The Constitution in Authoritarian Institutions*

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The protections provided by the United States Constitution apply least where they are needed the most. Throughout American history, but especially under the Burger and Rehnquist Courts, the Supreme Court has adopted a posture of great deference to institutions of government such as prisons, the military, schools, and the Immigration and Naturalization Service. Individuals in these institutions have little, if any, protection of their most basic civil liberties. Violations of basic rights that would not be tolerated in any other context are routinely approved by the Supreme Court. Indeed, the Court allows these institutions to violate the rights of others in society besides those who are subject to the direct control of these places.

Although there obviously are significant differences among these institutions, there are striking similarities in the Court's treatment of rights within them. In each area, the Supreme Court repeatedly proclaims a need for judicial deference to the authority that manages the institution. The Court proceeds from a frequently articulated premise that any judicial review is inconsistent with the preservation of the authoritarian nature of the place. The result is an almost complete abdication of judicial protection of individual rights and a judicial tolerance for unconscionable violations of basic human rights.

In this paper, I develop three points. First, the Court has consistently refused to follow usual constitutional principles and protect individual rights in what I will term "authoritarian institutions": prisons, military, and schools. In reviewing the conduct of each of these institutions, the Court proceeds from the assumption of a need for almost complete judicial deference to the governing authority.

Second, these are the places where judicial review is most essential.

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Because of the very nature of these institutions, serious abuses of basic rights can occur. When individuals are granted power and authority over others they often abuse it. Unfortunately, individuals in these institutions generally have nowhere else to turn for protection. They lack political power and are truly a "discrete and insular" minority in terms of their inability to form coalitions to effectively use the political process.

Finally, the justifications for the Court's approach—the need for deference to authority and expertise—do not warrant most of the specific rulings nor the general posture of abdication. In the vast majority of cases where the Court sides with the government, judicial review would not have undermined the necessary authority nor required any special expertise. In other words, the Court follows the approach of judicial deference even where the rationale behind it is inapplicable.

My conclusion is not that authority and expertise are irrelevant, but rather, that they are among the factors to be included in constitutional analysis. These factors should be given weight where appropriate, but not allowed to be controlling when inapplicable. It should not be assumed that they are decisive, or even present, in every case involving these institutions. The judiciary should operate from the premise that it has a special role in protecting individuals in these institutions and accept violations of rights based on expertise and authority only where it is proven to be necessary and desirable to do so.

"Authoritarian institutions" is defined functionally throughout this paper as the institutions of prisons, military, and schools.[1] Although the juxtaposition of these places initially seems strange, they share many characteristics. All involve individuals who are frequently involuntarily present. None are operated internally in a democratic fashion. In each, there is a rigid hierarchy of authority. Most importantly, as to each, the Supreme Court has proclaimed the need for deference to this authority in repeatedly siding with the government and refusing to protect individual liberties.

I. THE COURT'S POSTURE OF DEFERENCE TO AUTHORITY

Across the entire spectrum of constitutional rights, the Supreme Court adopts a posture of deference to the authority of institutions such as military, prisons, schools, and the Immigration and Naturalization Service. This section describes the extent of this deference and the Court's refusal to protect liberties and acceptance of rights' violations that would be intolerable in any other context. My goal is to show the enormous judicial deference to these institutions, such that even the most basic rights can be violated in an

1. This is not an exhaustive list of institutions that properly can be called "authoritarian." For example, the Immigration and Naturalization Service is, in many respects, an authoritarian institution in the same way as these others: individuals are involuntarily under its control, there is no democratic participation in control or governance, and there is tremendous judicial deference to its decisions.

unquestionably egregious manner. To describe this posture of judicial deference, I briefly consider each of these institutions in turn.

A. Military

It is familiar that the Bill of Rights has little application in the military. The Court's great deference to the military can be seen in three areas of constitutional law: the availability of judicial remedies for violations of rights, equal protection, and freedom of speech.[2]

First, the Court almost completely precludes those in the military from receiving any judicial redress for even the most egregious violations of rights. Constitutional liberties mean little if they are not enforced and if no remedy exists for their violation. Yet, in the context of the military, the Supreme Court has ruled that those who have been injured, even very seriously, by a violation of rights cannot sue.

In *Chappell v. Wallace*,[3] the Supreme Court held that those in the military cannot bring suits against military officials to recover for violations of constitutional rights.[4] The general rule, under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[5] states persons whose rights have been violated may sue the responsible government official directly under their constitutional right.[6] In other words, the Court inferred a cause of action for money damages directly under the constitutional provision, under a theory that such a remedy is imperative to compensate those injured for rights' violations and to deter such infringements.

In *Chappell*, however, the Supreme Court declared that *Bivens* suits are not available to those in the military. *Chappell* involved an allegation of racial discrimination by superior officers directed at minority enlisted personnel of the United States Navy. The Court, in an opinion by Chief Justice Burger, declared that the need for judicial deference to the military justified precluding any suits in this context.[7]

Burger wrote:

> [C]enturies of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel

2. There certainly are other areas where this is true as well. The usual protections of criminal procedure and a fair trial, for example, often do not apply in the military justice system, as reflected in the title of Robert Sherrill's famous book, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC.

3. 462 U.S. 296 (1983).

4. *See id.* at 305 (holding military personnel unable to recover damages).

5. 403 U.S. 388 (1971).

