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Institutional Formalism and Realism in Constitutional and Public Law

Constitutional law, and public law more generally, often entails regulating and reviewing the actions of institutions. Most prominently, in the realm of national affairs, public law oversees the actions of Congress, the President (a mix of an institution and a person), and administrative agencies. In the arena of state action, public law assesses the performance of institutions such as state courts and legislatures. To be sure, public law often involves judging more particularized actions of individual agents of the state—whether law enforcement officers, for example, have conducted a constitutional search or seizure in a specific factual setting. But much of the most important work of constitutional law—and certainly many of the highest-stakes and most visible cases—involves judicial review of the performance of the institutions of government. So it is with one of the most symbolically and politically charged Supreme Court decisions in decades, Shelby County v Holder,¹ in

¹ 133 S Ct 2612 (2013).
which the Court concluded that Congress had failed to provide adequate justification for reauthorizing the unique preclearance regime of the Voting Rights Act (VRA).

When courts engage in reviewing the actions of other governmental institutions, such as Congress, they nominally apply, or purport to apply, what I call “institutional formalism.” This formalism consists of treating the governmental institution involved as more or less a formal black box to which the Constitution (or other source of law) allocates specific legal powers and functions. Legal doctrine, that is, assimilates the institution—“the Congress,” or “the President”—at a high level of abstraction and generality. By design, this institutional formalism blinds courts to any more contingent, specific features of institutional behavior, or to the particular persons who happen to occupy the relevant offices, or to the ways in which the institution actually functions in particular eras in which the institution is embedded within distinct political, historical, and cultural contexts. Instead, the role of judicial review is to assay the powers and properties of the institution at a general, essentialized level that intentionally ignores these fluid features—though these features are central, as we know, to the way the institution actually functions. That this institutional formalism exists is often taken for granted as part, some might say, of what the rule of law entails. How could it be otherwise?

And yet, an alternative does exist, in some form of institutional realism. This form of realism would entail constitutional and public-law doctrines that penetrate the institutional black box and adapt legal doctrine to take account of how these institutions actually function in, and over, time. There are many forms and degrees of institutional realism that legal doctrine could reflect. Such realism could be limited only to certain indicators of institutional change, such as those considered most “objective.” For example, the most narrowly legalistic form of institutional realism would take into account only those changes directly reflected in a public institution’s formal structure; should the passage of the Seventeenth Amendment, for example, influence federalism doctrines? But the functioning of institutions can change dramatically, of course, even absent any formal structural change. For example, should the way the Court responds to congressional, executive, and administrative action shift at all to reflect that the “Congress” of our era is constituted by hyperpolarized political parties more ideologically unified and
more politically distant from each other than throughout the twentieth century?\textsuperscript{2} Does the Court’s expansive reading of the Clean Air Act, to permit the EPA to regulate greenhouse-gas emissions, already evince this realist view about the Congress of our era?\textsuperscript{3} Similarly, institutional realism could operate at higher and lower levels of generality: it could mean taking into account how \textit{this} particular presidency or \textit{this} particular agency is perceived to function. If legal doctrine is receptive at all to institutional realism, where should this form of realism begin and end?

Legal doctrine and judicial decisions, as noted, are typically framed in institutionally formalist terms. This is most obvious, perhaps, with respect to administrative agencies. In the unifying ambition of the Administrative Procedure Act (APA) and administrative law, agencies are legally and formally the same. Regardless of differences in features of how particular agencies are designed or function, courts nominally defer to all agencies to the same extent under the \textit{Chevron} doctrine and apply the same “arbitrary and capricious” or “substantial evidence” tests under the APA. Institutional formalism of this sort is even more consequential, yet ironically less visible, when it comes to “Congress” or “the President.” Legal doctrine comprehends these institutions as singular, not just at any moment in time, but over time as well (diachronically as well as synchronically, for fans of structural linguistics). Supreme Court doctrine developed decades or even centuries ago on how much deference Congress is owed in a certain regulatory domain, for example, is relevant precedent today—regardless whether the actual Congress is hindered or empowered in dramatically different ways. “Congress” is always “Congress,” for legal purposes. The constitutional powers of “the President” do not ebb or flow with the manifold changes of many forms that make the presidency a radically different institution in the early twenty-first century than the early nineteenth century. The manifestations of this institutional formalism radiate throughout public law.

Despite the rhetorical prevalence and rule-of-law appeal of institutional formalism, this article argues instead that the tension between institutionally formalist and realist approaches is pervasive, even if often obscured or latent, throughout the constitutional (and

\textsuperscript{3} \textit{Massachusetts v EPA}, 549 US 497 (2007).
public) law of institutions. We cannot understand this law fully without recognizing this fact. Many scholars in discrete areas of law can be understood as grappling with this tension in some form. But I do not think we have appreciated how profound this institutional issue is, nor how it transcends specific areas of law to stand as one of public law’s general, defining problems. Notwithstanding the nominal weight of institutional formalism, the pull of institutionalism realism is sometimes irresistible, whether opinions acknowledge so (as they occasionally do) or not. Part of the reason is that, even though some democratic theorists focus on pure procedural democracy, actual institutional designers do not. Constitutional democracies (indeed, all democracies) are institutionally designed with an eye toward substantive performance, based on assumptions about how institutions will function: a single- rather than plural-headed executive to make accountability and decisiveness more likely, separation of powers to achieve an appropriate level of checks and balances, bicameralism to protect minority interests. For those charged with implementing this system, including judges, not to take into account how these institutions function in fact would be, at the least, odd (and judges on our most important public-law courts live and breathe, not in Kansas, but amidst the institutions that comprise the national government). Dramatic conflicts within the Court, as well as public and academic debates about judicial decisions, thus are often implicitly fueled by differing stances on how formalist or realist the judiciary should be about Congress, the presidency, or other institutions.

Part I will demonstrate the pervasive presence of this formalist/realist tension across all the main institutions whose actions the federal courts review: the state “courts,” the state “legislatures,” the federal administrative “agencies,” the United States “Congress,” or “the presidency.” Regardless of the public institution involved, the question of how formalist or realist the federal courts should be about that institution shapes what legal doctrine is, as well as debates about what doctrine ought to be. Part II will then apply this framework to offer a particular perspective on the Court’s *Shelby County* decision. I conclude by suggesting that constitutional and public

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law can neither get rid of, nor solve, the tension between institutional formalism and realism. We cannot make any final choice between formalism and realism regarding institutions. Yet no titration formula (how much realism, how much formalism) exists either. Institutional realism might seem terrifying to contemplate, but public law cannot and does not live by institutional formalism alone.\(^5\)

I. **Institutional Formalism versus Realism: The General Framework**

The formalist/realist institutional tension structures public-law doctrine and debates regarding judicial oversight of virtually all the institutions of governance. In the realm of doctrine, the Supreme Court and other federal courts sometimes engage the tension overtly. At other times, we can do no more than speculate, with stronger evidence in some contexts, regarding how much this tension shapes the Court’s actions. Indeed, when legal doctrines change, I suggest it is often because the Court has altered its foundational stance toward the particular institution at issue: from a more formal to more realist stance or to a new and altered realist account concerning how the institution now functions.\(^6\) Scholarship, too, frequently turns on judgments and disagreements, explicit or not, on this underlying institutional question.

\(^5\) The tension between institutional formalism and realism I develop here bears a distant affinity with Neal Komesar’s policy-oriented urgings on behalf of comparative institutional analysis. See Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (1994); for his own most recent restatement of that work, see Neil Komesar, *The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness*, 2013 Wis L Rev 265. Komesar has pressed the idea that legal and policy analysis should focus on a pragmatic, comparative choice between decision-making institutions, with an analysis of the costs and benefits of different decision-making “institutions” (including the market) in light of the likely functioning of these institutions—particularly how their structures make them likely to handle the competing risks of majoritarian and minoritarian bias. But as Gregory Shaffer rightly observes, Komesar analyzes institutions “in ideal-type terms—assessing ‘the political process,’ ‘the market process,’ and ‘the judicial process’ as institutional alternatives.” Gregory Shaffer, *Comparative Institutional Analysis and a New Legal Realism*, 2013 Wis L Rev 607, 618 (internal quotation marks added). See also Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 J L & Soc Inquiry 959, 964 (noting that Komesar does not address how to determine the comparative advantage of various institutions in “real-world settings”). My aim here is to reveal the way legal doctrine and scholarship centers on the tension concerning just how much we ought to open up these ideal types to more realist appraisals, and the forms that realism might take, in judicial decision making.

This tension in how the law should conceive public institutions can be seen as the modern successor to the early twentieth-century tension between formalist and realist approaches to the substantive content of legal concepts, categories, and doctrines. When the more pragmatic and consequentialist vision of legal realism threatened to be too corrosive to legal concepts, categories, and doctrines altogether, the Legal Process school of thought sought to stabilize legal practice by shifting the focus from the substantive content of law to regulating the appropriate processes and institutions through which the underlying substantive conflicts should be resolved. But now the tension between institutional formalism and realism raises the question of how much pragmatism—this time, at the level of institutions and processes—is compatible with certain conceptions of the rule of law.\footnote{For the critique that scholars adopt realist stances toward governance institutions, but then inconsistently make doctrinal recommendations on the assumption that judges are not motivated in ways similar to the actors in these other institutions, see Eric A. Posner and Adrian Vermeule, \textit{Inside or Outside the System?}, 80 U Chi L Rev 1743, 1745 (2013). In addition to the good rejoinder in Charles L. Barzun, \textit{Getting Substantive: A Response to Posner and Vermeule}, 80 Chi L Rev Dialogue 267 (2014), my claim is that courts already do take institutional realism into account at times, but that it is illuminating to explore how they might and ought to do, whether courts are likely to do so in fact.} I begin with the field of federal courts.

\textbf{A. COURTS}

The core debate that roiled the field of federal courts for decades (and perhaps still does) was precisely this formalist/realist divide over the stance the federal courts should take toward the state courts, particularly in habeas corpus review of state criminal convictions. The linchpin to all other discrete issues concerning federal habeas review was essentially this: whether a state court is a court like any other court. More precisely, the question was whether the federal courts on habeas review should treat state courts like any other court (i.e., a federal district court) with respect to issues such as whether federal courts had the power and obligation to readjudicate federal constitutional issues fully and fairly litigated already in the state courts.

Doctrinally, this debate was launched with the decision in \textit{Brown v Allen}\footnote{344 US 443 (1953).} (decided nearly at the same time as \textit{Brown v Board of Education}), which opened the door wide to routine federal court habeas relitigation of federal questions. During the 1950s and
1960s, the Court continued to license expansive this federal court review of state criminal convictions—more expansive than that which the Court enjoyed over lower federal court decisions, but starting in the 1970s, the Court shifted direction and began to require the federal habeas courts to defer much more to state criminal proceedings.9 In the expansive phase of federal review, the Supreme Court did not, of course, expressly belittle the capacities or performance of state courts in general—even as the Court authorized expansive federal second opinions on state court decisions. But there can be little question that disputes within the Court, differences in Court decisions over time, and scholarly analyses and conflicts rested on differing, general institutional views of state courts, including whether doctrine should treat those courts in more formalist or realist terms.

In scholarship, this institutionalist issue was the core of the “parity” debate. For the figures who initially dominated federal courts scholarship starting in the 1950s, the Constitution required that state courts be conceptualized as in parity with federal courts.10 That followed logically from the original Madisonian compromise that Article III reflects; because Congress was not required to create lower federal courts, the Constitution presumed that state courts would be as adequate as a federal court to adjudicate federal issues. Doctrine over a range of issues had to reflect that constitutional conception; penetrating the black box of “state courts” any further to judge how they general function or perform in fact is not appropriate. This institutional formalist vein, most elegantly elaborated in Professor Paul Bator’s classic article on institutional “finality,”11 makes further “realist” questions about state versus federal judges legally irrelevant. Institutional formalism also entails consistency over time in the rules that govern federal court oversight of state courts; the same doctrines that applied in one era should apply in another.

