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Foreword: The Confident Court

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I. INTRODUCTION

Institutional actors at the federal and state level often claim that they deserve deference in the course of judicial review. Presidents, legislators, and academics alike have defended the interpretive competence of the coordinate branches of the federal government.[1] Federal agencies point to their expertise in arguing for deference.[2] And even certain state-run and private institutions have suggested that their decisions warrant respect from the judicial branch.[3]

On a doctrinal level, the Supreme Court has agreed that there are indeed certain types of decisions and decision makers to which it will defer. Legislative fact-finding,[4] agency rulemaking,[5] and the educational assessments of state universities[6] all deserve some measure of judicial deference. For every rule, though, there is an exception. The Court's decisions in its October 2012 Term show that a majority of the Supreme Court is increasingly willing to supplant both the prudential and legal judgments of other institutional actors. Indeed, the Court this Term proved itself to be a confident institution, poised and willing to actively review policy judgments

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1. *See, e.g.*, Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74 (1861) (attorney general opinion defending President Lincoln's decision to suspend the writ of habeas corpus and detain a suspected secessionist in disregard of a Supreme Court order); Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 85 (1993) (Each coordinate branch "has completely independent interpretive authority within the sphere of its powers.").

2. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (setting forth principles of deference to agency regulations).

3. *See, e.g.*, PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2013) (discussing deference to universities, churches, and civic organizations).

4. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

5. *See Chevron*, 467 U.S. at 842–44.

6. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

made by Congress and executive agencies, as well as the operational details of programs adopted by state governments and institutions.

Three years ago in these pages, Dean Erwin Chemerinsky noted that the Supreme Court's rulings in the late 1980s "emphasized great deference to the decisions of the elected branches of government."[7] He lamented the Roberts Court's increasing willingness to substitute its own judgment for that of majoritarian institutions, and suggested that this is evidence of an ascendant, activist, conservative judicial ideology.[8] Whether or not Dean Chemerinsky was correct in assessing the cause of the Court's pivot,[9] he certainly identified a clear trend in the Court's decision-making methodology. Deference is on the wane. Assertions of judicial competence are on the rise. The October 2012 Term provides further evidence of this trend, as well as its extension beyond disregard for majoritarian institutions. This Term, the Court proved itself willing to disregard the views of non-majoritarian institutions that traditionally have been thought to deserve a measure of judicial deference.

Rather than attempt to identify the motivation for such a shift, I suggest simply that today's Supreme Court is a confident one. A core group of Justices has an increasingly self-assured view of the judiciary's ability to conduct an independent assessment of both the legal and factual aspects of the cases that come before the Court. Several cases from the October 2012 Term illustrate the Court's shift away from deference. In each, the lower courts had embraced, and at least one party had defended, a posture of deference toward the challenged governmental program or decision. The Supreme Court ultimately disregarded those calls for deference and instead asserted and exercised its own independent judgment. In all, one is left with the impression of a high court that has fully embraced its "duty . . . to say what the law is."[10]

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7. Erwin Chemerinsky, *Supreme Court—October Term 2009 Foreword: Conservative Judicial Activism*, 44 LOY. L.A. L. REV. 863, 866 (2011) (citing Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 44, 48–49 (1989)).

8. *Id.*

9. *Id.* The Court's confidence transcends ideology, at least in some cases. This Term, the Court was equally willing to closely examine and strike down federal laws extending as well as withdrawing civil rights protections. *Compare* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (striking down provisions of Voting Rights Act), *with* United States v. Windsor, 133 S. Ct. 2675 (2013) (striking down section 3 of the Defense of Marriage Act).

10. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

II. COMPETENCE TO REVIEW THE ADMISSIONS PROGRAMS OF STATE UNIVERSITIES: *FISHER V. UNIVERSITY OF TEXAS*

Fisher v. University of Texas[11] provides this Term's clearest assertion of the Court's confidence in its own competence to evaluate the factual underpinnings of state programs. When the Court granted certiorari in *Fisher*, many foresaw a sweeping opinion on the constitutionality of affirmative action.[12] What most commentators and interested parties overlooked,[13] however, was the peculiar manner in which the Fifth Circuit panel had described its mode of review of the University of Texas's race-conscious admissions program, even while labeling it as strict scrutiny. Strict scrutiny, of course, traditionally places on the state actor the burden of proving that a racial classification is narrowly tailored to accomplish a compelling state interest.[14]

In accordance with *Grutter v. Bollinger*,[15] the Fifth Circuit stated that it would defer to a university's academic judgment that diversity is a compelling interest.[16] While such deference is traditionally not associated with strict scrutiny,[17] the *Grutter* majority

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11. 133 S. Ct. 2411 (2013).