6. *See id.* at 397 (allowing money damages under Fourth Amendment).

7. *See* 462 U.S. at 297-98 (1988) (providing background facts).

> and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.[8]

The extent of this deference, even in the face of serious human rights violations, is evident in *United States v. Stanley*.[9] In *Stanley*, a former serviceman sued because of severe injuries he allegedly sustained as a result of having been given LSD, without his knowledge or consent, in an army experiment in 1958.[10] The Court, in an opinion by Justice Scalia, applied *Chappell* and concluded "that no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service.'"[11] Obviously, human experimentation without disclosure or consent violates basic protocols of international human rights. Yet, no remedy is available for those who are subjected to this in the military.

Nor can such individuals sue the United States government for such injuries. The Federal Tort Claims Act waives the government's sovereign immunity and allows it to be sued by those injured by torts committed by the federal government and its employees. The act enumerates thirteen specific exceptions where the government may not be sued. One exception expressly precludes relief for injuries suffered while in combat. There is a strong argument that these thirteen exceptions were meant to be exclusive. Nonetheless, the judiciary has created an additional, major exception: the federal government may not be sued for injuries suffered by members of the armed services arising from activities incident to military service. This exception is known as the Feres doctrine, a title taken from the seminal case of *Feres v. United States*.[12]

Feres involved three cases that were consolidated before the Supreme Court of the United States. One involved a serviceman who died in a barracks fire, which allegedly resulted from the government's negligence. The other two cases concerned individuals who received negligent medical care from military doctors while serving in the military. One of the individuals died as a result of the alleged malpractice. The other plaintiff had surgery during which a towel marked "Medical Department U.S. Army," measuring thirty inches by eighteen inches, was left in his abdomen.

The Supreme Court said that none of these plaintiffs could recover and held that the "Government is not liable . . . for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[13] Thus, those in the military may not recover for their injuries from either the officials responsible or the government. Violations of basic rights remain uncompensated and the deterrence gained by damages is lost.

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8. Chappell v. Wallace, 462 U.S. 296, 300 (1983).
9. 483 U.S. 669 (1987).
10. *See id.* at 671-73 (describing Stanley's allegations).
11. *Id.* at 683-84 (holding no remedy available for injuries arising out of activity within service).
12. 340 U.S. 135 (1950).
13. *Id.* at 146 (holding no recovery for incidental injuries).

A second area where the deference is evident with regard to the military is in the area of equal protection. One of the few instances in history where the Court has approved a racial classification discriminating against minorities was based on deference to the military. During World War II, 110,000 Japanese-Americans—adults and children, aliens and citizens—were forcibly uprooted from their homes and placed in concentration camps. In some camps, they were housed in horse stalls and kept prisoners behind barbed wire.[14] The government's purported justification was national security based on a fear that Japanese-Americans on the west coast might aid an invading Japanese army or commit acts of espionage and sabotage. No evidence of a specific threat was required to evacuate and intern a person. Race alone was used to determine who would be uprooted and incarcerated, and who would remain free.

The Court considered the constitutionality of the government's actions in three decisions. In *Hirabayashi v. United States*,[15] the Supreme Court upheld the constitutionality of a curfew applicable only to Japanese-Americans.[16] A regulation required that all persons of Japanese ancestry residing in designated areas must be in their residences between 8:00 p.m. and 6:00 a.m. Although the regulations were explicitly discriminatory, the Supreme Court upheld them and concluded that "[t]he challenged orders were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by the Japanese forces . . . ."[17]

In *Korematsu v. United States*,[18] the Supreme Court went even further and upheld the constitutionality of the evacuation of Japanese-Americans.[19] The Court accepted the government's claim that there was a serious risk to national security from Japanese-Americans who were disloyal to the United States and that there was no way of screening to identify such individuals. Justice Black, writing for the Court, said:

> Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground.[20]

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14. *See* WILLIAM R. MANCHESTER, THE GLORY AND THE DREAM 300-01 (1974) (describing the conditions in internment camps).

15. 320 U.S. 81 (1943).

16. *See id.* at 105 (affirming constitutionality of congressional action).

17. *Id.* at 94-95 (providing purpose for restrictive measures).

18. 323 U.S. 214 (1945).

19. *See id.* at 224 (declaring actions not unjustified at time of execution order).

20. *Id.* at 218-19 (explaining rationale for exclusion of Japanese-Americans from specific area).

The Court emphasized that it was upholding the order because it was wartime and "hardships are part of war . . . ."[21]

The government used race alone as the basis for predicting who was a threat to national security and who would remain free.[22] The racial classification was enormously overinclusive because all Japanese-Americans were evacuated and interned simply because a few might be disloyal. In fact, there was no evidence even of a threat from any Japanese-Americans. Subsequent research by Professor Peter Irons has shown that government attorneys intentionally exaggerated the risk to persuade the Court to accept the evacuation order.[23] The racial classification also was enormously underinclusive because those of other races who posed a threat of disloyalty were not interned and evacuated. Even though winning the war undoubtedly was a compelling purpose, the means used was not necessary to attaining that end. As Justice Murphy lamented in his dissent, the evacuation of Japanese-Americans was "one of the most sweeping and complete deprivations of constitutional rights in the history of this nation . . . ."[24]