“The Myth of Parity,”12 my colleague Professor Burt Neuborne’s

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influential rejoinder, is a quintessential argument from institutional realism. In essence, Neuborne argued that not all courts are created equal; that to think so was a “dangerous myth”;13 that a more institutionally realist appraisal revealed that federal courts were more receptive to enforcement of federal constitutional rights than state courts; and that legal doctrine in the federal courts area should reflect this institutional realism. Examining the three factors Neuborne invoked to justify this position is important to assessing institutional realism. He argued that (1) state judges are more prone to majoritarian pressures against unpopular federal claims because most state judges are elected;14 (2) that federal judges are more technically competent lawyers better able to work with complex or novel claims, because federal judgeships are more prestigious and better compensated;15 and (3) that beyond greater technical legal competence, federal courts had a “psychological set”—a set of cultural and attitudinal characteristics—that made them more disposed to accept federal constitutional claims than state judges.16

Notice two distinct aspects of this institutional realism. First, it involves what I call “categorical” or wholesale realism about institutions. The argument is about state courts as a general or categorical matter. That is, the argument is not cast at a more particularist level of realism, such as an argument about how state courts function in a particular moment or era or how particular state courts function. Categorical realism of this sort could therefore still spawn general rules of federal court doctrine applied the same way over time; they would simply be different rules, which gave less deference to state courts on (some? all?) federal claims than the rules generated by the commitment to institutional parity. Second, note important differences between the kind of factors Neuborne invokes. His first factor rests on an objective, structural fact about formal institutional design (life tenure versus elections). But his other two factors are more subjective, elusive (“a psychological set”), and, indeed, capable of change over time.

From the perspective of legal doctrine, categorical realism about institutions is more judicially manageable than retail versions, examples of which we will soon see. Categorical realism, as noted,

13 Id at 1105.
14 Id at 1127–28.
15 Id at 1121–22.
16 Id at 1124–27.
still enables courts to craft doctrines of broad and general applicability regarding these institutions. And categorical realism is easiest to justify when based on objective, structural features of an institution. As soon as realism rests on more subjective institutional assessments, as in Neuborne’s final two factors, institutional realism will inevitably become more controversial normatively, more contested empirically, and more destabilizing, potentially, to conventional rule-of-law notions. For these less structural justifications for institutional realism open up possibilities such as that the habeas cases of the 1950s and 1960s were correct and that the retrenchment from those decisions in later decades was also correct. For if state courts in more recent decades (particularly Southern courts, after the civil-rights revolution) have developed a different “psychological set” than in earlier decades, institutional realism would argue that greater respect for the finality of state court adjudications would be warranted. Indeed, the Justices who led this retrenchment wrote precisely that. This is one area in which judicial decisions explicitly

17 It is true, of course, that interpreting the effects of specific structural features of an institution—such as whether the election of state judges does indeed make them less receptive to federal constitutional claims—is itself a subjective enterprise, absent widely accepted empirical standards and conclusions. Nonetheless, when structural differentiations of this sort do exist (life tenure versus elections) institutional realism based on those differentiations starts from the most defensible premises.

18 See, for example, Michael E. Solimine, The Future of Parity, 46 Wm & Mary L Rev 1457, 1487 (2005) (“Much discourse on parity is characterized by its static nature. . . . The better view is to examine parity as a fluid and dynamic concept, with changes—for good or ill—in both federal and state courts over time.”). As a more “modern,” further turning-of-the-realist wheel, Professor William Rubenstein argued that by the late 1990s, state judges had become more on a par with federal judges, though he was writing as a tactical matter for advocates, rather than as a matter of how federal courts doctrine should change. William Rubenstein, The Myth of Superiority, 16 Const Comm 599 (1999). For Neuborne’s own revisitation of these questions, which concludes that institutional factors continue to make federal courts function better than state courts in resolving close constitutional cases, see Burt Neuborne, Parity Revisited: The Use of a Judicial Forum of Excellence, 44 DePaul L Rev 797 (1995). For good summaries of the empirical literature and debates on the “parity” question, see Richard H. Fallon, Jr., et al, Hart and Wechsler’s The Federal Court and the Federal System 278–83 (Foundation, 6th ed 2009); Barry Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum L Rev 1211, 1221 n 25 (2004).

20 In Stone v Powell, Justice Powell wrote for the Court:

The policy arguments that respondents marshal in support of the view that federal habeas corpus review is necessary to effectuate the Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate safeguard. The principal rationale for this view emphasizes the
and directly reflect changing Court (perceptions) of the arguably dynamic nature of public institutions.21 For an example of Supreme Court institutional realism regarding state courts at an even less structural, and more contingent, level, consider an aspect of Justice Ginsburg’s dissenting opinion in Bush v Gore.22 Written to mount a challenge to the concurring opinion of Chief Justice Rehnquist, the conflict turned on how much deference federal courts owed to state court interpretations of state law when a federal constitutional issue is at stake. In federal courts terminology, this implicates the “fair support” rule—the doctrine that, even when federal claims are at stake, federal courts should or must accept state determinations of state law as long as those determinations rest upon “a fair or substantial basis” in prior state law.23 Arguing that the Florida courts had strained the interpretation of state election law beyond any reasonable bound, the concurrence invoked precedents from the 1950s and 1960s for the principle that the Constitution gives the Court a role in ensuring, when federal

428 US 465, 493 n 35 (emphasis added) (citation omitted).

21 Some scholars argue that the Court is the most well-positioned institution to evaluate and act on the basis of ongoing institutional reassessment of state court functioning. Barry Friedman, Habeas and Hubris, 45 Vand L Rev 797, 819 (1992). For the argument that we should not essentialize the judicial function, and should recognize that state courts differ structurally from federal courts in ways that do or should, for example, lead state courts to apply justiciability doctrines or rationality review differently from federal courts, see Helen Hershkoff, State Courts and the “Passive Virtues”: Rethinking the Judicial Function, 114 Harv L Rev 1833, 1909–15 (2001); Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv L Rev 1131, 1157–69 (1999).

22 Demorest v City Bank Farmers Trust Co., 321 US 36, 42 (1944). For a comprehensive discussion of this doctrine, see Henry Paul Monaghan, Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases, 103 Colum L Rev 1919 (2003). Instead of focusing on how the institution of the Florida courts functioned, the concurring opinion could have been framed around a form of realism about the nature of the claim involved: given the national stakes in a presidential election, federal courts should understand themselves to have much greater power than in ordinary federal cases to make an independent determination of the meaning of prior state law. See id at 1926. In ballot access cases, at least, the Court does seem to apply much greater scrutiny in presidential elections. See, for example, Anderson v Celebrezze, 460 US 780 (1983).
constitutional claims are at stake, that state courts have not radically altered state law in the guise of “interpreting” it.24

Responding in an institutionally realist vein, Justice Ginsburg argued that those precedents were no longer relevant because they were “embedded in historical contexts” dramatically different from the present: the context of Southern state courts addressing civil-rights claims “in the face of Southern resistance to the civil rights movement. . . .”25 State high courts in 2000 should not, her dissent argued explicitly, be treated the same as “state high courts of the Jim Crow South.”26 Thus, her opinion offers a temporarily contingent conception of how the Court should treat the institution of a “state court.” In contemplation of constitutional law, a state court is not once and always the same institution. Justice Ginsburg was not referring to any specific, identifiable structural change in state courts as institutions; she was appealing to more generalized transformations in culture and politics that should change the way federal courts reviewed state courts. And one consequence of this “realism” was that precedents from the 1950s and 1960s should be confined to that earlier context (the judicially polite way of saying abandoned).

In one sense, who can resist this institutionalism realism? Of course, far greater reason did exist to be skeptical of Southern courts in civil-rights cases in the era of Jim Crow (but then, the Chief Justice’s opinion might reflect perceived institutional realism of its own, albeit more subterraneously: as an elected court Democrats dominated, the Florida court was acting in a partisan fashion). Yet we arrive at a “law of institutions” that varies with perceived changes in how those institutions work—and even when federal judges can point to no specific structural change in the institutions. Indeed, the dissenter in the Court’s Eleventh Amendment immunity cases27 invoked an institutionally realist account of the Court itself in arguing that Hans v Louisiana28 should be narrowly confined; Hans should not be taken to reflect any generalizable constitutional prin-

25 Bush v Gore, 531 US at 140.
26 Id at 141.
28 134 US 1 (1890). For an explicitly realist self-account in this same era of the Court’s own limited power, offered as a justification for the Court’s decision making, see Giles v Harris, 189 US 475 (1903); for discussion of that realism, see Richard H. Pildes, Democracy, Anti-Democracy, and the Canon, 17 Const Comm 295 (2000).
ciple about state immunity, but rather the institutional reality that the Court of the late nineteenth century lacked the power to enforce any judgment against the states for repudiating their Reconstruction-era debts. To this the majority responded that realism of this sort was “a disservice to the Court’s traditional method of adjudication.”

In the absence of institutional formalism, principles and precedents come and go as judicial perceptions shift of how other institutions function. Institutional realism might be desirable, or irresistible to some extent, but it challenges many of our conceptions of how law functions.

B. THE PRESIDENCY

Since the Constitution’s adoption, the office of the presidency has obviously undergone vast changes. Some are formal changes in the Constitution itself, such as the two-term limit embodied in the Twenty-Second Amendment. Some are structural changes that have had dramatic practical effects on how much power the President can wield effectively, such as changes in the institutions and processes through which candidates for the office are selected. For the country’s first forty or so years, party caucuses in Congress became the de facto method for selecting candidates; as a result, presidential freedom of action was strongly subordinated to congressional control. Not only the invention of the party nominating conventions and the ability of Presidents such as Andrew Jackson to claim a popular mandate did the office come to rest on an independent basis of support that enabled it, as Corwin wrote, to be “thrust forward as one of three equal branches of government . . .” Some of the changes affecting the actual powers of the office are technological, such as the advent of television in the mid-twentieth century, which gave the President a powerful new capacity to project his views to the country. More modern technological changes might weaken the office, as it becomes eas-

29 Seminole Tribe, 517 US at 69.
ier for dissenters inside government or outside to publicize and mobilize opposition to presidential actions.32

Does and should constitutional doctrine on the powers of the presidency take account of developments of these and other kinds that do, realistically, shape and constrain the office’s effective power? If the President has greater power to mobilize public opinion once television is invented, should the Court push back by becoming less willing to recognize expansive powers of the President to act without clear, express congressional endorsement? In an era such as ours, when the political parties are so intensely polarized, control of government is divided between them, and enacting legislation has become systematically more difficult than in prior eras,33 should the Court be more accommodating to presidential uses of other tools to make policy, such as executive orders? Or should the Court adopt an institutionally formalist stance, in which the Court over time construes the powers of the office (both in constitutional terms and in construing statutes) without regard to any of these underlying, dynamic institutional realities? Apart from these normative questions, how much are Court decisions best construed as reflecting this kind of institutional realism?

The Court has issued a small number of opinions on presidential powers. In addition, even if institutionally realist considerations influence the Court’s decisions, we might expect the Court to refrain from being explicit about that, given the tension between some conceptions of the rule of law and institutional realism. Nonetheless, institutional realism overtly inspires two of the Court’s most significant presidential-power opinions.

The first is the most celebrated opinion in the presidential-powers canon. Justice Jackson’s concurrence in the Youngstown34 case insisted that modern separation-of-powers doctrine must reflect the way the effective powers of the presidency had changed over time—with the gap that had come to exist “between the President’s paper powers and his real powers.” Adverting to

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33 Paul Kane, 113th Congress, Going Down in History for Its Inaction, Has a Critical December To-Do List, Washington Post (Dec 1, 2013), online at http://goo.gl/GlatMz.
34 *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579, 634 (1952) (Jackson, J, concurring).
35 Id at 653.
transformations in communications technology by the mid-twentieth century (probably with FDR’s “fireside chats” in mind), Jackson pointed out that “[n]o other personality in public life can begin to compete with him in access to the public mind through modern methods of communications.” Moreover, no judicial assessment of the lawfulness of presidential action should take place, Jackson argued, without taking into account the emergence of the modern system of political parties; the modern dynamics of political parties across the institutions of government (at the time Jackson wrote) meant that the President, as the head of one of the two major parties, held significant parts of Congress (other party members) under his sway and could potentially wield more power, with less congressional resistance, than could earlier Presidents or than the Constitution permitted. In prior work, Professor Daryl Levinson and I quoted from an arresting passage in Justice Jackson’s opinion that has been virtually ignored, but that expresses vividly this political-party-based perspective of presidential realism. Justice Jackson wrote:

> [T]he rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.