12. *See, e.g.*, Adam Liptak, *Supreme Court Faces Weighty Cases and a New Dynamic*, N.Y. TIMES, Sept. 29, 2012, http://www.nytimes.com/2012/09/30/us/supreme-court-faces-crucial-cases-in-new-session.html.

13. Although the petition for certiorari focused heavily on this issue, Petition for a Writ of Certiorari at 23–35, Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013) (No. 11-345), 2011 WL 4352286, at *23–35, once the merits briefing began, the petitioner relegated this concern to page forty-seven of its fifty-seven-page brief, Brief for Petitioner at 47, Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 1882759, at *47. Moreover, very few of the ninety-eight amicus briefs filed either at the certiorari or merits stages focused on the standard of review. *See, e.g.*, Brief of the Asian American Legal Foundation as Amicus Curiae in Support of Petitioner at 7–9, Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013) (No. 11-345), 2011 WL 5040038, at *7–9; Brief of the Southeastern Legal Foundation, Inc. as Amicus Curiae Supporting Petitioner at 5–29, Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 1961248, at *5–29. A few commentators did note the issue. *See, e.g.*, Jennifer Mason McAward, *Good Faith and Narrow Tailoring in* Fisher v. University of Texas, 59 LOY. L. REV. 77, 81 (2013) (discussing the likelihood that the Court will use *Fisher* "to clarify that the university bears the entire burden of justifying a race-based classification"); Lyle Denniston, *UPDATED: New Test of College Affirmative Action*, SCOTUSBLOG (Sept. 15, 2011, 10:59 PM), http://www.scotusblog.com/?p=127255 (noting that the Fifth Circuit had concluded that "[j]udicial review of a college's use of race . . . is less rigorous than for other official uses of race").

14. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

15. *Id.*

16. *See* Fisher v. Univ. of Tex., 631 F.3d 213, 232 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013).

17. *See Grutter*, 539 U.S. at 379–80 (Rehnquist, C.J., dissenting)*; see also* Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 MO. L. REV. 1243, 1253 (2010) ("[T]he *Grutter* Court was not faithful to the tenets of the traditional strict-scrutiny test.").

stated that such deference was appropriate in educational affirmative-action cases because, first, courts lack expertise to make such "complex educational judgments"[18] and, second, the First Amendment protects the educational autonomy of universities.[19] Thus, *Grutter* recognized that strict scrutiny could accommodate a level of deference with respect to the question of whether a university's asserted interest in diversity was compelling.

The Fifth Circuit, however, extended that deference into the narrow-tailoring prong of the strict-scrutiny inquiry, stating that it would give a "degree of deference" to "the university's good faith determination that certain race-conscious measures are necessary" to achieve diversity.[20] Moreover, the court stated that it would assess the university's good faith by "scrutiniz[ing] the University's decisionmaking *process*" rather than the "merits of [its] decision" regarding how to structure its affirmative action policy.[21] Finally, the court accorded the university a rebuttable presumption that it had indeed operated in good faith in creating its affirmative action program.[22]

Thus, with respect to both prongs of the strict-scrutiny inquiry, the Fifth Circuit majority deferred to the university's institutional judgments. Judge Garza wrote a special concurrence in which he agreed that the majority correctly applied *Grutter*, but lamented that *Grutter* itself "applied a level of scrutiny markedly less demanding" than strict scrutiny should be.[23] Judge Garza questioned the "unusual deference" given to universities and attempted to identify a number of factors courts could employ in evaluating whether an affirmative-action program is narrowly tailored.[24]

Writing for a seven-member majority, Justice Kennedy concluded that the Fifth Circuit's review deviated from *Grutter* and failed to impose "the demanding burden of strict scrutiny"[25] on the University of Texas's admissions program. While he accepted *Grutter*'s holding that educational diversity was a compelling state