Another example of judicial deference to the military in the area of equal protection is found in *Rostker v. Goldberg*,[25] which upheld the registration of men but not women.[26] The Military Selective Service Act requires every male between the ages of eighteen and twenty-six to register for possible conscription. In its opinion, the Court expressed the need for "healthy deference to legislative and executive judgments in the area of military affairs . . . ."[27]

The Court premised its holding on the fact that women, unlike men, are not eligible for combat, and Congress and the President evidenced an intent to retain this policy in the future.[28] The Court advanced the idea that the exclusion of women from combat justifies Congress' decision to require only male registration for possible conscription.[29] Justice Rehnquist, writing for the Court, recognized that women could serve in noncombat roles, but added that "Congress simply did not consider it worth the added burdens of including women in draft and registration plans . . . . Most significantly, Congress determined that staffing noncombat positions with women during a

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21. *See id.* at 219 (attempting to justify exclusion order as necessity of war).

22. *See generally* Eugene Rostow, *The Japanese American Cases - A Disaster*, 54 YALE L.J. 489 (1945).

23. *See generally* PETER IRONS, JUSTICE AT WAR (1983).

24. Korematsu v. United States, 323 U.S. 214, 235 (1945) (Murphy, J., dissenting) (suggesting lack of reasonable public danger to justify restrictions). The Civil Liberties Act of 1988, 50 U.S.C. § 1989 (1988) issued a public apology by Congress to Japanese-Americans and promised to make restitution to those who were interned.

25. 453 U.S. 57 (1981).

26. *See id.* at 83 (upholding male-only draft registration under constitutional authority).

27. *Id.* at 66 (reconciling Congress' broad authority to regulate in this area).

28. *See id.* at 76-77 (recognizing preclusion of women in military as congressional).

29. *See id.* at 77 (quoting congressional committee report that states exclusion of women from combat justifies policy).

mobilization would be positively detrimental to the important goal of military flexibility."[30]

Justice Marshall dissented on the basis that the regulation was founded on sex-based stereotypes, and proffered that male-only registration is unconstitutional, whether or not it is constitutional to exclude women from serving in combat. Justice Marshall began his dissenting opinion: "The Court today places its imprimatur on one of the most potent remaining public expressions of 'ancient canards' about the proper role of women."[31] The dissent argued that registering women could be useful in the event that it became desirable to draft women for non-combat positions in the armed forces.[32]

A final major example of judicial deference to the military is in the area of First Amendment rights. The deference is evident both as to restrictions of speech rights of those in the military and those in society more generally. In *Parker v. Levy*,[33] the Court upheld a court martial of an officer for making several statements to enlisted personnel that were critical of the Vietnam War and for suggesting that African-American soldiers should refuse to go to Vietnam because they would be given the most hazardous duty there.[34] The Court recognized that "the military is, by necessity, a specialized society separate from civilian society."[35]

The Court explained that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."[36] The Court said that the speech of "a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment."[37] Yet, it should be noted that in any other context, criticism of government policy, and even advocacy of illegal disobedience, would be allowed unless the constitutional test for incitement was met.

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30. Rostker v. Goldberg, 453 U.S. 57, 81-82 (1981) (offering explanation for Congress' decision not to demand female registration).

31. *Id.* at 86 (suggesting majority excludes females from "fundamental civil obligation").

32. *See id.* at 99-101 (discussing Senate report). The assumption that women cannot serve in combat is itself open to serious question and can be challenged as being based on stereotypes. *See* Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 532-45 (1991) (offering reasons females may serve in military); Lori Kornblum, *Women Warriors in a Men's World: The Combat Exclusion*, 2 LAW & INEQ. J. 351 (1984) (arguing that women should not be excluded from combat).

33. 417 U.S. 733 (1974).

34. *See id.* at 755-57 (finding officer's actions beyond broadest interpretation of First Amendment).

35. *Id.* at 743 (putting forth Court's belief in uniqueness of military culture).

36. *Id.* at 758 (suggesting need for obedience and discipline in military allows diminished First Amendment protection).

37. *Id.* at 761 (explaining when military regulations prevail over First Amendment civilian protection).

In *Brown v. Glines*,[38] the Court went even further in exempting the military from the application of the First Amendment.[39] *Brown* involved an Air Force regulation prohibiting members of the Air Force from posting or distributing printed materials at an Air Force installation without the permission of the commander. This, of course, is the most blatant form of prior restraint: a government licensing system for speech. Unlike *Parker*, this case did not involve punishment for specific speech that threatened the military's operation. The majority still upheld the prior restraint and concluded that "[s]ince a commander is charged with maintaining morale, discipline, and readiness, he must have authority over the distribution of materials that could affect adversely these essential attributes of an effective military force."[40] Again, the underlying issue is whether deference to military authority, or excessive deference by allowing a system of prior restraint that would be permitted in virtually no other situation, is necessary.

Deference is evident even as to restrictions of speech for those outside the military. The first cases decided by the Supreme Court concerning the First Amendment upheld the constitutionality of federal laws that punished speech critical of the military and America's involvement in World War I. For example, in the leading case of *Schenck v. United States*,[41] individuals were convicted for circulating a leaflet arguing that the draft violated the Thirteenth Amendment as a form of involuntary servitude.[42] The leaflet said, "Do not submit to intimidation," and "Assert Your Rights." The leaflet did not, however, expressly urge violation of any law but only urged repealing the draft law.