We can debate precisely when the party system congealed into the form it assumed by the mid-twentieth century. But Jackson’s insistence that “the presidency” should not be viewed, by legal doctrine, as a unitary institution over time puts institutional formalism to the test. Jackson did not take the direct step of stating

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36 Id.
37 Id at 654.
38 As we explained the significance of this passage more fully:

Justice Jackson astutely recognized that the separation of powers no longer works as originally envisioned because interbranch dynamics have changed with the rise of political parties, which by the time of *Youngstown*, had long diminished the incentives of Congress to monitor and check the President. Yet this part of Justice Jackson’s opinion has been ignored entirely. Even after decades of dissecting Justice Jackson’s *Youngstown* opinion, neither the Supreme Court nor any other federal court has ever quoted this critical insight, nor has it received much notice by legal scholars. Justice Jackson’s sophisticated realism about the workings of government is widely admired by constitutional lawyers, but his
that it was because of these shifting features of presidential power
over Congress that he cast his vote to hold President Truman’s
seizure of the steel mills unconstitutional. But in applying his
tripartite framework of analysis, Jackson had to decide whether to
put the case in his “zone of twilight,” on the view that the relevant
statutes did not resolve the issue one way or the other, or in his
third category, in which these statutes were read to prohibit the
seizure. Jackson placed the seizure in this third category, of
course—but he did so not because any express congressional pro-
hibition on seizures of this sort existed, but because Congress had
silently refused to grant the President such authority. Is there any
doubt that Jackson’s decision to locate the case in category three,
based on the thin reed of congressional silence, directly reflected
his institutional realism about the modern presidency?

Though less baldly, other Justices, too, embraced institutional
realism in Youngstown. Prefacing an early part of his opinion with
the comment that “[i]t is absurd to see a dictator in a representative
product of the sturdy democratic traditions of the Mississippi
Valley,” Justice Frankfurter then did exactly that; as a basis for
rejecting President Truman’s action, Frankfurter lectured on the
incremental steps that paved a path to over-concentrated executive
power.39 Though more tersely than Jackson, Frankfurter, too, sug-
gested it would be feckless for constitutional doctrine not to shape
itself around modern institutional facts that appeared to smooth
the concentration of greater power into executive hands. Surely
the fact that America had just experienced a four-term presidency
contributed to the perception of changed institutional realities,
against which a more vigilant judicial review had to arise.

As a judicial opinion offering an institutionally realist founda-
tion for constitutional decision making, the most brilliant in this
area is surely Justice Scalia’s tour de force (initially rejected by
most scholars) solitary dissent in Morrison v Olson.40 In upholding
the office of an independent counsel, created a decade earlier to
investigate and prosecute crimes of high-level executive officials,

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most penetrating realist insight—recognizing party competition as a central
mechanism driving the institutional behavior that separation of powers law aims
to regulate—has been missed.

Levinson and Pildes, 119 Harv L Rev at 2315 (footnote omitted) (cited in note 30).

39 Youngstown, 343 US at 593 (Frankfurter, J, concurring).
the eight-member majority grounded its analysis on the formal properties of the new office, along with the formal relationship of the office to the existing institutions of government. The independent counsel office did not “disrupt[] the proper balance”41 between the branches, for example, because the Attorney General had several means formally available to supervise and control the independent counsel.42

Blistering with disdain for the majority’s lack of realism, Justice Scalia defined the case as being about the real-world workings of political “Power.”43 He delved into every nook and cranny of the law to conjure a revealing portrait (and a prescient one, as it turned out) of the actual currents of political power the law was too likely to unleash. The realist insights roll out in relentless waves to deluge the majority’s focus on formal legal structures and properties: the independent counsel’s office will be too zealously focused on one individual; it will lose any of the sense of judgment and perspective that comes with having to internalize budgetary and other constraints that come with a more generalized prosecutorial function; Congress can weaken the presidency not by going after the President in politically accountable ways, through impeachment proceedings, but by hiding behind the independent counsel; low thresholds for triggering public investigations will tie administrations up in knots, and so on.44 By the end of his opinion, Justice Scalia shifts his institutional realism from the way the independent counsel office is likely to work in practice to a realist’s political economy concerning Congress’s enactment of the law itself. Thus, he closes by penetrating “Congress” as a black box to provide an account of why members of Congress would be all too likely to vote for such a law (notice the resonance with his views about the nearly unanimous legislation in *Shelby County*), even if many of them believed the law bad policy—and why partisan politics would make it unlikely the law would be repealed even if it did great harm (ultimately Congress did let the law lapse when its sunset provision kicked in).45

41 Id at 695 (majority).
42 Id at 695–96.
43 Id at 699 (Scalia, J, dissenting).
44 Id at 713–14.
45 In full, Justice Scalia wrote:

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Whether one nods approvingly or is disturbed at all the modes of institutional realism on display here, the point is to notice this realism and the choice with which it confronts courts. To be sure, the causal linkage between Justice Scalia’s legal analysis and his passionate institutional realism is not as clear as in the *Youngstown* opinions. For Justice Scalia, judicial realism about the workings of political power seems offered more as evidentiary confirmation than as legal justification. The main thrust of his legal analysis, in his characteristically formal mode of reasoning, is that a simple syllogism should render the independent-counsel law unconstitutional: the law vests purely executive functions in an official whose actions are not fully within the supervision and control of the President. Case closed, Scalia argues. The work his realist analysis of power is then designed to do is twofold: (1) to explain that there are powerful functional or realist reasons that underlie the Constitution’s original allocation of authority (as he sees it) to a unitary executive branch, and (2) to show that when the Court tries to make its own functional judgments of when departures, for seemingly good reasons, from this unitary structure will come at little cost, the Court has a naive appreciation for the currents of real-world political power. Ironically, this most penetrating realist dissection of institutional power thus becomes a brief for the Court to stay out of the institutional realism business, because the Court is not good at it.

Though few presidential-powers opinions overtly speak in institutionally realist language, plausible grounds exist for speculating this kind of realism is silently at work in other cases—such as the Court’s Guantánamo Bay detention decisions. By the time these cases started reaching the Court, it was widely understood, particularly among legally attentive audiences, that the administration of President George W. Bush was not just adopting par-

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I cannot imagine that there are not many thoughtful men and women in Congress who realize that the benefits of this legislation are far outweighed by its harmful effect upon our system of government, and even upon the nature of justice received by those men and women who agree to serve in the Executive Branch. But it is difficult to vote not to enact, and even more difficult to vote to repeal, a statute called, appropriately enough, the Ethics in Government Act. If Congress is controlled by the party other than the one to which the President belongs, it has little incentive to repeal it; if it is controlled by the same party, it dare not. By its shortsighted action today, I fear the Court has permanently encumbered the Republic with an institution that will do it great harm.

Id at 733.
ticular policies it viewed as necessary and appropriate to combat modern terrorism, but also pursuing a consistent, wide-ranging, and independent agenda to redefine the scope of exclusive Article II presidential powers as a more general matter (supporters might say to “restore” the President’s rightful powers, critics to “expand” them).46

When the Court, through Justice O’Connor, pushed back in cases like *Hamdi v Rumsfeld* with decisions that included statements that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens,”47 the Court might well have been responding not just to one specific policy at issue in a particular case, but to the overall tenor of the administration’s conception of presidential powers as a whole: to this particular presidency, rather than to the presidency as a formal institution (high-level lawyers who served in that administration certainly view the Court that way48). The intriguing question is not whether the Court perceived a need to lecture the particular administration in more rhetorically forceful terms, but whether actual decisions in some or all of these cases about the scope of presidential power were affected. The willingness of other public institutions (as well as the public) to accept novel forms of presidential power is influenced by the extent to which a particular administration builds trust and credibility that suggests its actions reflect sound, well-thought-through judgment and principles;49 it is no great stretch to believe that similar considerations move the Court as well. To reject President George W. Bush’s claims, the Court had to minimize the most relevant precedents, from the World War II era,

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46 As a related matter, we can also speculate how much the President’s position on executive power in the initial Guantánamo Bay cases was discredited at the Court by release of the vivid, horrifying photographs from Abu Ghraib a mere eight hours or so after the Solicitor General had stated to the Court that “our executive [branch?] doesn’t” engage in “mild torture.” Joseph Marguiles, *Guantánamo and the Abuse of Presidential Power* 152–33 (Simon & Schuster, 2006) (asserting that the photos’ release “proved to be the most powerful amicus brief of all”). As Marguiles notes, there is no evidence that the Solicitor General was aware at the time of the Abu Ghraib facts.


as dissenting Justices pointed out.\textsuperscript{50} Of course, much has changed since then, beyond the particular nature of the Bush 43 presidency’s claims about executive power; we cannot know whether, and how much, this kind of institutional realism affected the Court’s decisions. This is institutional realism at the retail level; were this kind of realism to shape judicial decisions, it could well mean that acts of presidential power invalidated in some or all of these cases might, in contrast, have been upheld in an administration that did not generally invoke an exceptionally expansive conception of unilateral presidential powers. And institutional realism at this retail level might suggest that when related issues arise down the road, the precedential strength of the Guantánamo Bay cases might depend on the Court’s “realist” assessment of the kind of trust and credibility on legal issues some future administration in general has (or has not) established.

In our earlier work, Daryl Levinson and I suggested a default rule for separation-of-powers law that might emerge from, and build upon, Justice Jackson’s institutional realism about the changing dynamics of presidential power.\textsuperscript{51} Jackson is certainly right that presidential power is now strongly shaped by the modern political-party system. One consequence is that the House and Senate cannot be counted on to the same extent as in less party-dominated eras to provide strong institutional checks and balances on presidential power. Instead of being motivated to assert the role of their institutions as such against the presidency (if they were ever so motivated), their reelection prospects and hence motivations are strongly linked to their partisan alliances or antagonisms with the President; a unified Congress of the same party as the President is less likely to challenge his authority, while an opposite-party House or Senate surely will. Thus, in the “twilight zone” in which it is neither clear that Congress has licensed nor prohibited presidential action, we suggested courts should perhaps tilt toward rejecting claims of presidential power when Congress is controlled by the President’s political party. Presidents will likely face an open-minded Congress when forced to make their case and gain affirmative legislative endorsement. Conversely, during divided government, the risk that Congress will be more close-

\textsuperscript{50} See, for example, \textit{Johnson v Eisentrager}, 339 US 763 (1950); \textit{Hamdi}, 542 US at 579 (Thomas, J, dissenting).

\textsuperscript{51} Levinson and Pildes, 119 Harv L Rev at 2354–56 (cited in note 30).
minded toward presidential requests, for reasons of pure partisan opposition rather than genuine policy reflection, might suggest that a more generous judicial stance in the “twilight zone” is appropriate.

Even to raise these questions is surely to trigger easily recognizable fears about what institutional realism, particularly at the administration-by-administration level, might mean—including the risk that it opens the door for subjective perceptions about different Presidents to shape the Court’s decisions. And yet, is it plausible to believe the Court is institutionally formalist about the presidency or ought to be? The Court has more degrees of freedom in this area than others: many issues on presidential power never reach the Court; the actual cases are relatively few and far between; and the constitutional text is highly specific only on a few issues in this domain. Moreover, the cases often arise in such high-stakes contexts that getting the individual decision “right” can (properly) dwarf considerations of whether the rule of decision is appropriately generalizable across time, contexts, and administrations. We know that widespread cultural views on the presidency have changed over time; it is hard to believe that Supreme Court decision making would be immune, or should be, from the greater skepticism about presidential claims of fact and need (i.e., national security) that emerged after the presidential deceit and abuse of power revealed in the 1960s and 1970s.

As with state courts, institutional realism regarding the presidency is easiest to defend in the form of “categorical” or wholesale realism: judgments that the law should treat the institution differently (less deference on factual issues, or more restrictive readings of congressional delegations) than in a past era because of broad temporal changes that have reshaped the effective functioning of the presidency as a general matter. Categorical realism does spawn law that treats “the presidency” differently over time, but treats the institution in fairly stable ways over the short run. Justice Jackson, for example, points to changes in technology and political parties that justify greater judicial constraint on the presidency as a general matter going forward. Also as with state courts, this categorical realism is itself easiest to defend when proponents can point to objective structural features—such as legal changes—in the institution. The more subjective the perceptions of change that must be invoked, the more threatening this realism will be-
come. But notice that Jackson’s institutional analysis, though cat-
egorical, relies precisely on these more subjective perceptions (the
effect of technology and modern parties on actual presidential
power), not hard legal changes to the presidency.