18. *Grutter*, 539 U.S. at 328 (majority opinion).
19. *Id.* at 329.
20. *See Fisher*, 631 F.3d at 232–33.
21. *Id.* at 231 (emphasis added).
22. *Id.* at 231–32.
23. *Id.* at 247 (Garza, J., specially concurring).
24. *Id.* at 253.
25. Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2415 (2013).

interest,[26] he also stated that intensive judicial review of any affirmative-action process was a "clear precondition" for such a program: "Race may not be considered unless the admissions process can withstand strict scrutiny."[27]

Strict scrutiny, as the *Fisher* Court described it, "is a searching examination, and it is the government that bears the burden to prove 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.'"[28] The Court condemned the Fifth Circuit's willingness to defer to the university with respect to the narrow-tailoring prong of strict scrutiny and rejected the lower court's application of a rebuttable presumption of good faith.[29] Rather, the Court repeatedly emphasized that deference with respect to narrow tailoring is inappropriate and that it "remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine" that an affirmative action program is "specifically and narrowly framed" to attain diversity.[30] The Court made clear that while it may "take account of a university's experience and expertise," it would be the Court's ultimate responsibility to evaluate the university's mode of individually assessing applicants, as well as to inquire carefully as to whether the university "could achieve sufficient diversity without using racial classifications."[31] On this latter point, the Court "must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."[32] The university's "good faith consideration of workable race-neutral alternatives" is one data point the Court will consider, but it is incumbent upon the university to convince the Court not just that it followed a certain deliberative process, but that "available, workable race-neutral alternatives do not suffice."[33]

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26. *Id.* at 2418.

27. *Id.*

28. *Id.* at 2419 (alteration in original) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989)).

29. The Court declined to consider whether *Grutter*'s deference to the university's assessment of its compelling interest in diversity was appropriate because "the parties here d[id] not ask the Court to revisit that aspect of *Grutter*'s holding." *See id.*

30. *Id.* at 2420.

31. *Id.*

32. *Id.*

33. *Id.*

Thus, the Court used *Fisher* not to opine on the constitutionality of affirmative-action programs but rather to issue a pointed reminder of the importance of the Court's own role in assessing such programs. The *Fisher* Court claimed competence to assess the operational details of an affirmative-action admissions program, as well as the workability of race-neutral alternatives. And it explicitly rejected a university's claim to greater institutional competence with respect to these aspects of its programs.[34] Thus, *Fisher* provides a stark, if not unsurprising, example of the Court's confidence in its ability to evaluate the factual assessments underlying race-conscious state programs.

III. COMPETENCE TO REVIEW THE FACTUAL FINDINGS OF CONGRESS: *SHELBY COUNTY V. HOLDER*

While the *Fisher* opinion focused on judicial process, the Court's decision in *Shelby County v. Holder* is a sweeping decision on the merits that held unconstitutional section 4(b) of the Voting Rights Act of 1965,[35] which had set forth a formula for determining which jurisdictions would be required to seek federal preclearance for changes to voting rules.[36] Although the *Shelby County* majority was opaque as to its standard of review, its willingness to disregard the 15,000-plus page legislative record developed during the 2006 reauthorization of the Voting Rights Act bespeaks the Court's confidence in its own ability to assess that formula on its merits and to displace Congress's judgment as to its current viability.[37]

Writing for a five-member majority, Chief Justice Roberts held that the coverage formula—which was repeatedly reenacted without changes, most recently in 2006—bore no "logical"[38] or "sufficien[t]"[39] relationship to "current conditions."[40] The Court condemned Congress for failing to adjust the formula to reflect the current record of electoral abuses and deciding instead to use a formula "based on decades-old data and eradicated practices."[41] The

34. *Id.* at 2420–21.
35. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2613 (2013).
36. *Id.* at 2630–31.
37. *Id.* at 2636 (Ginsburg, J., dissenting).
38. *Id.* at 2629 (majority opinion).
39. *Id.* at 2627.
40. *Id.* at 2629.
41. *Id.* at 2627.