There was not any evidence that the law had any connection to causing a single person to resist the draft. But the Court, in an opinion by Justice Oliver Wendell Holmes, dismissed this as irrelevant. Holmes said, "[o]f course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."[43]

The Court continued that although in "many places and in ordinary times" the speech would have been protected by the First Amendment, the wartime circumstances were crucial.[44] In what may be the most famous words in the United States Reports, Justice Holmes said,

> But the character of every act depends upon the circumstances in which it is

38. 444 U.S. 348 (1980).

39. *See id.* at 353 (overturning lower court's decision that Air Force speech regulations equaled overbroad restriction on speech).

40. *Id.* at 356-57 (explaining need for military commanders to maintain order).

41. 249 U.S. 47 (1919).

42. *See id.* at 51 (describing leaflet's purpose as provoking obstruction of draft system).

43. *Id.* at 51 (discussing circulation of leaflet clearly intended to influence draft participation).

44. *See id.* at 52 (discussing importance of context regarding speech).

> done. (Citations omitted) The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic .... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[45]

With relatively little elaboration, the Court found that this test was met and upheld Schenck's conviction.[46]

More recently, in *United States v. O'Brien*,[47] the Court formulated a test for evaluating the constitutional protection for conduct that communicates.[48] *O'Brien* involved individuals who burned their draft cards to protest the Vietnam War in violation of a federal law, amended in 1965, to make it a crime to "knowingly destroy" or "knowingly mutilate" draft registration certificates. The *O'Brien* Court let the law stand and identified several justifications for prohibiting the destruction or mutilation of draft cards. For example, the Court offered that requiring the presence of draft cards facilitates emergency military mobilization and aids communication with a person's draft board because the address is listed on the card, and reminds individuals to notify their draft board of any change in address or changes related to draft status.

All of these justifications can be questioned. It seems highly unlikely that the military would ever induct people by means of pulling them over, inspecting draft cards, or conscripting those who were draft eligible. Moreover, individuals can communicate with their draft boards or remember to notify them of a change of address without carrying their draft card.

The clear purpose of the amendment to the Selective Service Act was to stop draft card burning as a form of political protest. Yet the Court declared this motive irrelevant in stating that: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[49] The Supreme Court further explained that "[i]nquiries into congressional motives or purposes are a hazardous matter."[50]

The Supreme Court, however, frequently engages itself in exactly such inquiry into motives. In the area of equal protection of the law, courts determine whether there is a discriminatory purpose behind a law. In First Amendment analysis, the determination of whether a law is content-based or content-neutral often turns on whether the government's purpose is to suppress a particular message.

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45. *Id.* at 52.
46. Schenk v. United States, 249 U.S. 47, 53 (1919).
47. 391 U.S. 367 (1968).
48. *See id.* at 382.
49. *Id.* at 383.
50. *Id.*

B. Prisons

The usual rule allows prisons to take away only those liberties that are necessary to effectuate incarceration. The Supreme Court, however, affords great judicial deference to prison authorities when they violate inmates' rights. Two important examples are in the areas of procedural due process and freedom of speech.

In *Washington v. Harper*,[51] the Supreme Court allowed prisons to administer powerful antipsychotic medications, with potential permanent serious adverse effects, under the most minimal due process before prison officials and prison doctors.[52] The Court recognized that prisoners have a liberty interest in avoiding the involuntary administration of antipsychotic medications. The Court found, however, that the state law met the requirements for procedural and substantive due process before the administration of these drugs. Prison regulations required that the prisoner be given at least twenty-four hour notice before the administration of this medication, and it provided the opportunity for a hearing before health professionals employed by the prison and prison officials. The Court found this procedurally adequate to meet the requirements of due process.

The Court ignored any potential incentive that prison doctors and prison administrators might have to drug prisoners against their will in order to make them more docile and more easily controllable. Finding a liberty interest, but leaving its protection entirely in the hands of those with the greatest incentive to violate it, offers prisoners little safeguard against abuse.

Another example of the lack of procedural due process for prisoners is the recent case of *Sandin v. Conner*.[53] The theory that a person has a liberty interest where statutes or regulations create one is well established law. For almost a quarter of a century this had been the law with regard to prisons. But in *Sandin*, the Supreme Court rejected this liberty for prisoners.

Sandin involved a Hawaii prisoner who was placed in disciplinary segregation for vocally objecting to a body cavity search. The United States Court of Appeals for the Ninth Circuit found that there was a liberty interest based on Hawaii prison regulations that allowed placing an individual in disciplinary segregation only if there was "substantial evidence" of misconduct.[54] The Supreme Court reversed and strongly criticized the lower court for finding liberty interests based on the language of statutes and regulations.

The Court said this approach produced two undesirable consequences. First,

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51. 494 U.S. 210 (1990).

52. *See id.* (holding prison regulation constitutional). In the interest of disclosure: I served as co-counsel in this case before the Supreme Court.

53. 515 U.S. 472 (1995).

54. *See* Conner v. Sakai, 15 F.3d 1463, 1466 (9th Cir. 1994) (discussing prison regulation).

"it creates disincentives for States to codify prison management procedures in the interest of uniform treatment."[55] Rather than create a judicially enforceable liberty interest requiring due process, a state might choose not to place matters in regulations. This, the Court said, is undesirable because it does not provide standards to guide prison employees in how to exercise their discretion.