If Jackson’s realism about “the nature” of modern presidential
power seems hard to resist, though, the boundary between his
wholesale-level realism and the kind of retail realism that might
have influenced the Guantánamo Bay cases becomes thinner. Once
subjective judicial perceptions about the changing nature of the
presidency enter decision making, how broadly (several decades?)
or narrowly (one administration?) should courts bound the tem-
poral baseline over which this realism is proper? My claim is that,
whatever the right answers to questions of this sort, the tension
between institutionally formalist and realist approaches to the
presidency, and how to apply realist approaches when Justices and
the Court do so, is at the foundation of many disputes over how
to construe the powers of the presidency. We cannot understand
the law of presidential power, or these disputes, without appre-
ciating the work institutional formalism or realism are doing.52

C. AGENCIES

Institutional realism might seem most compelling with respect
to public-law doctrine that reviews administrative agency action.
Indeed, the rise of agency capture theory in the 1970s and 1980s
to challenge the expertise vision of agency functioning, with the
resulting doctrinal shift to more aggressive “hard-look” judicial
review,53 is itself a form of institutional realism. This defining
transformation in modern administrative law reflects judicial re-

52 Institutional formalism and realism in the separation-of-powers arena raise distinct
issues from those raised by the conventional debates between “formalism” and “function-
alism” in this area. In the latter debate, put most crudely, the question is typically whether
national powers should be formally categorized into sharply distinct legislative, executive,
and judicial powers—with any such power having to be exercised exclusively by the branch
assigned that “kind” of power—or whether Congress should have the power to create
more complex institutional arrangements that blur these categorical distinctions in the
service of pursuing (Congress’s view) of more effective governance. As samples of the
immense scholarly literature on those questions, see Peter L. Strauss, Formal and Functional
Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 Cornell L Rev 488
(1987); Cass R. Sunstein, Constitutionalism After the New Deal, 101 Harv L Rev 421 (1987);
Steven G. Calabresi and Christopher S. Yoo, The Unitary Executive: Presidential Power from
Washington to Bush (Yale, 2008).

53 For the classic article on this shift, see Richard B. Stewart, The Reformation of American
ceptivity to piercing “the administrative agency” veil and adjusting doctrine accordingly. As new doctrine that functioned as a general matter across all agencies, this transformation reflected a categorical realism, but not one tied to any structural or legal change in agency design. These doctrinal shifts instead embodied a new “realist” political-economy analysis of agency functioning that led courts to shift their stance toward agencies, as reflected in a range of administrative-law doctrines, and to apply that new understanding across the board to agencies in general.54

We can ask whether analogous doctrinal shifts should take place today to reflect institutional realities concerning Congress. In numerous policy arenas in which agencies act, Congress has not revisited the issues in many decades, despite dramatic technological, economic, scientific, and other changes. The episodic nature of congressional action in these areas is now exacerbated by the hyperpolarized partisan context, combined with divided government, that cripples the capacity of Congress to act in general. In these areas, such as energy or environmental policy, should courts be more deferential to the relevant regulatory agencies in light of the institutional reality that they alone are likely to be practical capable of actively updating statutory regimes?55 Or more broadly, realist accounts of the administrative process today suggested it has changed dramatically over the past decades. Contrasting the “lost world of the APA and administrative law” with “the real world of modern administrative practice”—in which the White House and political considerations play a dominant role; an “agency” often acts in coordination with other agencies, not alone; much of the important decision making is done outside the formal record; and agencies are often led only by acting directors, not Senate-confirmed leadership—Professors Dan Farber and Anne O’Connell have suggested ways in which administrative law should change accordingly.56

Just as interesting questions about formalism and realism re-

54 For a more recent assessment of how judicial review could be redesigned to inhibit agency capture, see M. Elizabeth Magill, Courts and Regulatory Capture, in Daniel Carpenter and David A. Moss, eds, Preventing Capture: Special Interest Influence in Regulation, and How to Limit It (2013).

55 For detailed analysis of this question, see Jody Freeman and David B. Spence, Old Statutes, New Problems, forthcoming, Penn L Rev (2014).

garding agencies operate at a yet more specific level. Agencies vary in a range of ways, some more visible, others not. Formal structural differences in agency design are the most obvious, such as the legal difference between independent and executive agencies, or whether the agency/commission/board is multiheaded or single-headed, or whether bipartisan appointment requirements exist.57 A categorical doctrinal realism might track these formal differences in agency design. Some agencies are known to reflect partisan political differences more pervasively, and to shift positions more routinely with changes in administration appointments, than others. The NLRB immediately comes to mind, as then Professor, now Judge Winter noted in these pages many years ago;58 his argument that the board’s distinct mix of political responsiveness and expertise should lead courts to review board findings of fact more aggressively than those of other agencies is surely reflected in the Court’s more recent, distinctly assertive “substantial evidence” review in the well-known Allentown Mack case.59 The agencies that administer federal election laws are uniquely headed by an even number of commissioners, who are also required to be balanced between the political parties; as a result, they are more prone to deadlock, and Professor Jennifer Nou has proposed that unique administrative-law doctrines should govern judicial review of these particular agencies.60 Some agencies are required to submit proposed major rules for presidential review through the OMB process; other agencies, such as those involved in financial regulation, are not.61 And so on.


58 Ralph Winter, Judicial Review of Agency Decisions: The Labor Board and the Court, 1968 Supreme Court Review 53. Winter argued for statutory changes that would permit courts to engage in more aggressive factual review, rather than for courts assuming this power on their own.

59 Allentown Mack Sales and Service, Inc. v NLRB, 522 US 359 (1998). The Court was well aware of the view that the NLRB, unlike other agencies, “hides the ball” from the courts through “obfuscatory techniques” such as significant gaps between articulated standards in adjudication and their application; these claims were developed in Joan Flynn, The Costs and Benefits of “Hiding the Ball”: NLRB Policymaking and the Failure of Judicial Review, 75 BU L Rev 387 (1995), which the Court block-quoted from in its opinion, 522 US at 372–73. The courts also recognize that the NLRB is unique in eschewing rulemaking and developing all its policies instead through adjudication; that, too, might account for more aggressive judicial review of the NLRB’s findings of fact.

60 Jennifer Nou, Sub-Regulating Elections, 2013 Supreme Court Review (in this volume).
How much does, and should, legal doctrine ask and reflect more realist questions (and which ones) about particular agencies in reviewing a specific administrative action? Consider the history of the *Chevron* doctrine. *Chevron*\(^2\) started in exceptionally complex regulatory terrain in the environmental field—an area where Justice Stevens, *Chevron*’s author, admitted he was so confused, he believed he simply ought to defer to the EPA.\(^3\) Yet *Chevron* “gradually displaced formulations about deference developed in other fields [of regulation],” including those, such as labor and tax law, that had preexisting deference doctrines.\(^4\) That is, *Chevron*, as the most important doctrine in modern administrative law, developed into an institutionally formalist rule independent of the particular agency or the nature of any specialized expertise involved.\(^5\) As

\(^{61}\) By the terms of Executive Order 12,866, OIRA review remains limited to the actions of executive agencies (this is unchanged from Executive Order 12,291). See Bruce Kraus and Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 Yale J Reg 289, 295 (2013); Note, *OIRA Avoidance*, 124 Harv L Rev 994, 998 (2011). In the recent *Business Roundtable v SEC* case, 647 F3d 1144 (DC Cir 2011), the DC Circuit held that SEC’s Rule 14a-11, which would have required public companies to provide shareholders with information about shareholder-nominated candidates for their boards of directors, was “arbitrary and capricious” and violated the Administrative Procedure Act (APA). Though decided on procedural grounds, *Business Roundtable* might well be viewed as a decision to apply particularly aggressive “hard look” review precisely because the SEC’s rules do not have to go through the OIRA cost-benefit analysis—the court, for example, noted that the SEC failed to conduct a proper cost-benefit analysis of the rule. Kraus and Raso, 30 Yale J Reg at 298, 300, 316.


\(^{65}\) Judicial refinements on *Chevron* do suggest differentiation of certain sorts between different forms of agency action. The most significant, of course, is established in *United States v Mead Corp.*, 533 US 218 (2001), in which the Court indicated that *Chevron* deference should apply only to agency interpretations that have “the force of law,” though a great deal of confusion reigns about precisely what that does or should mean. To the extent these refinements make deference turn on questions such as how much procedural formality lies behind an agency action (in addition to whether Congress delegated to the agency the authority to act with the force of law when interpreting a statute), these refinements introduce a certain kind of process-based realism: formality serves as a proxy for the seriousness of agency deliberation. This process-based realism remains agnostic about differences between agencies. Similarly, some suggested improvements upon *Mead* also can be seen as efforts to find better process-based proxies for the seriousness of the agency’s deliberation or its real-world political accountability for the decision; that is one way to understand the proposal that *Chevron* deference should turn on the “who” of administrative decision making rather than the “how.” See David J. Barron and Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 Supreme Court Review 201, 203–05 (arguing that *Chevron* deference should apply when the official to whom Congress has delegated statutory responsibility takes personal responsibility for the decision). This suggested adjustment to *Chevron/Mead* again abstracts from institution-specific features of
Professor Tom Merrill notes (speaking from experience), the Department of Justice played a major role in bringing all agencies formally under the protective wings of Chevron because doing so (1) simplified defense of agency action and (2) promoted the government’s interests through a doctrine perceived to be pro-government. Some scholars argue that Chevron should become an even more universal deference doctrine than it formally is already.

Yet here, too, institutional realism pushes back. Indeed, some of the administrative-law experts on the Court itself have divided over just this formalist/realist tension. Justice Breyer, for three other Justices as well, has argued that, to the extent Chevron rests on a theory of political accountability, judicial review of the actions of independent agencies—which lack accountability to the President—should be more assertive than that for executive agencies. As he put it in *FCC v Fox Television Stations, Inc.*, “comparative freedom from ballot-box control makes it all the more important that courts review [an independent agency’s] decisionmaking to assure compliance with applicable provisions of the law—including law requiring that major policy decisions be based upon articulable reasons.” Rejecting this approach, Justice Scalia, writing for four Justices, insisted on adherence to the formalism of the APA, which makes no distinction between types of agencies, and to the insti-

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67 See William N. Eskridge, Jr., *Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 Wis L Rev 411, 445. Applying Komesar’s “comparative institutional analysis” (see above note 5), Professor Eskridge advocates an even more general (and hence more formal) application of Chevron; in his view Chevron should be expanded to all statutes, other than criminal ones. As he puts it, “federal courts should defer to all rules adopted by an agency in a public document representing the agency’s considered judgment, unless the agency’s rule is clearly contrary to the statute or to settled understandings about the statute.” Id at 445.
69 Id at 547 (2009) (Breyer, J, dissenting).
tutional formalism of the Court’s administrative-law precedents, which similarly do not distinguish between types of agencies.70

In the same vein as Justice Breyer, another administrative law expert on the Court, then Professor Elena Kagan, more than a decade ago, had pursued a similar critique of *Chevron*’s institutional formality. As she noted, administrative law currently tends to ignore whether the President had played any role in shaping the agency’s action. Observing that the figure of the President rarely appeared at all in opinions on deference to agency action, Kagan confirmed *Chevron*’s institutional formality by showing that “[c]ourts grant (or decline to grant) step-two deference to administrative interpretations of law irrespective whether the President potentially could, or actually did, direct or otherwise participate in their promulgation.”71

Cast in the terms of my analysis here, Kagan’s article on “Presidential Administration” then sought to change judicial practice by providing a brief for institutional realism in administrative law. Anticipating Justice Breyer in *Fox Television*, she argued that courts should give greater *Chevron* deference to decisions from executive agencies than from independent agencies (presidential accountability and judicial review are substitutes, in this view). At this first stage, this is an argument for categorical realism; it ties judicial review to the formal properties of an agency.72 But at a second stage, Kagan pursued institutional realism more relentlessly, beyond this categorical level; she also argued for a more penetrating, case-by-case realism that would tie judicial review to the level and

70 Id at 523 (plurality). In addition, Justice Scalia observed that, institutional formalism aside, independent agencies were indeed politically accountable, not to the President, but to “Congress”—which presumably means to the committees that oversee a particular agency. When the issue is engaged in these terms, the debate becomes a normative one regarding the modes of “political accountability”—presidential or congressional committee—that *Chevron* should be understood to value insofar as the doctrine rests on a “political accountability” justification.


72 Kagan herself acknowledges that the actual independence of agencies is affected by less “hard” factors other than formal removal control, such as “longstanding (even if psychological) norms of independence. . . .” Id at 2376. And Professor Lisa Schultz Bressman challenged Kagan on realist turf, arguing that independent agencies are in reality subject to “practical control” by both the President and Congress through administrative procedures—both congressionally enacted legal requirements, such as the APA, and legislative oversight. Bressman also pointed out that independent agencies often work together with executive agencies to shape and implement policy, thus further dissolving the formal categorical distinction between these agencies. See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 Colum L Rev 1749, 1807–08 (2007).
nature of actual presidential involvement. If *Chevron* rests on the accountability of agencies to the President, then the doctrine should only apply, she argued, when concrete evidence exists that presidential involvement in an agency’s decision rose “to a certain level of substantiality”—as revealed by objective evidence in the decision-making process (executive orders, directives, and the like). In arguing for an analogously realist application of the hard-look doctrine of *State Farm*, Kagan made similar points, descriptively and normatively. Observing that courts currently treated all agency action the same under hard-look review, irrespective of the action’s “provenance or pedigree,” she argued instead that courts should relax this review when credible evidence shows that the President “has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question.”