Court declined to defer to the 2006 legislative record cataloguing attempts at voting discrimination because that record "played no role in shaping the statutory formula" before the Court.[42]

Strangely, the *Shelby County* majority's analysis did not mention Congress's power to "enforce" the Fourteenth and Fifteenth Amendments,[43] pursuant to which the Voting Rights Act and subsequent reauthorizations had been passed. Traditionally, laws passed pursuant to Congress's power under the Reconstruction Amendments have received highly deferential review in the federal courts governed by *McCulloch v. Maryland*,[44] which held that Congress deserves substantial deference in choosing the means by which to effectuate its enumerated powers.[45] As the Court held in *South Carolina v. Katzenbach*, the Fifteenth Amendment enforcement power permits Congress to "use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[46] Indeed, the district court and court of appeals in the *Shelby County* case invoked this standard and both determined that the extensive record of voting discrimination amassed by Congress in 2006, as well as "Congress's predictive judgment about the continued need for [preclearance] in covered jurisdictions," warranted "substantial deference."[47]

The *Shelby County* Court instead invoked a different aspect of *McCulloch*, emphasizing that Congress's chosen means of combatting voting discrimination were not "'consist[ent] with the

42. *Id.* at 2629.

43. *See* U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2. The Court briefly mentioned the Fifteenth Amendment enforcement power, *Shelby County*, 133 S. Ct. at 2629, but did not suggest that it informed the Court's standard of review.

44. 17 U.S. (4 Wheat.) 316 (1819).

45. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (13th Amendment); Katzenbach v. Morgan, 384 U.S. 641 (1966) (14th Amendment); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (15th Amendment), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013). Some scholars have suggested that *McCulloch* does not warrant such a high level of deference to Congress. *See, e.g.*, J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-End Relationships*, 36 U.C. DAVIS L. REV. 407, 427 (2003); Jennifer Mason McAward, McCulloch *and the Thirteenth Amendment*, 112 COLUM. L. REV. 1769 (2012).

46. *South Carolina*, 383 U.S. at 324.

47. Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 498 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612 (2013); *see also Shelby Cnty.*, 679 F.3d at 858 ("Given this, the district court concluded that Congress's predictive judgment about the continued need for section 5 in covered jurisdictions was due 'substantial deference,' and therefore 'decline[d] to overturn Congress's carefully considered judgment.'" (citations omitted)).

letter and spirit of the constitution.'"[48] Specifically, the Court objected that requiring specified jurisdictions to seek preclearance imposed significant burdens on the constitutional principle of equal state sovereignty.[49] Thus, while *McCulloch* traditionally has been invoked to support judicial deference to congressional legislation, the Court viewed that case as supporting judicial intervention and increased scrutiny when federal laws impinge on principles of constitutional structure.

This change in emphasis and departure from deference is not entirely surprising. In the Fourteenth Amendment context, the Supreme Court has largely jettisoned the deferential reading of *McCulloch*, asserting instead the Court's own competence to review both the factual record of constitutional violations developed by Congress and the "congruence and proportionality" between those violations and Congress's chosen means of redressing them.[50] The *Shelby County* majority, however, ignored the debate about whether to apply this same standard of review to Fifteenth Amendment legislation[51] and simply asserted that the extensive legislative record bore no "logical" or "substantial" relation to the coverage formula at issue. The majority declined to respond to Justice Ginsburg's dissenting opinion (and the lower court opinions), which detailed the ways in which Congress had in fact considered the adequacy and accuracy of the coverage formula in 2006, and argued that this legislative record deserved deference.[52]

While it is difficult to discern a clear rule or standard emanating from *Shelby County*, the majority's approach strongly suggests a high level of confidence in the Court's own ability to assess a

48. *Shelby Cnty*, 811 F. Supp. 2d at 451 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

49. *Id.* at 427–28.

50. *See* City of Boerne v. Flores, 521 U.S. 507, 508 (1997).

51. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009). The D.C. Circuit in *Shelby County* held that Congress's 2006 record deserved deference even under the elevated *City of Boerne* standard. *See Shelby Cnty.*, 679 F.3d at 861, 873.

52. Retired Justice John Paul Stevens has critiqued the *Shelby County* majority for "fail[ing] . . . to explain" why a decision to discard an outdated preclearance formula "should be made by the members of the Supreme Court" rather than "[t]he members of Congress . . . [who] are far more likely to evaluate correctly the risk that the" politics of the former confederate states are still driven significantly by white supremacy. *See* John Paul Stevens, *The Court & the Right to Vote: A Dissent*, THE NEW YORK REVIEW OF BOOKS (Aug. 15, 2013), www.nybooks.com /articles/archives/2013/aug/15/the-court-right-to-vote-dissent/?pagination=false (reviewing GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY (2013)).

legislative record and to displace Congress's predictive policy judgments. As Linda Greenhouse has noted, "distrust of Congress radiates from the majority's every page."[53] Moreover, *Shelby County* may signal the Court's increasing willingness to distance itself from the deferential posture that *McCulloch v. Maryland* has long been thought to endorse for the Court vis-à-vis Congress and to embrace a more active role in evaluating federal legislation passed pursuant to Congress's powers under the Reconstruction Amendments.