Second, the Court explained that the "approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone."[56] Chief Justice Rehnquist, writing for the Court, listed a series of cases where prisoners brought litigation to object to such matters as being given a sack lunch rather than a tray lunch or in receiving a paperback dictionary.[57] Rehnquist believed that the federal court's actions ran against, or countered, the Court's view "that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment."[58]

The Court thus concluded "that the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause."[59] The majority then sought to clarify when a prisoner has a liberty interest. The Court said:

> Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.[60]

In other words, after *Sandin*, a statute or regulation creates a liberty interest for prisoners only if it "imposes atypical and significant hardship . . . in relation to the ordinary incidents of prison life."[61] Under this test, the Court would rarely provide procedural protections for prisoners.

Lack of protection for prisoner's rights also concerns the First Amendment. The Court has held that the government may restrict and punish a prisoner's speech if the action reasonably relates to a legitimate penological interest.[62] The Court has said that in a prison context, "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with

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55. *Sandin*, 515 U.S. at 482.

56. *Id.* at 482.

57. *See id.* at 483.

58. Sandin v. Conner, 515 U.S. 472, 482 (1995).

59. *Id.* at 483.

60. *Sandin*, 515 U.S. at 483-84 (citations omitted).

61. *Id.*

62. *See* Turner v. Safley, 482 U.S. 78, 99 (1987) (striking down Missouri prison ban on inmate marriages as not reasonably related to legitimate penological objectives).

the legitimate penological objectives of the corrections system."[63] Almost all regulations of prisoner speech have been upheld under this test.[64]

In *Turner v. Safley*,[65] the Court upheld a prison regulation that prohibited correspondence between inmates at other prisons.[66] The Court accepted the government's claim that correspondence among prisoners could lead to comparisons of treatment that could provoke dissatisfaction and unrest. The Court also accepted the government's concern that unrest could spread among institutions through such correspondence.

In several cases, the Court allowed prisons to restrict the press from interviewing prisoners or from gaining access to prisons. In *Pell v. Procunier*[67] and *Saxbe v. Washington Post Co.*,[68] the Court upheld prison regulations that prevented the media from interviewing particular prisoners. The Court regarded the regulations as justified because "press attention . . . concentrated on a relatively small number of inmates who, as a result, became virtual 'public figures' within the prison society and gained a disproportionate degree of notoriety and influence among their fellow inmates . . . [and] often became the source of severe disciplinary problems."[69]

In *Houchins v. KQED*,[70] the Court held that the press did not have a right of access to observe prison conditions. The prison only allowed the media monthly tours, without cameras or tape recorders, of the Greystone portion of the Santa Rita jail. The public has manifested a strong interest in knowledge of prison conditions, yet the public may only learn of such conditions through the press. The Court, however, upheld the restriction, in part, based on the lack of any special First Amendment rights for the press to gather information. The Court also noted that a need existed for government control over prisons.

The Court not only has restricted the ability of prisoners to communicate with those outside, but also has limited the ability of prisoners to receive information. In *Bell v. Wolfish*,[71] the Court upheld a regulation that prevented jail inmates from receiving hardcover books except when mailed from

63. Pell v. Procunier, 417 U.S. 817, 822 (1979). An exception to this is *Procunier v. Martinez*, where the Court declared unconstitutional a prison regulation that restricted the types of letters that prisoners can write. The regulation provided that prisoners could not write letters that would "magnify grievances" or that were "lewd, obscene, defamatory, or otherwise inappropriate." The Court held that this restriction on the ability of prisoners to communicate with those outside the prison was unnecessary for the maintenance of order and discipline among prisoners. The prison had no legitimate interest in stopping prisoners from expressing their grievances to those outside the prison or to censoring the content of prisoner correspondence. *See Turner*, 482 U.S. at 85 (discussing and quoting Procunier v. Martinez, 416 U.S. 396, 405-06 (1979)).

64. *See generally, Turner*, 482 U.S. 78.

65. 482 U.S. 78 (1987).

66. *See Turner*, 482 U.S. at 93 (upholding ban on prisoner correspondence).

67. 417 U.S. 817 (1974).

68. 417 U.S. 843 (1974).

69. *Pell*, 417 U.S. at 831-32.

70. 438 U.S. 1 (1978).

71. 441 U.S. 520 (1979).

publishers or bookstores.[72] The Court accepted the prison's concern that books could contain contraband and that the need for security required restricting the acquisition of such books. The Court rejected the argument that the prison could search the books prior to delivery to the inmates.

Even more troubling, in *Thornburgh v. Abbott*,[73] the Court upheld a federal prison regulation that limited the publications that prisoners receive.[74] The Court upheld the regulation to prevent a prisoner from receiving a magazine that contained an article describing how a prisoner at a different institution died of an asthma attack because of the lack of adequate medical care within the facility. The Court emphasized the need for control within the prison and upheld the regulation as reasonably related to a legitimate penological interest.[75] Again, such a prior restraint is inconsistent with the most basic First Amendment principles and yet the Court upheld this censorship based on conjecture about adverse effects of the speech.

