle v. Gamble*, 429 U.S. 97 (1976).

422. See *Hill*, 547 U.S. at 579–83; *Nelson*, 541 U.S. at 647.

423. See *Berger*, *supra* note 27, at 296.

424. See *id.* at 280–301.

425. See *Iqbal v. Ashcroft*, 556 U.S. 662, 677 (2009); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 533 (2010) (“*Iqbal* has strengthened district court discretion to dismiss civil rights and employment cases.”).

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.⁴²⁶ Along similar lines, the Court has also seemed to heighten standing requirements in recent years.⁴²⁷

The Court has also cut back on the availability of civil rights remedies in recent decades.⁴²⁸ It has even indicated that *Ex Parte Young* injunctive relief may not always be available against state officials for violations of federal law.⁴²⁹ And it has also bolstered the doctrine of state sovereign immunity to protect state officials from suits for money damages.⁴³⁰ These developments reflect the Court's general discomfort with litigants using the federal courts to attack governmental policies. To this extent, *Glossip* is small part of a larger judicial project.⁴³¹

2. *Protecting State Penological Interests*

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. *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."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

426. See *Iqbal*, 556 U.S. at 697–98 (Souter, J., dissenting).

427. See generally *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540 (2016); *Clapper v. Amnesty Int'l U.S.A.*, ___ U.S. ___, 133 S. Ct. 1138 (2013).

428. See generally *Wilkie v. Robbins*, 551 U.S. 537, 561 (2007) ("[A] *Bivens* action to redress retaliation against those who resist Government impositions on their property rights would invite claims in every sphere of legitimate governmental action . . ."); *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997); *United States v. Stanley*, 483 U.S. 669 (1987); *Chappel v. Wallace*, 462 U.S. 296 (1983).

429. See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997).

430. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

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.

432. *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2739 (2015); 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.”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.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.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,⁴³⁶ and federal courts frequently indicate that an execution stay is an “extraordinary remedy.”⁴³⁷ Though *Glossip*

433. *Id.* at 2732–33 (quoting *Baze v. Rees*, 553 U.S. 35, 47 (2008)).

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.”).

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.

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).

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,⁴⁴⁶ 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

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.

443. See FAIGMAN, *supra* note 99, at 2.

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.”).

445. See *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> [<https://perma.cc/7LF8-PHXQ>].

446. See, e.g., PFIZER, *supra* note 397.

unreliable sources.⁴⁴⁷ 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.⁴⁴⁸ Given the proper facts, such an argument might occasionally work, though, admittedly, it usually will be a long shot.⁴⁴⁹

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.⁴⁵⁰ 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.⁴⁵¹

Relatedly, inmates may consider challenging the safety of execution procedures not under the Eighth Amendment but under analogous state constitutional provisions.⁴⁵² While some state constitution's provisions

447. See Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES (May 13, 2016), http://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html?_r=0 [<https://perma.cc/2XTZ-269B>]; Segura, *supra* note 361.

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).

450. See *Smith v. Montana*, No. 2008-303, slip op. at 11 (Mont. 1st Jud. Dist. Ct. Oct. 6, 2015) (permanently enjoining Montana from using its lethal injection protocol because it did not comply with state statute); Jeff Amy, *Judge Orders Temporary Halt to Mississippi Executions*, ASSOCIATED PRESS (Aug. 25, 2015), <http://www.usnews.com/news/us/articles/2015/08/25/judge-orders-temporary-halt-to-mississippi-executions> [<https://perma.cc/KM3G-2XWS>] (noting that federal judge issued temporary restraining order because Mississippi law requires three drug procedure, but Mississippi planned to conduct execution with just two drugs).

451. See Amy, *supra* note 450; Arnold Rochvarg, *How Administrative Law Halted the Death Penalty in Maryland*, 37 U. BALT. L.F. 119, 119, 124–25 (2007) (discussing the successful administrative law lethal injection challenge in Maryland).

452. See, e.g., ARK. CONST. of 1874, art. II, § 9; ARIZ. CONST. art. II, § 15; COLO. CONST. art. II, § 20; FLA. CONST. art. I, § 17; GA. CONST. art. I, § 1, para. XVII; IDAHO CONST. art. I, § 6; IND. CONST. art. I, § 16; IOWA CONST. art. I, § 17; MD. CONST. Declaration of Rights art. 16; MO. CONST. art. I, § 21; MONT. CONST. art. II, § 22; NEB. CONST. art. I, § 9; N.J. CONST. art. I, pt. 12; N.M. CONST. art. II, § 13; N.Y. CONST. art. I, § 5; OHIO CONST. art. I, § 9; OR. CONST. art. I, § 16; TENN. CONST. art. I, § 16; UTAH CONST. art. I, § 9; VA. CONST. art. I, § 9; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 6.

merely track the Eighth Amendment,⁴⁵³ others, such as those prohibiting “cruel or unusual” punishment, arguably offer broader protection.⁴⁵⁴ Given *Glossip*’s stingy reading of the Eighth Amendment, inmates may find state constitutional law more protective.⁴⁵⁵

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.”⁴⁵⁶ 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).