Professor Anne Joseph O’Connell presses for a similar turn toward institutional realism in administrative law, but in an even more aggressive style. After perhaps the most extensive empirical study in the legal literature on agency rulemaking, she suggests that a penetrating institutional realism should inform when, and how much, courts should defer to agencies. Instead of relying on the kinds of considerations that *Chevron/Mead* invoke, such as the degree and kind of procedural formality that underlies the agency’s action, judicial deference should hinge more on factors like “the type of agency, the agency’s track record, the agency’s expertise, the level of presidential and congressional control over the agency, and the timing of the agency’s action.” Moreover, she notes that some of these factors might shift depending on changes in control of Congress and the White House. Seen in light of the more pervasive foundational choices that affect all issues concerning judicial review of public action, both Professors Kagan and O’Connell should be recognized to be arguing for bold

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77 Id at 980.
78 Id.
forms of institutional realism, in more moderate and stronger versions, respectively, as against the institutional formalism they see underlying current administrative law doctrine.

If judicial doctrine rarely invokes this kind of institutional realism, how much does realism of this sort nonetheless inform the pattern of judicial decision making? Getting an empirical handle on that question is, of course, difficult. In a majority of cases, the Court apparently does not even cite the formal deference regime being applied; in a majority of cases, the Court “gave no evidence of deference at all.” Studies have shown that courts tend to rely most strongly on precedents involving the particular agency being reviewed, even when the courts are applying general administrative law doctrines, perhaps because counsel tend to present cases in this agency-specific way; thus, “both the articulation and application of the doctrine often beg[in] over time to develop their own unique characteristics within the precedents concerning the specific agency.”

With respect to specific agencies, scholars have identified unique patterns of judicial review. Thus, in the antitrust area, Professor Eskridge asserts that the Supreme Court has “almost slavishly” followed the Department of Justice’s (DOJ) preferred legal constructions. Whether that is a reflection of the complexity of the economic expertise relevant to these issues, or the Court’s special trust in the DOJ as an institution on these issues, cannot be disentangled. Similarly, the unique and well-known tendency of

79 William N. Eskridge, Jr., and Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan, 96 Georgetown L. J 1083, 1117–20 (2008). The denominator was composed of all cases “between 1984 and 2006 in which an agency interpretation of a statute was at issue and in which the Supreme Court produced a published opinion.” Id at 1090 n 33.


NLRB adjudications to “oscillate between extremes,” as the membership of the board changes, has led scholars such as Professors Fisk and Malamud to argue that, as a normative matter, administrative law doctrine should “carve out a category of adjudications [i.e., board adjudications] that will not be entitled to Chevron deference.”

In practice, courts might perhaps be doing so already; some scholars have suggested that despite Chevron courts actually review NLRB decisions close to de novo.

More broadly, a recent study of all cases from Chevron up until 2006 concluded that the Court afforded agencies considerably greater deference in areas involving “environmental science, energy regulation, intellectual property, pension regulation, and bankruptcy.” This differential implementation of Chevron suggests the Court is embracing a more grounded, realist’s stance on the deference issue; whether that stance is based on the Court’s comparative assessment of judicial versus agency expertise, or specific features of the agency applying judgment in these areas—or some mix of the two—is impossible to say. Similarly, there remain contexts in which judicial doctrine directly makes the agency’s “expertise” an express factor in judicial review, as when Skidmore still applies; in those contexts, courts necessarily are making particularized judgments about the specific agency and issue. Here, too, separating the dancer from the dance—the nature of the agency involved versus some more free-floating concept of expertise regarding the issue—remains elusive.

If there is a great deal of uncertainty about both what courts actually do, and what they ought to do, in the administrative review context, it is in part, I suggest, due to the pervasive tension between

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84 Eskridge and Baer, 96 Georgetown L. J at 1083, 1173–74 (cited in note 79). A much earlier study had concluded that courts were harsher in reviewing INS interpretations of the immigration laws than other agency interpretations—hardly a surprise and surely a reflection of judicial knowledge of the dysfunctionality of that particular agency. Peter H. Schuck and E. Donald Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 Duke L J 984, 1043.

institutional formalism and realism. Doctrine typically instructs courts to be blind to the particular qualities that differentiate agencies; yet in some contexts, doctrine makes judgments concerning agency expertise directly relevant. Empirical studies confirm what common sense suggests: courts engage in institutional realism at least some of the time. Not all agencies are treated the same. Some move down that path might be unavoidable; surely courts that know these agencies well cannot blind themselves to the differences between the NLRB and the SEC—nor, I would venture to say, would we want them to. And yet, once the Pandora’s box of institutional realism is open, questions leap about concerning precisely how far into the black box of “the administrative agency” that realism should penetrate.

D. CONGRESS

In the constitutional sphere, the formalist/realist institutional divide is most immediately recognized, perhaps, in the “political safeguards of federalism” debate. Moreover, the question of how well the national political process actually protects state interests and how to tailor constitutional doctrine accordingly—including whether doctrine should dynamically adapt to (perceived) changes in this political process—has been shaped not just by academic work, but doctrine as well. In the important, precedent-overturning Garcia v San Antonio Metropolitan Transit Authority decision, for example, Justice Powell, for four dissenters, argued that “a variety of structural and political changes occurring in this century have combined to make Congress particularly insensitive to state and local values”—thus justifying a more assertive judicial role. Rejecting this role, the majority offered a competing realist account to assert that state actors remained practically effective at

86 For the general view that during the Roberts Court the Chevron doctrine and related administrative law ones have failed to be applied in any consistent way, and that where Justices differ, the differences reflect ideological preferences about the substantive policies at issue, see Jack Michael Beermann, Chevron at the Roberts Court: Still Failing After All These Years, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2382984.

87 Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum L Rev 543 (1954). Given the vast modern literature on this issue, I risk offending many if I cite anything other than Wechsler’s original article.


89 Id at 565 n 9 (Powell, J, dissenting) (quoting Advisory Committee on Intergovernmental Relations, Regulatory Federalism: Policy, Process, Impact and Reform 50 (1984)).
protecting state interests.90 More recent federalism cases reprise these realist debates.91 These outcroppings of institutional analyses otherwise latent are reminders that, even if institutional assessments of this sort are not empirically resolvable, judicial perceptions of political processes are often at work. As the earlier discussion of the separation of powers suggests, judgments about whether, and how, to assess the functioning of national political institutions pervades constitutional law.

Outside the constitutional domain, implicit conceptions of Congress, and the formalist/realist tension, motivate views of appropriate doctrine as well. Many (most?) issues in statutory interpretation reflect this fact. In offering this conceptual framework as a general way to organize specific issues in this area, a few examples should suffice. With respect to the general task of interpretation, should courts interpret ambiguous statutory language to take into account the realistic likelihood that Congress will respond if the Court’s interpretation is “wrong”? An institutionally formalist approach suggests not; the courts should provide their “best” interpretation of the statute without predicting the likely congressional capacity to respond. This formalism, which might best fit conventional rule-of-law ideas, treats Congress as an abstraction. In this posture, courts either engage in a formal presumption that Congress will correct erroneous judicial interpretations or treat legal doctrine as indifferent to whether Congress is likely to respond. As with other institutionally formalist approaches, this conception of the judicial role would apply across statutes, without differences tied to the nature of the law being construed.92

90 Id at 552–53, 555.
91 See, for example, United States v Morrison, 529 US 598, 616 n 7 (2000); id at 647–52 (Souter, J, dissenting). Interestingly, in defending the role of the congressional political process in adequately respecting state interests, Justice Souter’s dissent expressly acknowledges that the Seventeenth Amendment might have reduced the Senate’s “enthusiasm” for doing so, but then proclaims this change irrelevant for constitutional purposes. Id at 652.
92 In his comparative institutionalist approach to legal interpretation (both statutory and constitutional), Adrian Vermeule endorses doctrines of statutory interpretation typically associated with more formalist visions of both Congress and the courts (textualism, strong stare decisis effect for statutory precedents, no use of legislative history), but he does so based on a realist, rule-consequentialist comparative assessment of how courts, agencies, and Congress are perceived to function. Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation (Harvard, 2006). In arguing that legal interpretation should not be conceived as an attempt to resolve meaning in a vacuum, but instead as a method to determine which potential institutional interpreters are best positioned to interpret the text, and for what reasons, Professor Vermeule argues for a comparative
In contrast, the Court at times adopts an institutionally realist stance toward interpretation based on political-economy judgments of likely congressional response. One clear example is the Court’s justification of the rule of lenity in criminal cases as reflecting, among other considerations, the judgment that, if the Court’s decision is “wrong,” the government will be far more able to overcome the burden of legislative inertia than actual or potential criminal defendants. An extensively worked out generalization of this kind of institutional realism is Professor Einer Elhauge’s position that courts should employ “preference-elicting canons” to resolve cases of statutory ambiguity. Canons of this sort are designed to favor interpretations most likely to trigger a response from Congress, if the Court’s resolution of the ambiguity is wrong (by the lights of the current Congress). Moreover, in cases of ambiguity this approach should, he argues, systematically rule against those groups or interests most likely to have “a significant advantage in commanding the legislative agenda compared to those favored by an alternative interpretation. . . .” Public-choice theory completes the analytic process: well-organized groups with intense interests that experience concentrated effects from the Court’s interpretation are more likely to mobilize to pressure Congress than large, more diffuse interests that have lost the interpretive battle. Whether Congress overrules the Court’s interpretation or not, this pressure is designed to come closest to ensuring that ultimately, the statute will best track current political preferences.

institutional analysis that is “evenhandedly empirical.” Id at 18. He contrasts that commitment to institutional analysis that is more of the Weberian ideal type, or what he calls “stylized institutionalism” (which, as he rightly notes, characterizes the Hart and Sacks Legal Process School) and “asymmetrical institutionalism,” which takes a highly realistic eye toward some institutions but a more idealized stance toward others.

See United States v Santos, 553 US 507, 514 (2008) (Scalia, J) (plurality) (“This venerable rule [of lenity] not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead.”) (emphasis added).


Elhauge also emphasizes the ex ante effects of such canons, but I focus here only on their ex post effects.

Id at 182.

For a related argument that the Court should employ similar default rules, motivated by similar “institutionally realist” considerations, in the constitutional domain, see John Ferejohn and Barry Friedman, Toward a Political Theory of Constitutional Default Rules, 33 Fla St U L Rev 825 (2006).
Accepting for the moment that this is the proper goal of interpretation in ambiguous cases, is it disturbing or beyond judicial capacity for courts to engage in this kind of political-economy realism about how Congress functions? Descriptively, studies do suggest, not surprisingly, that Congress does override at a higher rate statutory decisions that disadvantage organized business groups or the United States government than those that disadvantage other entities or persons. Moreover, special interpretive rules in antitrust law do include strong presumptions against reading unclear statutes to create exemptions to the law, just as courts maintain that tax statutes should not be read to provide exemptions when text is ambiguous. Various justifications for these doctrines have been offered; Elhauge argues, however, that the best explanation is that, when courts face interpretive ambiguity, they put the burden of overcoming legislative inertia on the politically more powerful because those actors have greater capacity to mobilize Congress’s attention to the courts’ decisions. In this view, the same institutionally-realist, preference-eliciting approach to interpretation best explains other canons, such as the canon favoring Indian tribes, or the constitutional avoidance canon. And in their detailed empirical survey of how “Congress” actually drafts statutes, Professors Gluck and Bressman conclude that Court decisions already reflect, but in “under-the-radar” ways, the kinds of intricate, institutionally realist insights into the legislative process their work has revealed. Formalist doctrinal principles aside, we cannot

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98 For an early reflection on these issues, see William N. Eskridge, Jr., and John Ferejohn, The Relationship Between Theories of Legislatures and Theories of Statutory Interpretation, in the Rule of Law (Nomos, 1993).
100 Elhauge, Statutory Default Rules at 187 (cited in note 94).
101 Abbe R. Gluck and Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II, 66 Stan. L. Rev. *68 (forthcoming 2014), available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2358074. They suggest that courts should give much greater weight to institutionally realist factors such as committee jurisdictional issues, the way the Congressional Budget Office scores proposed legislation, and the type of statute at issue (whether the court is construing omnibus, appropriations, or single-subject legislation). As they note, they intentionally advocate these factors because they are most “amenable to clear legal rules.” Id at 70. In the terms used here, these are “categorical” forms of institutional realism, which is why they are most easy to envision being incorporated into legal doctrine.
dismiss the possibility that courts already undertake interpretation in ways that actually vacillate between an institutionally formalist and realist approach to “Congress.”