It bears noting that not all of the Court's 2012 Term opinions involving Congress resulted in the Court supplanting congressional judgments with its own. Indeed, at first glance, *United States v. Kebodeaux*[54] seems at odds with the thesis that the Court is increasingly willing to scrutinize congressional action. In *Kebodeaux*, the Court held that the federal Sex Offender Registration and Notification Act (SORNA) was an appropriate exercise of Congress's power under the Military Regulation and Necessary and Proper Clauses.[55] Justice Breyer's opinion for the five-member majority quoted *McCulloch* and stated that Congress has "large discretion as to the means that may be employed in executing a given power."[56] It is a job for Congress, the majority said, to "weigh [conflicting] evidence and to reach a rational conclusion" regarding policy questions.[57] Thus, the majority deferred to Congress's assessment of the safety benefits of registration rules for sex offenders.

The separate opinions in *Kebodeaux* tell a different story, however, and point to a group of Justices that is increasingly willing to rethink longstanding doctrine in order to expand the judiciary's oversight of Congress. For example, Chief Justice Roberts concurred in the *Kebodeaux* judgment, agreeing that Congress was empowered to pass SORNA.[58] However, he declined to join the majority's opinion for fear that its discussion of the safety benefits of registration rules might imply incorrectly that Congress has "a

53. Linda Greenhouse, *Current Conditions*, N.Y. TIMES, June 26, 2013, http://opinionator.blogs.nytimes.com/2013/06/26/current-conditions/.

54. 133 S. Ct. 2496 (2013).

55. *Id.* at 2505.

56. *Id.* at 2503 (quoting Champion v. Ames, 188 U.S. 321, 355 (1903)).

57. *Id.*

58. *Id.* at 2505–06 (Roberts, C.J., concurring in the judgment).

federal police power."[59] He cited *McCulloch*, not for its suggestion of judicial deference, but for its assertion that Congress's powers "'are limited' and that no 'great substantive and independent power' can be 'implied as incidental to other powers, or used as a means of executing them.'"[60] The sheer breadth of a federal police power, Chief Justice Roberts argued, would be inconsistent "with the letter and spirit of the Constitution,"[61] and therefore such a power is not "proper" within the meaning of the Necessary and Proper Clause.[62]

Chief Justice Roberts, therefore, used *Kebodeaux* as an opportunity to stake out a view that there are indeed limits to what Congress can do under the Necessary and Proper Clause. He implicitly tapped into scholarship asserting that the concept of propriety under the Necessary and Proper Clause provides an independent metric for assessing federal legislation and that laws that infringe on structural constitutional values are improper and thus invalid under the Clause.[63]

Justice Thomas's *Kebodeaux* dissent made this claim even more explicitly. As he had written in *United States v. Comstock*,[64] Justice Thomas—joined by Justice Scalia in both cases[65]—argued that the Necessary and Proper Clause empowers federal legislation under two conditions. First, the law must be "directed toward a 'legitimate' end," namely, the execution of a power expressly vested in Congress by Article I.[66] "Second, there must be a necessary and proper fit between the 'means' (the federal law) and the 'end' (the enumerated power or powers) it is designed to serve."[67] While Justice Thomas has acknowledged that "*McCulloch* accords Congress a certain amount of discretion in assessing means-end fit under this second inquiry,"[68] he clearly contemplates active judicial review on both

59. *Id.* at 2507.

60. *Id.* (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) at 421, 411).

61. *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

62. *See id.*

63. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

64. 130 S. Ct. 1949, 1970 (2010) (Thomas, J., dissenting).

65. *See Kebodeaux*, 133 S. Ct. at 2510 (Thomas, J., dissenting) (Justice Scalia joined as to all parts except Part III.A.); *Comstock*, 130 S. Ct. 1970 (Thomas, J., dissenting) (Justice Scalia joined as to all parts except Part III.A.1.b.).