Finally, in addition to restricting speech from and to prisoners, the Court also has limited speech among inmates in a prison. In *Jones v. North Carolina Prisoners' Union*,[76] the Court upheld a prison regulation that prohibited prisoners from forming a union, specifically forbade inmates from soliciting others to join the union, and outlawed union meetings. The Court expressed the need for great deference to prison authorities "because the realities of running a penal institution are complex and difficult, [and because] we have . . . recognized the wide-ranging deference to be accorded the decisions of prison administrators."[77] The Court upheld the prohibition of the prison union because of the prison's claim that it threatened discipline and order within the institution. The Court said that the "prison officials concluded that the presence, perhaps even the objectives, of a prisoners' labor union would be detrimental to order and security. It is enough to say that they have not been conclusively shown to be wrong in this view."[78] In any other context, the government would have to prove its justification for regulating speech; here, the Court upheld the restriction because the *subject* did not disprove the government's claim.

A final recent example of the Court's tremendous deference afforded the government in the area of prison administration, and its undercutting of the rights of students, concerns prisoner's access to libraries. In *Bounds v. Smith*,[79] the Court held that prisons were obligated to provide law library facilities and

72. *See id.* at 550 (upholding prison restriction on receipt of hardcover books).
73. 490 U.S. 401 (1989).
74. *See id.* at 404 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).
75. *See id.* at 416 (concluding discretion provided in regulations rationally related to security interests).
76. 433 U.S. 119 (1977).
77. *Id.* at 126.
78. *Id.* at 132.
79. 430 U.S. 817 (1977).

appropriate supplies to inmates. The Court explained that the government has the affirmative obligation to provide prisoners with facilities that can facilitate access to the courts. The Court said: "[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with law libraries or adequate assistance from persons trained in the law."[80] Notably, the Court spoke explicitly of a "fundamental constitutional right of access to the courts." In *Lewis v. Casey*,[81] however, the Court narrowed, and even repudiated, parts of *Bounds v. Smith*.[82] A federal district court in Arizona found systematic inadequacies in the law libraries and legal assistance available to prisoners, including the failure to adequately update legal materials, the unavailability of photocopiers, the lack of access to law libraries for "lock-down prisoners," and the inadequacy of legal assistance for illiterate and non-English speaking inmates.[83] The Court ordered an injunction to remedy these inadequacies, which the United States Court of Appeals for the Ninth Circuit affirmed on appeal.

The Supreme Court, in an opinion by Justice Scalia, reversed. First, the Court ruled that "in order to establish a violation of *Bounds*, an inmate must show that the alleged inadequacies of a prison's library facilities or legal assistance program caused him 'actual injury'—that is, 'actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.'"[84] In other words, the Court specifically rejected the view that *Bounds* created a right of access to law libraries for prisoners.[85] The Court said that the language in *Bounds*, which spoke of a "right of access to the courts have no antecedent in our pre-*Bounds* cases, and we now disclaim them."[86]

Second, the Court said that the system-wide relief contained in the district court's injunction was unjustified. Justice Scalia concluded that the trial court "failed to accord adequate deference to the judgment of the prison authorities . . . ."[87] The Court emphasized that the right of access for prisoners, like all prisoners' rights, is evaluated under rational basis review; that is, "a prison regulation impinging on inmates' constitutional rights 'is valid if it is reasonably related to legitimate penological interests.'"[88] Justice Scalia said that it was reasonable for the prison to restrict access to legal materials for

80. *Id.* at 828.
81. 518 U.S. 343 (1996).
82. 430 U.S. 817 (1977).
83. *See id.* at 346-47.
84. *Id.* at 348 (citation omitted) (discussing petitioners' claims).
85. *See id.* at 349.
86. *Id.* at 354.
87. Lewis v. Casey, 518 U.S. 343, 361 (1996).
88. *Id.* at 361 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

inmates in "lockdown" because of security concerns.[89]

Lewis v. Casey dramatically undermines *Bounds v. Smith*. Whereas *Bounds* spoke of a fundamental right of access to the courts for prisoners, *Lewis* says that only rational basis review is to be used. While *Bounds* broadly declares a right of access to the courts for prisoners, *Lewis* disavows that language. *Bounds* creates a right of access to law libraries for prisoners, but *Lewis* expressly repudiates such a right and says that the prisoner must show an actual, specific injury resulting from not having adequate access to the courts. *Lewis*, like so many of the cases discussed in this section, is premised on the Court's express declaration of a need for judicial deference to prison officials.

C. Schools

Schools, of course, are in many ways different from prisons and the military. An important function of schools is in teaching constitutional principles, such as the importance of freedom of speech. Restrictions of expression within schools is contrary to that teaching. Also, while there is a need for discipline and order in schools, it is quite different in this regard than prisons or the military. On the other hand, courts tend to defer to the expertise of school officials in making decisions about education and how to preserve discipline and order within the schools. Freedom of speech and the Fourth Amendment illustrate this deference.

Some Supreme Court decisions have been very protective of student speech. In *West Virginia Board of Education v. Barnette*,[90] the Court declared unconstitutional a state law that required that students salute the flag at the beginning of the school day.[91] Although the Court focused on the First Amendment's prohibition against compelled expression, the decision obviously accepted the protection of First Amendment rights in schools.

In *Tinker v. Des Moines School District*,[92] the Court said that the First Amendment protected the ability of students in a high school to wear black arm bands to protest the Vietnam War. In an opinion by Justice Fortas, the Court said that: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[93]

In more recent years, however, the Court has been much less protective of speech in school environments and much more deferential to school authorities.

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89. *See id.*

90. 319 U.S. 624 (1943).

91. *See id.* at 642 (affirming injunction enjoining enforcement of flag salute regulation).