Demands that the Court embrace institutional realism also course through some critical responses to the Shelby County decision itself. Under the Court’s decision, Congress retains the power to reenact a preclearance regime tailored more directly than in the 2006 reauthorization Act to areas of the country in which distinct patterns of voting-rights violations have been occurring in recent years. Indeed, that is the significance of the Court not striking down the preclearance regime itself, Section 5, but rather the current coverage formula for that regime contained in Section 4 of the Act. But critics castigate the Court with the reality of today’s polarized parties and gridlocked Congress102 (whether Congress will in fact act in some form, such as on the bill introduced already,103 the future will tell). To the extent this stark, realist vision of Congress implies that the Court should have given more constitutional latitude to the 2006 reauthorization, because a polarized and gridlocked Congress is unlikely to revise the Act, we should recognize this as an argument that constitutional interpretation should reflect a temporally contingent view of how Congress functions (or fails to function) in this era.

At a more specific level, many doctrines or canons (and debates about them) concerning statutory interpretation revolve around whether courts should adopt formalist or realist stances toward Congress. The debate over legislative history has this cast; institutional formalists treat documents such as committee reports as relevant authority regarding congressional intent or purposes, while realists dismiss these documents by asking who actually writes and reads them. Or consider the modern doctrine that stare decisis should have exceptionally strong force when Congress reenacts a statute without overturning the Court’s prior interpretation104—or the closely related acquiescence doctrine, invoked more


103 See the Voting Rights Amendments Act of 2014, HR 3899, 113th Cong, 2d Sess (Jan 16, 2014) and S 1945, 113th Cong, 2d Sess (Jan 16, 2014).

104 See, e.g., John R. Sand & Gravel Co. v United States, 552 US 130, 139 (2008). The doctrine is a relatively modern innovation in the sense that it apparently did not exist before the late nineteenth century and did not take hold until the 1930s. See Thomas
erratically, that even congressional failure to act in response to a prior judicial or administrative interpretation should be taken to mean that “the interpretation of the Act . . . has legislative approval.” How much are these doctrines meant to be institutionally realist ones? Should it matter whether any evidence exists that Congress actually considered the prior judicial interpretation, either when Congress reenacts the statute or when Congress fails to act at all (but might debate the judicial interpretation)? Or should these doctrines be understood as institutionally formalist ones, in which courts need not, and should not, take note of anything other than what “Congress” formally did or failed to do? Similarly, should application of doctrines of these sorts vary with changes the background context more generally in which “Congress” actually functions. As noted earlier, in our era of hyperpolarized political parties and divided government (though the modern filibuster practice requiring sixty votes for much legislation effectively ensures that even a minority party will have blocking power in the Senate) should courts relax any of these or similar interpretive doctrines based on how much more difficult this larger context makes it for Congress to act in general? Or should legal doctrine be blind to these institutional realities?

Preemption issues, too, might well revolve around the formalist/realist institutional tension. Professor Tom Merrill, for example, has suggested that the doctrinal quagmire that is preemption doctrine be sorted out by shifting the inquiry from “the meaning” of federal and state laws to a comparative institutional analysis: which institutions (Congress, courts, or, when relevant, agencies) are best


107 David Shapiro defends doctrines like these based on independent, normative legal grounds reflecting the value of continuity. David L. Shapiro, Continuity and Change in Statutory Interpretation, 67 NYU L Rev 921 (1992).

108 For a thoughtful reflection on these issues concerning statutory interpretation, see John F. Manning and Matthew C. Stephenson, Legislation and Regulation 175 (Foundation, 2d ed 2013).
designed to apply the range of values that ought to underlie the preemption decision.\(^4\) Having made this institutional turn, he analyzes the properties of the various institutions at a general level; the result, in doctrinal terms, is thus a broad general “rule of law” that allocates decisional responsibility.\(^5\) But Merrill also notes that institutional analysis of this sort “rests ultimately on empirical judgments about the capabilities of different legal institutions.”\(^6\)

At that point, the level of generality at which those “empirical judgments” ought to be made is inescapable. How rigorously should legal doctrine continuously reflect on these empirical judgments about institutional performance; how much should doctrine, in areas like preemption, adjust the law’s allocation of decisional authority accordingly?

Statutory interpretation, like all legal interpretation, is inevitably a matter of implicit political theory as well as legal or linguistic theory. A judge’s conception of role responsibility reflects a conception of the proper relationship between courts and legislatures; that conception, in turn, is influenced by judicial views of how much courts are to take into account how legislatures actually function.

**E. STATE LEGISLATURES**

A final, small window into constitutional law concerning state legislative action (or inaction) reveals that here, too, the formalist/realist tension, and if realism, how much, is inescapably foundational.

The most obvious example is the Court’s reapportionment revolution. For decades, the Court adopted an essentially formalist legal stance toward state legislatures—and Congress—in refusing to find malapportionment claims justiciable.\(^7\) Under the Elections Clause,\(^8\) districting was a task constitutionally assigned to the state legislatures, or to Congress should it choose to displace

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\(^5\) Id at 779 (“Absent resolution of the question by Congress, courts are the best (that is, the least worst) institution to decide whether to displace state law in order to further federal policy objectives, but courts should draw on the expertise of agencies in helping to understand the pragmatic variables that bear on the preemption decision.”).

\(^6\) Id.

\(^7\) See, for example, *Colegrove v Green*, 328 US 549 (1946).

\(^8\) US Const, Art I, § 4.
state authority; for the Court, that was the end of the matter, without probing more deeply into how these institutions actually functioned on this issue. If dissatisfaction with that performance existed, change depended “on the vigilance of the people in exercising their political rights,” in Justice Frankfurter’s memorable phrase.114 But by the 1960s, the Court had clearly reached the breaking point of its formalist forbearance. Faced with additional decades of legislative inaction, the Court could no longer blind itself to the institutionally realist view that sitting legislators elected under the existing system of massive malapportionment, in the states and Congress, had every incentive to resist change to the system under which they had gained and maintained power. Having all possible political-process avenues to updated apportionment, the Court concluded that “from a practical standpoint”—that is, an institutionally realist perspective—these formal paths were “without substance.”115 Once institutional realism became legally relevant, constitutional doctrine was justifiably adjusted (indeed, revolutionized).

Reapportionment law is the most dramatic example, but legislative regulation of the democratic process always challenges courts about whether they should adopt a formalist or realist foundation for judicial review. Regulation of the process is of course necessary and unavoidable; yet “the state legislature” is not some detached, abstract entity, but a political body composed of incumbents and dominant partisan forces with powerful incentives to act (or fail to act) for narrowly self-interested reasons. How much do courts intentionally blind themselves to these dynamics and take an institutionally formalist stance toward “the state”; alternatively, how much is constitutional doctrine shaped by the courts’ willingness to embrace institutional realism?

Given the profundity and intractability of the issues, perhaps it is no surprise that courts are all over the map on this implicit, foundational question. At times, the Supreme Court has been expressly realist. In Tashjian v Republican Party of Connecticut,116 for example, the Republican Party, as the out-of-power party in the state, wanted to broaden its appeal by permitting independents to

114 Colegrove, 328 US at 556.
vote in the party’s primary. But state law prohibited this. Efforts to change the law produced straight party-line votes in the legislature, then a veto from the Democratic Governor. In holding that state law mandating a closed primary violated the Republican Party’s First Amendment right of association, the Court dismissed “the state’s” justification for the law with a realist sensibility about the partisan dynamics involved. As the Court wrote: “the views of the State, which to some extent represent the views of the one political party transently enjoying majority power . . . lose much of their force.”

A similar willingness to embrace institutional realism sat at the core of the Supreme Court’s decision in *Georgia v Ashcroft*, in which the Court accepted some modification of the racial-redistricting regime that the Voting Rights Act (VRA) amendments of 1982 had brought into being. In the 2001 round of redistricting, Democrats still controlled the redistricting process, knew the tides were turning fast against them, and were willing to try whatever they could in the districting process to preserve as much of their fleeting power as possible. Their strategy was to drop the African-American population of some districts modestly, for the purpose of dispersing these voters more widely to foster the electoral prospects of Democrats in the aggregate. Applying conventional VRA doctrine, the DOJ and lower three-judge federal court held that this action violated Section 5. But the Court reversed, held that

117 Id at 244. A similar view is expressed in Justice O’Connor’s concurring opinion in *Clingman v Beaver*, 544 US 581, 603 (2005) (O’Connor, J, concurring in part and in judgment):

Although the State has a legitimate—and indeed critical—role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the state is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit. Recognition of that basic reality need not render suspect most electoral regulations. Where the state imposes only reasonable and genuinely neutral restrictions on associational rights, there is no threat to the integrity of the electoral process and no apparent reason for judicial intervention. As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the state’s asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions.

Section 5 should now be read to permit more flexibility in the racial-redistricting regime, and strongly suggested the Georgia plan was legal.\textsuperscript{119}

Of central importance for present purposes is that, to justify this conclusion, the Court relied critically on the following kind of “institutionally realist” facts: by this point in time, African Americans had a significant presence in the Georgia legislature; this plan was a Democratic one that had been rammed down the throat of the Republican Party with the joint support of black and white Democratic legislators; that black Democrats had enough power in the legislature to have blocked the plan had they so wanted; and that African American legislators had occupied key positions in the districting process (the Court noted, as one example, that the chair of a key subcommittee was black). The Court did not defer to “the Georgia legislature” in an abstract or formal fashion; instead, these facts served as realist proxies for the judgment that this particular political process could be trusted to have made good-faith judgments about the system of districting that would most protect the overall interests of Georgia’s minority communities—and hence be consistent with the VRA. Moreover, when the VRA racial-redistricting regime began, almost no African Americans held elective office; by the time that had changed, the Court suggested, legal doctrine ought to adjust accordingly. In other words, the “Georgia legislature” of the 2000s was not the “Georgia legislature” of the 1980s—let alone of the 1960s.

In legal process terms, the underlying substantive issue of how to design districts to best protect minority voters is a difficult one; instead of trying to give a first-order substantive answer, the Court deferred to another institution, the state legislature, as the better forum for resolution. But only because the Court probed the political process deeply enough to convince itself that the “state” indeed warranted this deference. Of course, this institutional realism raises predictable rule-of-law questions (in what other contexts, through what other political processes, is similar flexibility in racial redistricting permissible?).\textsuperscript{120} And yet, the Court cannot

\textsuperscript{119} Technically, the Court remanded for application to the facts of the standards it announced. \textit{Georgia v Ashcroft}, 539 US at 491.

\textsuperscript{120} Concerns of this sort played a role in Congress’s action to overturn the Court’s decision in the 2006 reauthorization amendments. See Nathaniel Persily, \textit{The Promise and Pitfalls of the New Voting Rights Act}, 117 Yale L J 174 (2007). \textit{Shelby County} alludes to this feature of the 2006 amendments but, in light of holding Section 4 unconstitutional, the...
avoid institutional realism altogether, with respect to state legislatures and other public institutions.

Current controversies over voter-identification laws are also illuminated through similar formalist/realist tensions. Should constitutional doctrine take into account that these laws almost always pass on straight party-line votes? In the first challenge, to an Indiana law, Judge Evans, dissenting in the Seventh Circuit, certainly thought so; his opinion began by proclaiming that the law had an obvious partisan motivation and was unconstitutional (leaving a strong sense of connection between premise and conclusion). Cutting against this approach, the Court in *Crawford v Marion County Election Board* eschewed realism of this kind or that it had employed in cases like *Tashjian*; the Court found it “fair to infer that partisan considerations may have played a significant role in the decision to enact [the law],” but that such a law should still be constitutional if supported by valid, neutral justifications. In this respect, voter-identification laws are a metonym for all election laws: should courts (1) assess whether an election law reflects a partisan aim and (2) adjust doctrine, and perhaps legal outcomes, in response? When courts suspect that partisan aims have contributed (exclusively? predominantly? in part?) to a law’s enactment, for example, should courts apply a more aggressive mode of review?

From a more normative perspective, Professor Sam Issacharoff and I have pointed out that some of the constitutional doctrine and the central public policies in the area of race, rights, and voting were developed in the long era in which the Democratic Party had a complete monopoly on political power in the South. “The state legislature” was not an abstraction, nor an ideal type envi-
sioned in much of conventional legal doctrine. Constitutional and statutory doctrine concerning the problem of vote dilution, as well as the constitutionally restrictive restraints on political parties in the White Primary cases, were designed in this unique, aberrational context of one-party political monopoly. Neither the Court nor Congress could have been oblivious to that. With the dismantling of that one-party system that began with the 1965 VRA and culminated in the emergence of more normal—indeed, robust—two-party competitive politics that came to characterize Southern politics by the 1990s, we have asked whether any of these doctrines or policies should be revisited. Does the modern structure of two-party competitive politics now serve as an adequate (or even better) substitute for the role that doctrine or national policy had to play in the past? Professors Tracey Meares and Dan Kahan launched a related debate in criminal procedure when they argued that constitutional precedents and approaches from the pre-VRA era should be adapted, once African Americans became full political participants. Should certain doctrines and decisions be understood not as general “precedents,” but as contingent products—limited to that (or similar context)—of the unique composition of state “democracy” and legislatures in the one-party South?