66. *Kebodeaux*, 133 S. Ct. at 2511 (Thomas, J., dissenting) (quoting *Comstock*, 130 S. Ct. at 1971 (Thomas, J., dissenting)).

67. *Id.* (quoting *Comstock*, 130 S. Ct. at 1971 (Thomas, J., dissenting)).

68. *Comstock*, 130 S. Ct. at 1971 (Thomas, J., dissenting).

fronts. With respect to the second inquiry, the judiciary must ask whether Congress's chosen means are "'appropriate' and 'plainly adapted' to the exercise of an enumerated power," and "not otherwise 'prohibited' by" or "[in]consistent with" the Constitution.[69] Thus, in cases where *McCulloch* was thought to mandate judicial deference, Justice Thomas has advocated for more intensive judicial review and proven himself willing to strike down federal laws.

Thus, while *Shelby County* provides a concrete example of the Supreme Court's willingness to displace congressional fact finding and policy judgments, it would be too easy to dismiss that opinion as an outlier motivated by the Justices' political preferences. *Kebodeaux* demonstrates that the Court is still willing to defer to certain congressional judgments, but the separate opinions in that case—read in conjunction with *Shelby County*—point to an energized element of the Court that is explicitly prepared to assert the judiciary's power and competence to review a broad range of federal legislation.

IV. COMPETENCE TO REVIEW EXECUTIVE AGENCY POLICY GUIDANCE: *VANCE V. BALL STATE UNIVERSITY* AND *UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR*

The Supreme Court long has accorded varying degrees of deference to the views of executive agencies charged with implementing federal law. In two cases this Term, the Court applied traditional doctrine to defer to an agency's interpretation of its own regulations,[70] as well as an agency's interpretation of a statutory ambiguity concerning the agency's own jurisdiction.[71] As in *Kebodeaux*, each case generated a separate opinion from Chief Justice Roberts arguing for greater judicial scrutiny of administrative interpretations.[72]

69. *Kebodeaux*, 133 S. Ct. at 2511 (quoting *Comstock*, 130 S. Ct. at 1972 (Thomas, J., dissenting)).

70. *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1337–08 (2013) (applying deference under *Auer v. Robbins*, 519 U.S. 452 (1997)).

71. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1874–75 (2013) (applying *Chevron* deference).

72. *See City of Arlington*, 133 S. Ct. at 1877 (Roberts, C.J., dissenting); *Decker*, 133 S. Ct. at 1338–39 (Roberts, C.J., concurring); *see also Decker*, 133 S. Ct. at 1339–44 (Scalia, J., dissenting) (arguing for greater judicial scrutiny of administrative interpretations).

In two other cases, however, a five-member majority of the Court declined to defer to two longstanding policy guidances issued by the Equal Employment Opportunity Commission (EEOC). *Chevron* deference does not apply to the EEOC because Congress did not confer upon that body the authority to promulgate rules or regulations. However, the EEOC routinely issues policy guidances regarding Title VII and the other statutes it is charged with implementing. The Court has long held that such EEOC guidances and guidelines warrant deference to the extent the administrative judgment has the "power to persuade."[73] Specifically, the EEOC's "policy statements, embodied in its compliance manual and internal directives . . . reflect a body of experience and informed judgment" that entitle them to "a measure of respect."[74] This level of deference to the agency—termed *Skidmore* deference for the case that first discussed it[75]—depends upon the degree of care in its formulation, its consistency, formality, and relative expertness, and upon the persuasiveness of the agency's position.[76] Since the 1970s, the Court has split in its approach to EEOC cases, deferring to EEOC policy guidances in roughly half the cases before it.[77] This past Term, however, the balance tipped away from deference to the EEOC.

In *Vance v. Ball State University*,[78] the Court considered the meaning of the term "supervisor" for purposes of assigning vicarious

73. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)), *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000(e)(k), *as recognized in* Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

74. Fed. Express Corp. v. Holowecki, 552 U.S. 389, 399 (2008) (internal quotation marks omitted).

75. *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944).

76. *See* United States v. Mead Corp., 533 U.S. 218, 228 (2001) (citing *Skidmore*, 323 U.S. at 139–40).