454. See ALA. CONST. art. I, § 15; CAL. CONST. art. I, § 17; HAW. CONST. art. I, § 12; KAN. CONST. BILL OF RIGHTS, § 9; LA. CONST. art. I, § 20; ME. CONST. art. I, § 9; MASS. CONST. pt. I, art. 26; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. 3, § 28; NEV. CONST. art. I, § 6; N.H. CONST. pt. 1, art. 33; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OKLA. CONST. art. II, § 9; S.C. CONST. art. I, § 15; TEX. CONST. art. I, § 13; WYO. CONST. art. I, § 14; *State v. Mata*, 745 N.W. 2d 229, 257, 261 (Neb. 2008); *State v. Santiago*, 318 Conn. 1, 16 (2015); *People v. Yepez*, 2011 WL 1554729, at *8 n.14 (Santa Cruz Cnty. Super. Ct. Apr. 26, 2011); *People v. Lorentzen*, 194 N.W. 2d 827, 829 (Mich. 1972); *People v. Bullock*, 485 N.W. 2d 866, 874 (Mich. 1992); *People v. Anderson*, 493 P.2d 880, 886–87 (Cal. 1972).

455. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

456. Tim Waller, *South Carolina Death Row Inmates Won’t Be Executed Anytime Soon*, WYFF4.COM, (July 22, 2015, 5:13 AM) <http://www.wyff4.com/news/south-carolina-death-row-inmates-wont-be-executed-anytime-soon/34277610> [<https://perma.cc/TNZ7-RJCM>] (quoting Director of South Carolina DOC).

switch.⁴⁵⁷ Nevertheless, it is notable that, at least so far, many death penalty states do not seem to be rushing to embrace the drug.⁴⁵⁸

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.⁴⁵⁹ Many states turned from thiopental to pentobarbital, because thiopental became unavailable.⁴⁶⁰ 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.⁴⁶¹ Akorn also announced that it would no longer ship any of its drugs directly to prisons.⁴⁶² The drug also recently appeared on an American Society of Health-System Pharmacists bulletin listing current drug shortages.⁴⁶³ Even more importantly, Pfizer recently announced sweeping controls to try to ensure that none of its drugs are used in lethal injection.⁴⁶⁴ Pfizer manufactures most of the drugs used in lethal injection protocols.⁴⁶⁵ As a result of its announcement, one commentator noted that "all F.D.A.-

457. See Steve Barnes, *Arkansas Just Got One Step Closer to Ending Its Decade-Long Execution Hiatus*, REUTERS (Aug. 12, 2015), <http://www.businessinsider.com/r-arkansas-buys-lethal-injection-drugs-aims-to-end-execution-hiatus-2015-8?IR=T> [<https://perma.cc/BS2F-WATU>] (noting local reports stating that Arkansas had purchased drugs for its execution procedure, including midazolam); Jack Elliott Jr., *Attorney General Seeks Execution Date for Death Row Inmate*, ASSOCIATED PRESS (July 29, 2015), http://hosted.ap.org/dynamic/stories/M/MS_JORDAN_EXECUTION_MSOL-?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT [<https://perma.cc/9PAB-B6ZT>] ("The Mississippi Department of Corrections amended its lethal injection protocol Tuesday to include the use of midazolam.").

458. See Chris McDaniel, *So Far, States Haven't Rushed To Embrace Execution Drug Approved by U.S. Supreme Court*, BUZZFEED NEWS (July 21, 2015), <http://www.buzzfeed.com/chrismdaniel/so-far-states-havent-rushed-to-embrace-execution-drug-approv#.yiMno7VvJ> [<https://perma.cc/23NA-YLDT>].

459. See *supra* Part II.D.2.a.

460. See Gibson & Lain, *supra* note 41, at 1227; Denno, *supra* note 35, at 1360–65.

461. See Kim Bellware, *Manufacturer Asks Prisons to Return Supply of Controversial Lethal Injection Drug*, HUFFINGTON POST (Apr. 22, 2015), http://www.huffingtonpost.com/2015/04/22/arizona-lethal-injection-drug-return_n_7118486.html [<https://perma.cc/4C3T-Y3D9>].