I have focused on formalism/realism regarding state legislatures in the context of election laws because even the staunchest institutional formalist is likely to find the realist’s “distrust” of “the legislature” hardest to resist in this area, as John Hart Ely recognized long ago. Once doctrine opens the door to that institutional realism, though, the familiar anxieties race through, including how far courts can or should take realism. In reapportionment, the realism was at a general, structural level: the design of legislatures makes legislators unlikely to change the systems under which they hold power. In the analysis Professor Issacharoff and I offer, the realism is of an unusual but still categorical nature: law should distinguish at least between long eras of one-party monopoly and more “normal” eras of two-party com-

petition (but, of course, political systems can reside at some point on a continuum, rather than clearly defined poles, so this categoricism can break down). In cases like *Tashjian* or *Georgia v Ashcroft*, the realism is at the most retail level: judicial decision making should turn on realistic appraisals of the particular political process behind a specific law. Yet if realism in this sphere seems disturbing, would we really prefer a legal order that resolutely takes an institutional formalist stance toward legislative action?

As Part II will now show, this broader framework concerning the formalist/realist tension provides an important perspective on *Shelby County*, the Court’s most dramatic civil-rights decision since the modern civil-rights revolution.

II. INSTITUTIONAL FORMALISM VERSUS REALISM: *SHELBY COUNTY*

*Shelby County* is a story about how the legal and political system adapts to changes over time in one of the most charged realms of all, the relationship among race, democracy, and politics. In addition to revealing the Court’s greater capacity to act as a countermajoritarian institution than some scholars believe, the decision provides a powerful vantage point into the question of how institutionally formalist or realist the Court ought to be about Congress.

In the depressingly characteristic 5–4 divide that recurs on these issues, the Court held unconstitutional the current preclearance regime of the Voting Rights Act (VRA), under which certain states and localities could not make any change in their voting systems without advance federal approval. Nearly fifty years earlier, in initially blessing the constitutionality of this regime immediately after its birth, the Court in *South Carolina v Katzenbach* had expressed a great deal of deference to Congress and called preclearance an “uncommon exercise of congressional power” justified by the “exceptional conditions” obvious to all in the South of 1965. As a signal that preclearance was considered exceptional, Congress al-

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129 In the comparative constitutional sphere, Sujit Choudhry similarly argues that constitutional courts should develop a distinct body of law for political systems dominated over long periods of time by one political party. Sujit Choudhry, “He Had a Mandate”: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy, 2 Const Ct Rev 1 (2009).

130 For discussion of that issue, see Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 Supreme Court Review 103.

ways designed this part of the VRA, unlike other parts, with an automatic sunset provision. Embodied in Section 5, preclearance first expired in 1970, and Congress then extended it for another five years; in 1975, for another seven; and in 1982, for twenty-five more years. In the 2006 enactment at issue in Shelby County, Congress then reauthorized this system for another twenty-five years, until 2031. Thus, from a five-year structure to address the circumstance of American apartheid in 1965, Section 5 became a regime that Congress set into place until 2031.132

Shelby County did not hold this preclearance regime itself unconstitutional (Justice Thomas, concurring, would have).133 Instead, the Court held unconstitutional Section 4, the coverage formula in the 2006 Act. A key element in the 1965 Act,134 this formula had been designed to identify the particular jurisdictions in which systematic racially-discriminatory voting practices provided strong evidence that justified singling out those areas for federal control. In 1965, such evidence was not hard to come by. In the 1965 Act, that formula was based on whether a jurisdiction (1) had in place as of November 1, 1964, a “test or device” (literacy tests, “understanding” and knowledge requirements, good moral character tests, and the like) and (2) had less than 50 percent voter registration or turnout in the 1964 presidential election. In early reauthorizations of Section 5, Congress updated this formula to include the 1968 and 1972 elections. After that, Congress stopped updating this trigger, including in 2006, when it essentially left in place the 1964, 1968, and 1972 formula from the Act’s initial life.135 The effect, then, was that the areas that had been brought under coverage because they used illegitimate “tests and devices” in 1964, and had low presidential election participation then or no later than 1972, continued to remain covered under the 2006 Act.

The 1965 Act had contemplated that the preclearance regime would unwind from within over time, through provisions that permitted covered areas eventually to “bail out” of coverage. But

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132 The Act did include a precatory provision stating that Congress should “reconsider” Section 5 in fifteen years, 42 USC § 1973b(a)(7), (8) (2006 ed, Supp V), but the Act remained in effect without any need for subsequent reauthorization until 2031.
133 Shelby County, 133 S Ct at 2632 (Thomas, J, concurring).
134 For a good history of how this design came about, see Brian Landsberg, Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act (Kansas, 2007).
135 Shelby County, 133 S Ct at 2620–21.
for any number of possible reasons, these bail-out provisions never had any meaningful practical effect in unwinding coverage—even after Congress had tried in 1982 amendments to make the bailout process a more practical option. Of all the more than 850 or so counties that the Act originally covered with significant minority populations, fewer than 2 percent had ever emerged from the Act. In the 2006 Act, Congress did not adapt or update the bailout process. The coverage formula, alone then, had to carry even more weight in showing that the Act was appropriately tailored to current conditions.

Holding that it was constitutionally irrational for Congress to base continuation of the preclearance regime on a jurisdiction’s use of voting tests or devices and low turnout from forty or more years ago, the Court announced that Congress could not “rely simply on the past.” If Section 5 were to continue, Section 4 had to “identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions.” The Court concluded that Congress had failed to do that—though the decision leaves open the possibility that Congress could enact an updated preclearance formula.

A. WHAT WAS SHELBY COUNTY “ABOUT”?

The historical, moral, and symbolic weight of the VRA inevitably entails that the Court’s decision cannot be approached in doctrinal terms alone, for a decision so momentous and visible will have “meaning” far beyond anything in the opinion itself. But what is that meaning likely to be?

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137 This figure is based on my own calculation.


139 *Shelby County*, 133 S Ct at 2629.

140 A thoughtful proposal to do so, modestly bipartisan, has been introduced (whether it will have any traction remains to be seen). See Voting Rights Amendments Act of 2014, HR 3899, 113th Cong, 2d Sess (Jan 16, 2014) and S 1945, 113th Cong, 2d Sess (Jan 16, 2014).

141 The next several paragraphs are adapted from a blog post of mine. Richard Pildes, *Shelby Commentary: What Does the Court’s Decision Mean?* (SCOTUSblog, June 25, 2013), online at http://goo.gl/13sqXI.
I believe the decision will express such radically different meanings to different people for years to come that we will not be able to forge common ground regarding even the threshold question of what the decision is “about.” To some, *Shelby County* will be seen as a test of whether the Court believes systematic racial discriminating in voting systems continues in the South; to others, it will be seen as test of the ability of our political institutions, particularly Congress, to grapple with charged issues of race and democracy in an institutionally serious way. These will remain radically incommensurable starting points.

To many critics, the essential question will be whether racial discrimination in voting still exists in the South. Framed this way, the Court’s decision will appear to be, at best, a denial of reality. It is not just outside critics who are likely to view the decision this way. Justice Sotomayor, at oral argument, reflected this perspective on “the question” at stake when she pointedly asked the VRA’s challengers: “Do you think that racial discrimination in voting has ended, that there is none anywhere?” If the answer to that question is no, as it must be, and if that is what the case was about, the Court’s decision must look wrong.

Almost as soon as the (metaphorical) ink on the decision was dry, Justice Ginsburg confirmed that this was the starting point for other dissenters. In a remarkable public interview one month after the decision, she proclaimed her dissent to have been right—“I didn’t want to be right [in my dissent], but sadly I am”—on the basis that some covered or partially-covered states, particularly Texas and North Carolina, had put back into force or enacted new regulations on voting, including voter identification laws. Accepting Justice Ginsburg’s judgment on the legality of these laws (and leaving aside the propriety of her expressing a view on them), this statement further confirms that, to many, the case was “about” whether racially-discriminatory voting policies continue to be

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adopted in the South. From this vantage point, as long as it does, Section 4 remains not just justifiable, but essential.

Yet to others, including the Court majority, the case was not about racial discrimination in isolation, but about the way Congress had addressed the issue. In doctrinal terms, that question was whether Congress had met the relevant constitutional obligation to establish that this unique regime of federal control was adequately tailored to where systematic problems with racially-discriminatory voting practices existed. But more generally and symbolically, the question from this perspective was whether our political institutions and culture have the capacity to recognize what has changed, and what has not, at the intersection of race and voting in the decades since Congress last engaged the VRA. As I noted already and will discuss more shortly, the face of the Act did not reflect any change. Congress did not update the coverage formula in any way or make bailout easier; and it reauthorized the preclearance regime for another twenty-five years. This lack of updating led Justice Kennedy, at the oral argument, to say: Congress “should use criteria that are relevant to the existing [conditions]—and Congress just didn’t have the time or the energy to do this; it just re-enacted it.”145 That statement reflects disbelief that Congress had engaged in the kind of responsible lawmaking process he thought these issues constitutionally required; even if areas of discriminatory voting practices remain, could they so precisely mirror exactly the areas of which this was true forty or fifty years ago? From this viewpoint, the renewed preclearance structure symbolized that the issues at the intersec-

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145 Despite the popular image that Section 5 is about protecting access to the ballot box, Section 5 in practice for many decades had been much more about racial redistricting than access to the ballot box. While the Justice Department in recent decades blocked access changes on average fewer than twice a year, it blocked redistrictings nearly fourteen times as often. Indeed, in the 2006 Act itself, Congress itself did not rely primarily on ballot-box access problems to justify renewing Section 4, but on issues like redistricting. If Section 4 is “about” access to the ballot box in the public imagination, to the Court majority, I suspect, Section 4 is about racial redistricting. This is a further conflict in symbolism regarding what the VRA “represents” that is likely to endure for years to come in debates over the decision. Only in the last few years had Section 5 become significant again with respect to access to the ballot-box issues in responses to changes in state laws that reduced hours of early voting or added additional identification requirements as proof of eligibility to vote. For lengthy analysis of how Section 5 functioned in practice, see Rick Birdes and Dan Tokaji, What Did VRA Precoalence Actually Do?: The Gap Between Perception and Reality (Election Law Blog, Aug 19, 2013), online at http://electionlawblog.org/?p=54521; Rick Birdes and Dan Tokaji, What Did VRA Precoalence Actually Do?: The Gap Between Perception and Reality Part II (Election Law Blog, Aug 21, 2013), online at http://electionlawblog.org/?p=54638.
tion of race, democracy, and voting rights remain so charged that our political system is paralyzed when confronting them.

Was the case about racial discrimination in voting? Or Congress’s lawmaking?

B. THE COURT AND CONGRESS

In deciding whether and how much to defer to Congress, the Court first had to resolve a critical threshold constitutional issue. Yet the two opinions hardly debate this issue—another manifestation of the radically different frames within which judicial perceptions of Congress’s action take place. Both opinions largely take their own starting points as given—as a premise, rather than a choice to explain and justify. For that reason, this issue is obscured; it is easy to miss. Yet all other aspects of the case, including deference to Congress and the relevance of the legislative process and record, flow from this threshold question: what should the appropriate baseline be, as a constitutional matter, for judging whether Congress in 2006 had fulfilled its constitutional responsibility in designing Section 4’s geographic coverage formula?146

Three different possibilities exist for this choice of constitutional baseline.147 And how the Court “pictured” Congress and the legislative process depended heavily on how this constitutional baseline was set:

1. Does Congress need to establish sufficient continuing differences today between “the covered” and the “noncovered” areas to justify continuing to single out the former for preclearance (taking the covered jurisdictions in the aggregate);
2. Does Congress only need to focus on the already-covered jurisdictions in isolation and establish that significant racially discriminatory voting problems continue to exist in those areas;
3. Assuming Congress can limit itself to the areas already covered, how much can Congress treat those areas as a group rather than addressing and recognizing any significant differences today within the previously-covered areas?