77. *See* Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 870–71 (2011) (Ginsburg, J., concurring) (noting that the Court's decision "accords with the longstanding views of the [EEOC]" as articulated in its compliance manual); *Holowecki*, 552 U.S. at 399 (2008) (deferring to EEOC compliance manual); Clackamas Gastroenterology Assocs., P. C. v. Wells, 538 U.S. 440, 449 (2003) (same); Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002) (same); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 517–18 (1986) (same); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (same); Nashville Gas Co. v. Satty, 434 U.S. 136, 142 n.4 (1977) (same). *But see* Ky. Ret. Sys. v. EEOC, 554 U.S. 135, 150 (2008) (declining to follow EEOC compliance manual); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (declining to follow EEOC ruling); Sutton v. United Air Lines, Inc., 527 U.S. 471, 480 (1999) (declining to follow EEOC guidance); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257–58 (1991) (same); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69 (1986) (same); *Gen. Elec. Co.*, 429 U.S. at 143 (same).

78. 133 S. Ct. 2434 (2013).

liability under Title VII. The EEOC had issued an Enforcement Guidance in 1999, adopting an open-ended approach to that term and tying supervisory status to the ability to exercise significant direction over another employee's daily work.[79] The *Vance* majority rejected the EEOC's view and instead adopted a narrower definition focused on the supervisor's ability to take tangible employment actions (i.e., significant changes in employment status) against the victim. The majority determined that the EEOC's rule was "murky,"[80] "open-ended,"[81] and susceptible of inconsistent application. The Court declined to defer to the EEOC for fear that its "standard[] would present daunting problems for the lower federal courts and for juries."[82] Dissenting, Justice Ginsburg took the majority to task for, among other things, failing to accord due deference to the EEOC's guidance. What the majority took for ambiguity, Justice Ginsburg lauded as a "powerfully persuasive" view grounded in the realities of workplace structure.[83]

In *University of Texas Southwestern Medical Center v. Nassar*,[84] the Court considered the proper causation standard for Title VII retaliation claims. As in *Vance*, the EEOC had issued guidance and a compliance manual opining that such claims required evidence that retaliation was a motivating factor of the challenged action, as opposed to its but-for cause.[85] The EEOC justified this position as consistent with both prior judicial decisions and the statutory purpose of allowing remedies for retaliation. The *Nassar* majority found that these explanations "lack[ed] . . . persuasive force" and therefore did not warrant deference.[86] Justice Ginsburg again dissented, arguing that the EEOC's "well-reasoned and longstanding guidance"[87] merited respect.

79. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS 3–4 (1999), *available at* Westlaw 1999 WL 33305874.

80. *Vance*, 133 S. Ct. at 2449.

81. *Id.*

82. *Id.* at 2450.

83. *Id.* at 2462.

84. 133 S. Ct. 2517 (2013).

85. 2 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, COMPLIANCE MANUAL § 8–II(E)(1) (Mar. 2003).

86. *Nassar*, 133 S. Ct. at 2533.

87. *Id.* at 2540 (Ginsburg, J., dissenting).

Vance and *Nassar* thus further substantiate the claim that today's Court is a confident one. While it was possible to make a legal and pragmatic argument in favor of deference to the EEOC in both cases, the Court instead opted to exercise its own independent judgment in construing the requirements of Title VII.

V. CONCLUSION

The October 2012 Term was a particularly high profile one for the Supreme Court because so many of its cases involved politically charged topics, including affirmative action,[88] voting rights,[89] gay marriage,[90] gene patenting,[91] and the collection of DNA data from criminal arrestees.[92] While it might be tempting to evaluate the Term by focusing on the outcomes of these cases, I suggest that there is a more important story lurking just under the surface. That story is one about judicial process. The Court proved itself increasingly willing to disregard the legal and policy judgments of Congress, state universities, and federal agencies—institutions to which the Court has, in the past, said it would defer at least under certain circumstances. While the Court will always formally embrace principles of deference grounded in separation of powers or institutional competence, its willingness to exercise its own judgment and disregard the considered views of other institutions was on full display this Term. Time will tell whether the Court's confidence, as exhibited in cases like *Fisher*, *Shelby County*, *Vance*, and *Nasser*, is indeed part of a larger trend.

88. *See* Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013).

89. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

90. *See* United States v. Windsor, 133 S. Ct. 2675 (2013); Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

91. *See* Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013).

92. *See* Maryland v. King, 133 S. Ct. 1958 (2013).