462. See *id.*

463. See *Drug Shortages: Current Shortages Bulletin, Midazolam Injections*, AM. SOC'Y OF HEALTH-SYS. PHARMACISTS (Aug. 6, 2015), <http://www.ashp.org/menu/DrugShortages/CurrentShortages/Bulletin.aspx?id=858> [<https://perma.cc/9HLG->].

464. See Eckholm, *supra* note 447.

465. See PFIZER, *supra* note 397 (listing Propofol, pancuronium bromide, midazolam, hydromorphone, rocuronium bromide, vecuronium bromide and potassium chloride).

approved manufacturers of any potential execution drug have now blocked their sale for this purpose.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.⁴⁶⁷ To this extent, some states likely will continue to struggle to carry out executions, notwithstanding *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.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 1999.⁴⁶⁹ Since 2006, the country has averaged 40 executions annually.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.⁴⁷¹ Courts have imposed

466. See Eckholm, *supra* note 447.

467. See Mark Berman, *Ohio Drops Controversial Lethal Injection Drug, Postpones Upcoming Execution*, WASH. POST (Jan. 9, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/01/09/ohio-drops-controversial-lethal-injection-drug-postpones-upcoming-execution/> [https://perma.cc/X868-A7KP] (explaining that drug shortage required postponing executions); Amanda Sakuma, *Arkansas Judge Halts 8 Upcoming Executions*, MSNBC NEWS (Oct. 9, 2015), <http://www.msnbc.com/msnbc/arkansas-judge-halts-8-upcoming-executions> [https://perma.cc/CD28-4Q55]; Rick Green, *Oklahoma Governor Says Future of Death Penalty Uncertain After Mix-Ups*, THE OKLAHOMAN (Oct. 8, 2015), <http://newsok.com/article/5452114> [https://perma.cc/H63F-HCB8]; *Ohio Delays Executions Until 2017 over Lack of Lethal Drugs*, CBSNEWS (Oct. 19, 2015), <http://www.cbsnews.com/news/ohio-delays-executions-until-2017-over-lack-of-lethal-drugs/> [https://perma.cc/UL7R-4HTR]; Manny Fernandez, *Delays as Death-Penalty States Scramble for Execution Drugs*, N.Y. TIMES, (Oct. 8, 2015), <http://www.nytimes.com/2015/10/09/us/death-penalty-lethal-injection.html> [https://perma.cc/J872-XP6Z]; Tim Lockette, *Court Records Show Pharmacists Refused Death Penalty Drugs*, THE ANNISTON STAR (Jan. 3, 2016), http://www.annistonstar.com/news/court-records-show-pharmacists-refused-death-penalty-drugs/article_61ca7062-b1e0-11e5-ac9e-db30e09f373a.html [https://perma.cc/JC76-PQ6S]; Frank Green, *Virginia Says It Lacks Drugs Needed for Lethal Injections*, RICHMOND TIMES-DISPATCH (Jan. 24, 2016), http://www.richmond.com/news/article_e148a875-b3b5-5451-845c-34c2e1fe9924.html [https://perma.cc/3HNN-2W6H].

468. See *Executions by Year Since 1976*, DEATH PENALTY INFO. CTR. (July 15, 2016), <http://www.deathpenaltyinfo.org/executions-year> [https://perma.cc/DH4K-ANYZ].

469. See *id.*

470. See *id.*

471. See *Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFO. CTR. (Aug. 3, 2016), <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> [https://perma.cc/F8ZM-LLZQ].

fewer than 100 capital sentences in each year since 2010, with only 49 such sentences in 2015.⁴⁷² Seven states have abolished their death penalty since 2007,⁴⁷³ and Justice Breyer's *Glossip* dissent may spur still more debate.⁴⁷⁴ 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.*

473. *See States with and without the Death Penalty*, DEATH PENALTY INFO. CTR. (July 1, 2015), <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [https://perma.cc/L62Q-U6DX]. The status of Nebraska's 2015 repeal of the death penalty is uncertain, due to a referendum effort to override the repeal. *See* Paul Hammel, *Death Penalty Supporters put Repeal on Hold till 2016 Vote*, OMAHA.COM (Oct. 16, 2015), http://www.omaha.com/news/nebraska/death-penalty-supporters-put-repeal-on-hold-till-vote/article_d713527e-6f20-5903-8654-cc5d283ba47a.html [https://perma.cc/XP4H-GJNJ].

474. *See* *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting) ("I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.").

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,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.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.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.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

475. See Petitioners' Brief, *supra* note 4, at 32.

476. See Berger, *supra* note 238, at 725–26.

477. See *Glossip*, 135 S. Ct. at 2786 (Sotomayor, J., dissenting).

478. See generally Berger, *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.

480. Cf. Berger, *supra* note 23, at 494–98.