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146 The next few pages are adapted from a blog post of mine. See Richard Pildes, The Supreme Court Response to Congressional Avoidance (SCOTUSblog, Sept 12, 2012), online at http://goo.gl/4uKaow.
147 On constitutional baselines, see Daryl J. Levinson, Framing Transactions in Constitutional Law, 111 Yale L.J. 1311 (2002).
First, on which of these understandings of its constitutional responsibility did Congress in fact legislate? Second, on which of these understandings did the majority and dissent decide the case? As to the former, it is clear, to me at least, that Congress acted on the view that principle (2) defined its constitutional obligations. The legislative process had been designed as if Congress’s only constitutional (and policy) responsibility were to establish that race-related voting-rights problems continued to exist within parts of the already-covered areas—regardless whether parts of the covered areas no longer differed significantly from parts of the non-covered areas (or whether some noncovered areas were now worse than some covered areas). Most of the legislative record was built in the House, where the legislative process began. After looking at that evidence, I testified before the Senate Judiciary Committee in 2006 to my concern that the evidence in the legislative record did not adequately address whether there continued to be “systematic differences between the covered and the non-covered areas of the United States.” Congress simply made a strategic decision


First, I am concerned that the evidence in the record does not address an essential issue to the constitutionality of the proposed bill, and I am not aware that this concern, though I think it may be essential, has been addressed in the House hearings or in the previous hearings before this Committee.

The assumption so far of all of the evidence I have seen, or most of the evidence at least, is that it is sufficient to document continuing instances of problems in the area of race and voting rights in the covered jurisdictions. But I am very concerned that under the congruence and proportionality test that the Court now applies in this area, the Court is going to insist that there be some account of systematic differences between the covered and the non-covered areas of the United States.

There is very little evidence in the record on this, and, in fact, the evidence that is in the record suggests that there is more similarity than difference. Now, I want to be clear about why I raise this point. It is not to assert that the bill as proposed is unconstitutional. But I look at this record as a lawyer concerned about how the courts will respond to it, trying to determine how best to ensure the constitutionality of a renewed Section 5, and I think this is an essential issue that has been neglected until now.

I am more worried than Professor Karlan is about the lack of evidence in the record about the differences between covered and non-covered States. I agree, the power of Congress in the area of voting rights is at its highest, but the Voting Rights Act in Section 5 is also an extremely unusual, indeed unique,
to keep the focus on the already-covered areas and not open up current systematic comparisons with the noncovered areas; for reasons of realpolitik, doing so was thought to be too explosive.150

Because Congress chose not to compare in any detail the covered and noncovered areas, it is no surprise that little evidence in the record does so. In her dissent, Justice Ginsburg made a valiant effort to salvage the record by marshaling the one piece of evidence purporting to address this issue, but even that bit of evidence had been undermined before Shelby County.151 But more meaningfully, the larger truth is that battling on this terrain was a losing proposition from the start, given the way the process intentionally bypassed this issue. That is not to say that such differences do not exist; it is to say that Congress did not address that question in any detail.

As to the second question, the majority held that Congress, in essence, had asked the wrong legal question. In holding that Congress was required to “identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions,”152 provision, as you know, in Federal law. It singles out part of the country.

Now, the constitutional jurisprudence has changed greatly since the courts last looked at this singling out of one part of the country. And it seems to me it is one thing, with the Family Medical Leave Act and cases like Hibbs, to base national uniform law on evidence from a number of States, but not all the States. It seems to me, constitutionally, it is a very different question to base geographically selective national law, the only one we have, as far as I know, on evidence that does not today show that that targeting is congruent to the constitutional violations that are out there. That is what I am worried about with the evidence in the record so far.

The Court quoted part of this testimony in Northwest Austin Municipal Utility District Number One v Holder, 557 US 193, 204 (2009).


151 This evidence, collected by Professor Ellen Katz, is known as the Katz study. Ellen Katz et al, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1942, 59 U Mich J L Ref 643 (2006). In a series of articles, Professors Adam Cox and Thomas Miles argue that Katz’s study cannot sustain the weight the dissent puts on it; in strong terms, they conclude “the data provide no meaningful evidence about whether discrimination is worse in one part of the country than the other.” Adam Cox and Thomas Miles, Online VRA Symposium: Social Science Goes to Court (SCOTUSblog, Sep 13, 2012), online at http://goo.gl/BLbqYd. The dissent does not address these critiques of the Katz study, perhaps because the main briefs did not point the Court to them. For a brief summary of the Cox/Miles critiques, see the blog post just cited; for the academic articles, see Adam B. Cox and Thomas J. Miles, Judging the Voting Rights Act, 108 Colum L Rev 1 (2008); Adam B. Cox and Thomas J. Miles, Documenting Discrimination?, 108 Colum L Rev Sidebar 31 (2008); Adam B. Cox and Thomas J. Miles, Judicial Ideology and the Transformation of Voting Rights Jurisprudence, 76 U Chi L Rev 1493 (2008).

152 Shelby County, 133 S Ct at 2629.
the majority embraced principle (1) as the constitutional baseline required. The Court did not explicitly justify and explain this choice over principle (2). Instead, it treated the Court’s prior decision on the constitutionality of preclearance, *NAMUDNO*, in which the Court avoided the constitutional issue, as having resolved that baseline issue already. That is indeed a plausible reading of *NAMUDNO*, which stressed the importance of a coverage formula tied to current conditions and noted that voting problems might “no longer be concentrated in” the covered areas. But even so, *NAMUDNO* itself did not expressly compare these two baselines and offer a considered justification for choosing (1) over (2). Thus, the Court “resolved” this essential issue without any indication that it was making the most important decision in the case. Once this becomes the appropriate baseline, it is unsurprising that the majority would view Congress as not having made a serious attempt to meet its constitutional obligation.

So, too, it is with the dissenting opinion. Justice Ginsburg’s dissent paints an entirely different picture of Congress. But in large part, that is because the dissent assumes—more implicitly than not—that the correct legal baseline is (2), not (1). The principal theme of the dissent is deference to Congress; citing the 1966 *South Carolina v Katzenbach* decision, the dissent castigates the majority for not having given Congress “the full measure of respect its judgments in this domain should garner.” Justice Ginsburg describes Congress as having approached its task in 2006 with “great care and seriousness”; she says Congress “did not take this task lightly”; she describes the empirical record before Congress as “huge” and “extraordinary”; she characterizes the legislative process as having involved “exhaustive evidence-gathering and deliberative process. . . .” But to what would the Court be deferring? This portrait is based on the assumption that Congress was only required to meet the obligations of principle (2). For if the constitutional baseline is (1), Congress asked and an-

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154 Id at 203–04.
155 *Shelby County*, 133 S Ct at 2644 (Ginsburg, J, dissenting).
156 Id at 2655.
157 Id at 2639.
158 Id at 2652.
159 Id.
answered a different (and in the majority’s view, wrong) legal question.

Unlike the majority, the dissent does make a brief effort to justify (2) as the correct baseline, offering three quick reasons to do so. But Justice Ginsburg’s points are more descriptive than legal; it is hard to see how they provide a legal argument as to why the majority is wrong to require Congress to show significant continuing differences between the covered and the noncovered areas. That argument can be made. But in an otherwise lengthy opinion, the dissent, too, mostly assumes that its baseline, (2), can be taken for granted. In addition, the dissent also implicitly rejected (3) as the appropriate baseline. That is, even assuming that Congress could properly avoid comparisons between covered and noncovered areas, could Congress continue to treat the previously covered states as an undifferentiated group without examining in more detail whether they had come to differ in significant ways? Could it be the case that all the areas, and only the areas, that had been covered for decades remained the proper areas to cover today? And did the Court, and Congress, even have to ask that question?

The single most important constitutional issue, then—the legal linchpin—is the one least debated, analyzed, or discussed. Yet the Court’s perceptions of how Congress functioned were deeply colored by the answer to this question.

But not only to that question. For as I have written before, in the 2006 VRA amendments, “Congress ha[d], in effect, thrown down a gauntlet to the Court.” For nearly twenty-five years leading up to 2006, the Court had been more assertive in limiting the scope of Congress’s enumerated powers in the name of federalism; in limiting the scope of Congress’s powers to enforce the Fourteenth Amendment; and in limiting the use of race in public

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160 See id at 2638–39. She observes that the court should expect the record of violations to be less stark in 2006 than in 1965; she also notes that the sunset provision requires Congress to revisit the scope of coverage. But neither point addresses or explains why Congress should or should not have the constitutional obligation to establish that significant differentiations continue between the covered and noncovered states. The closest the dissent comes is in asserting that “legislation re-authorizing an existing statute is especially likely to satisfy the minimal requirements of the rational basis test.” But again, this appears to be more of an empirical point—prior bad actors are likely to remain current bad actors—than a legal argument as to why (2) rather than (1) should provide the constitutional baseline (or why (3) is not the more appropriate baseline than (2)).

policymaking. The preclearance regime stood at the intersection of all these areas. For many years now, the Court has been more intensely insisting, rightly or wrongly, that legislation in these areas rests on an adequate foundation.

Yet faced with these pivotal developments of the Rehnquist and Roberts Courts, Congress followed the same roadmap it had used when it had last revisited Section 5 in 1982. As in 1982, it did not update the coverage formula; it cemented this regime into place for twenty-five years, rather than the shorter periods that had characterized the pre-1982 preauthorizations; it did not even make bailout easier (as it had tried to do in 1982); and Congress also effectively overruled two Supreme Court decisions with which it disagreed (it had done so for one Court decision in the 1982 amendments). Had Congress narrowed and modified the preclearance regime in any way, the Court might have found it easier to see the reauthorization process as a good-faith effort to honor these shifts in constitutional doctrines at the same time that Congress struggled with a difficult policy and political problem. But even though some of these provisions were not before the Court in Shelby County, they all no doubt contributed to the majority’s picture of the legislative process. As Chief Justice Roberts wrote about the provisions that overruled prior Court decisions, “the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved.”162 The tone of incredulity is hard to miss. Similarly, the majority concluded that the coverage formula was “irrational in theory” because the existence of tests and devices in the 1960s and 1970s, which had been prohibited ever since, could not possibly be the cause of whatever voting problems remained. How could Congress have left the Act tied to triggering events that dated that far back?

We are left then, among all the other aspects of Shelby County with competing pictures of Congress. That is why, for Justice Kennedy, “Congress just didn’t have the time or the energy to do this [i.e., to use criteria relevant to existing conditions]; it just re-enacted it.”163 That is why, for the dissent, Congress had acted with “great care and seriousness.” What did it mean that Congress has been nearly unan-

162 Shelby County, 133 S Ct at 2627.
imous in approving the legislation? To Justice Scalia, that was yet another sign that Congress had passed the buck and avoided confronting the serious, difficult issues involved;\textsuperscript{164} to critics of the decision, the notion that Justices would probe beneath the surface of a law to ask questions about whether it emanated from a serious, deliberative lawmaking process was itself outrageous.\textsuperscript{165} In the legislative processes of the great 1960s civil-rights era that ended Jim Crow, every legislative detail was fought over tooth and nail; the 1964 Civil Rights Act was enacted only after the longest filibuster in Senate history.\textsuperscript{166} Was the legislative process in 2006 deliberatively similar—and should that matter, along with the end of Jim Crow itself, to the precedential weight of \textit{South Carolina v. Katzenbach}? If the Court showed great deference to Congress then, is it required to do so now? Put in other terms, how formal or realist should the Court be about Congress (or other institutions) and the weight of its own precedents regarding Congress (or other institutions).

\textit{Shelby County} is “about” many things. But to a significant extent, it is about essential questions that run throughout nearly all of constitutional and public-law adjudication regarding the appropriate role of institutional formalism and realism in judicial decision making.

III. Conclusion

The tension between more formalist and realist institutional conceptions is a profound, inescapable, and irresolvable one throughout constitutional and public law. Focusing more directly on this tension illuminates public law and its controversies but can-

\textsuperscript{164} See this exchange at the oral argument:

JUSTICE SCALIA: . . . What was the vote on this 2006 extension—98 to nothing in the Senate, and what was it in the House? Was—

MR. ADEGBILE: It was—it was 33 to 390, I believe.

JUSTICE SCALIA: 33 to 390. You know, the—the Israeli Supreme Court, the Sanhedrin, used to have a rule that if the death penalty was pronounced unanimously, it was invalid, because there must be something wrong there.


not suggest that any final resolution of this tension can be had. Too much institutional formalism defeats the purposes that animate the constitutional order in the first place; too much institutional realism is perceived to pose a threat to the rule of law. We can try to bound institutional realism in more categorical or generalizable forms, but no rule-of-law-like principles exist to decide just how much institutional realism ought to shape public law. Yet to understand public law fully requires appreciating the powerful role this tension quietly plays.