92. 393 U.S. 503 (1969).

93. *Id.* at 506.

In *Bethel School District v. Fraser*,[94] the Court upheld the punishment of a student for a speech given at a school assembly, in which the student nominated another student for a position in student government, fraught with sexual innuendo.[95] The student was suspended for a few days.

The *Bethel* Court upheld the punishment and emphasized the need for judicial deference to educational institutions. Chief Justice Burger, writing for the Court, said that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[96] The Court also distinguished *Tinker* on the ground that it had involved political speech, whereas the expression in *Bethel* was sexual in nature. Chief Justice Burger said that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[97] He concluded that "[a] high school assembly or classroom is no place for a sexually explicit monologue . . . [and] it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech . . . is wholly inconsistent with the 'fundamental values' of public school education."[98]

The Court went even further in its deference to school authorities in *Hazelwood School District v. Kuhlmeier*.[99] A school newspaper produced as part of a journalism class was going to publish, with the approval of its faculty advisor, stories about three students' experience with pregnancy and about the impact of divorce on students. No students' names were included in the article on pregnancy and one was mentioned in the article on divorce (although it had been deleted after the paper had been forwarded to the principal for review). The principal decided to publish the paper without these articles by deleting the two pages on which they appeared. The principal expressed the view that the articles on pregnancy discussed sexual activity and birth control in a manner that were inappropriate for some of the younger students at the school, that the three students in the article on pregnancy might be identified from other aspects of the article, and that the parents of the student identified in the article about divorce should have the opportunity to respond.

The Supreme Court upheld the principal's decision and rejected the First Amendment challenge. At the outset, Justice White, writing for the Court, quoted *Tinker*, explaining that "[s]tudents in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" Quoting *Bethel*, however, he then added that the "First Amendment rights of students in the public schools 'are not automatically coextensive with

94. 478 U.S. 675 (1986).
95. *See id.* at 684.
96. *Id.* at 683.
97. *Id.*
98. *Id.* at 685-86.
99. 484 U.S. 260 (1988).

the rights of adults in other settings . . . ."[100] Justice White concluded that the school newspaper was a nonpublic forum and that as a result "school officials were entitled to regulate the contents of [the school newspaper] in any reasonable manner."[101] The Court emphasized the ability of schools to control curricular decisions, such as what appears in school newspapers published as part of journalism classes. Justice White wrote:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.[102]

The Court said in this context schools have broad authority to regulate student speech.

The other example of great judicial deference to schools concerns the Fourth Amendment. In *New Jersey v. T.L.O.*,[103] the Supreme Court held that schools could search students without meeting the probable cause requirement of the Fourth Amendment. The Court held that "special needs" exist in the school context and that adherence to the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed."[104] The Court expressly proclaimed the need to defer to the authority and expertise of the schools. The Court declared that "strict adherence to the requirement that searches be based upon probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools . . . ."[105]

In *Vernonia School District v. Acton*,[106] the Supreme Court took this proposition even further and approved random drug testing for high school athletes.[107] A school district in Oregon required that all student athletes submit to drug testing before the school year and subsequent random tests during the school year. The Court, in an opinion by Justice Scalia, found that the program did not violate the Fourth Amendment. The Court stressed that students have a relatively minimal privacy interest, especially as compared with the schools'

100. *Id.* at 266.
101. *Id.* at 270.
102. *Id.* at 270-71.
103. 469 U.S. 325 (1985).
104. *Id.* at 340.
105. *Id.* at 341.
106. 515 U.S. 646 (1995).
107. *See id.* at 665.

significant interest in stopping the use of illegal drugs. The Court expressed the need for deference to schools in saying: "[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake."[108] In other words, schools are allowed to violate the Fourth Amendment's basic requirement of individualized suspicion. The Court's deference to the authority and expertise of schools is controlling.

II. THE NEED FOR JUDICIAL REVIEW OF AUTHORITARIAN INSTITUTIONS

Contrary to the Court's assumption of the need for deference to authoritarian institutions, these are the places where aggressive judicial review is most essential. There are two interrelated reasons: first, the authoritarian nature of these institutions makes them places where serious abuses of power and violations of rights are likely to occur; and second, the political process is extremely unlikely to provide any protections in these arenas.

First, there is a great need for judicial protection of rights in these institutions because of the great likelihood of serious rights violations. Indeed, the greater the authority some have over others, and the fewer the checks or limits on behavior, the greater the chance for abuse. A number of examples reveal that when people are given authority over others abuses are likely to occur.

Social psychologist Philip Zimbardo conducted an enlightening study in which he created a prison in order to examine behavior.[109] He asked for students to be part of the experiment and screened them for personality disorders. He divided the participants randomly between guards and prisoners. Those assigned to be prisoners were "arrested" and taken into custody by those assigned to be guards. Zimbardo then watched the guards engage in serious abusive behavior against the prisoners. The study was ended much earlier than scheduled as the behavior of all involved seemed out of control. Zimbardo concluded that the role assigned to people powerfully influences behavior. The study demonstrates that in a number of contexts significant abuses of power are inevitable in authoritarian institutions.

Second, the Court should impose greater judicial review because society is inadequately protected from authoritarian institutions. Since 1937, the Court has proclaimed deference to the political branches of government in some areas, but the need for aggressive judicial review in others. This philosophy was expressed in a very famous footnote in *United States v. Carolene Products Co.*,[110] where the Supreme Court articulated the idea that different

108. *Id.* at 665.

109. *See* Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIMINOLOGY & PENOLOGY 69, 80-81 (1973).

110. 304 U.S. 144 (1938).

constitutional claims would be subjected to varying levels of review.[111] In footnote four, the Court declared:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . . Nor need we [i]nquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[112]

In other words, courts generally should presume that laws are constitutional. As the Court has noted, "more searching judicial inquiry" is appropriate when it is a law that interferes with individual rights, or a law that restricts the ability of the political process to repeal undesirable legislation, a law that discriminates against a "discrete and insular minority." It is a framework of general judicial deference to the legislature, but with particular areas of more intensive judicial review.

The violations of basic constitutional rights by authoritarian institutions fits exactly within the areas where the *Carolene Products* footnote justifies heightened review. Both the infringement of fundamental rights secured by the Bill of Rights as well as a "discrete and insular minority exist." The concept of a discrete and insular minority is about groups that are unlikely to rely on the political process for adequate protection. Aggressive judicial review, therefore, is justified because insular minority groups cannot trust the other branches of government.

Those in the military, in prisons, and in schools are classic discrete and insular minorities, who have little political power. Those in prisons, for example, are routinely and permanently disenfranchised.[113] Those in the military are likely scattered throughout the country and, therefore, unable to exercise political influence. Moreover, the restrictions on their free speech rights limits their ability to criticize military policy and use the political process. Students in elementary and high schools lack the ability to vote. In theory, their parents can protect their rights, but in reality, such safeguards are often absent.

Furthermore, it is unlikely that these groups will be able to form coalitions in

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111. *See id.* at 152 n.4; J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

112. *Caroline*, 304 U.S. at 152 n.4.

113. *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (upholding permanent disenfranchisement of felons and ex-felons).

the political process to protect their rights. There is no constituency for protecting prisoners rights. They have no bargaining chip to offer others in the political process to form coalitions to get laws adopted. The same is true of those in the military and students. Thus, for those subjected to the power of authoritarian institutions, only judicial review will suffice to protect their rights. Unfortunately, the Court's posture of deference to authoritarian institutions generally affords nothing in the way of protection for individuals.

III. IS DEFERENCE TO AUTHORITARIAN INSTITUTIONS NECESSARY?

The Supreme Court offers two primary justifications for its almost complete deference to authoritarian institutions: the need to preserve authority within these places and the expertise of those managing them. I do not wish to deny the importance of either of these factors. These institutions do not operate—and cannot operate consistent with their missions—in a democratic fashion. There is a need for discipline and order in each of these institutions to ensure preservation of authority. Additionally, administrators of these institutions possess knowledge regarding their operation that is absent from the judiciary.

While deference to authoritarian institutions is important, it does not warrant the complete abdication of judicial review. To the contrary, order and discipline warrant judicial deference where the Court can show that judicial review would undermine the authority within the institutions or where these authoritarian institutions demonstrate the importance of expertise. In the vast majority of cases described above, the result cannot be justified either based on the need to preserve authority or on the need to defer to expertise.

Consider examples from each institution. In the context of the military, allowing an individual to sue for injuries suffered from the involuntary administration of LSD would not contradict the authority of the military.[114] In no way would allowing such recovery undercut the military chain of command or encourage disobedience of military orders, which the Court has urged as its primary justification for judicial abdication in this area. The damages, however, would compensate a seriously injured individual and would deter military officers from engaging in human rights violations in the future. Human experimentation is wrong and there is no justification possible based on expertise or anything else.

Similarly, providing prisoners meaningful protection when they are given antipsychotic medications against their will would not compromise the authority of the prisons.[115] The general power of prisons and prison officials over prisoners is not compromised by protecting prisoners from drugs that can have serious, life-long adverse effects. Nor is this an area of special expertise possessed only by prison officials. A neutral doctor can evaluate the

114. *See generally* United States v. Stanley, 483 U.S. 669 (1987).

115. *See generally* Washington v. Harper, 494 U.S. 10 (1990).

appropriateness of administering these medications. The problem with *Washington v. Harper* is that it leaves the decision to prison doctors and prison officials who often may have an incentive to administer the medications to more easily control inmates.

In the area of schools, random drug testing of students does not serve either the value of authority or that of expertise. Stopping schools from forcing students to submit to drug tests would not undermine the overall authority of the schools. Whether random drug testing violates the Fourth Amendment is a classic legal question. Schools have no special expertise in this area.

The Supreme Court's assumption is that virtually any judicial review is inconsistent with the authority of these institutions. Yet, there is no reason why this is so, especially because authority and expertise are factors that courts can use as part of judicial analysis. Allowing military doctors to be sued for negligence against service personnel has nothing to do with authority or expertise. Moreover, if a chain of command regarding decision making exists in the military context, the Court can defer to that. In the vast majority of cases where the Court has sided with the government, judicial review would not have undermined the necessary authority nor required any special expertise.

IV. CONCLUSION

The current presumption is against judicial review when there is a claim that an authoritarian institution has violated a person's rights. This assumption is backwards of what it should be. The judiciary should operate from the premise that it has a special role in protecting individuals in these institutions. The Court should accept violations of rights based on expertise and authority only where it is proven to be necessary and desirable to do so.


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