The Democracy We Want: Standards of Review and Democratic Embeddedness at the Inter-American Court of Human Rights

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Reading *In Whose Name?* is like meeting an old schoolmate – that not-all-too interesting person who, in fact, turned out to be a rather fascinating character, full of ambition, achievements, and contradictions. That old acquaintance is, of course, the international court, whose adjudicative powers in the era of global governance are studied by Armin von Bogdandy and Ingo Venzke with the drive and gusto of a zoologist just made privy of a new species of tiger.

The result is kaleidoscopic. The public law theory of adjudication advanced by the text opens many fronts of fruitful engagement, particularly at the current moment of backlash against the book's central character.[1] In this contribution, I will focus on one such front. In Whose Name? puts forward the idea of political embeddedness as a source of democratic legitimacy of international courts. This chapter takes up that question and explores it in reference to the Gelman decision of the Inter-American Court of Human Rights (IACtHR).

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1 On the backlash against international courts, see generally, Madsen, M.R., Cebulak, P. and Wiebusch, M. (2018), "Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts", *International Journal of Law in Context* 14(2), 197–220; Voeten, E. (2017), "Liberalism, Populism, and the Backlash against International Court", available at: https://global.upenn.edu/sites/default/files/voetenpaper.original.pdf; Posner, E.A. (2017), "Liberal Internationalism and the Populist Backlash", *Arizona State Law Journal* 49, 795. On the backlash against the Inter-American System of Human Rights, which will be discussed in this chapter, see Urueña, R. (2018), "Double or Nothing: The Inter-American Court of Human Rights in an Increasingly Adverse Context", *Wisconsin International Law Journal* 35, 398–425; Soley, X. and Steininger, S. (2018), "Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights", *International Journal of Law in Context* 14(2), 237–257.

My central argument will be the following: the balance between the appropriate Inter-American standard of review and the democratic pedigree of the primary decision is fundamental for the democratic legitimacy of the regional court. Yet, in the context of human rights indeterminacy, such democratic balancing needs to be performed in reference to a regional (and not solely national) process of democratization, in which an Inter-American community of human rights practice plays a central role.

To advance that argument, this chapter explores first the issue of standard of review at the Inter-American Court of Human Rights, and then focuses, in the second section, on *Gelman* as an expression of the Court's no-deference standard. The third section, in turn, assesses the critiques of this decision, focusing on how its critics misrepresent both the indeterminacy of human rights, and the possibility of a regional, Inter-American, democratic process. The final section concludes, by proposing a good faith approach to the balancing between standard of review and the democratic pedigree of domestic decisions -– good faith as a way to achieve the democracy we *want* in Latin America, and not only to defend the democracy we *have*.

1. Standard of review and the Inter-American Court of Human Rights:

In Whose Name? argues that international adjudication can be made more democratically legitimate. International judges can be selected more transparently and representatively. The procedure before international courts can be made more transparent and participatory by allowing, for example, for *amicus curiae* interventions, or by establishing effective legal remedies. The international judicial decision itself can be used as a source of democratic legitimacy, if it is supported by solid legal reasoning.[2] Moreover, democratic legitimacy can be enhanced by a smart combination of international public authority and vibrant political processes. Thus, an appropriate standard of review, a self-critical use of soft law, and an increased politicization of the international system – all could, according to *In Whose Name?*, better embed international courts in the political process, thus enhancing their democratic legitimacy.[3]

2 Von Bogdandy, A. and Venzke, I. (2014), *In Whose Name?: A Public Law Theory of International Adjudication*. Oxford: Oxford University Press, 156–197.

3 *Ibid*., 199–206.

These venues of democratic legitimation, though, are deployed in a dense political context, both national and international. The selection of international judges, the procedure before international courts, and the adoption of their decisions, all occur in a political scenario that interacts with each of these sources of legitimacy – sometimes boosting, sometimes underlying them. For that reason, von Bogdandy and Venzke's treatment of international courts' embeddedness in the political process seems so crucial. Such embeddedness is, ultimately, not an alternative source of democratic legitimacy (as the authors suggest), but rather a prerequisite for the other sources of democratic legitimacy to begin operating.

Thought of as a prerequisite of democratic legitimacy, *In Whose Name?*'s notion of political embeddedness poses both a descriptive and a normative problem. Descriptively, it requires scholars to assess whether international adjudication has an impact on, or is impacted by, domestic political process. Much interesting work is being done at that descriptive level, particularly with regards to the Inter-American context.[4] At a normative level, political embeddedness poses the question of how much international adjudication *should* impact domestic political processes, if the objective is to enhance democratic legitimacy. In this contribution, I will focus on this latter normative question, and will explore it by discussing the appropriate standard of review used by the Inter-American Court of Human Rights in its political context.[5]

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4 See the essays in Engstrom, P. (ed.) (2019), *The Inter-American Human Rights System. Impact Beyond Compliance*. Cham: Palgrave Macmillan. Also: Parra, O. (2017), "The Impact of Inter- American Judgments by Institutional Empowerment" In: A. von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*. Oxford/New York: Oxford University Press, 357–376. And Urueña, R., Sanchez, B. and Anzola, S. (2015), *Después del fallo: El cumplimiento de las decisiones del sistema interamericano de derechos humanos. Una propuesta de metodología*. Bogota: Uniandes, Series "Documentos Justicia Global".

5 It will be noticed that I will not discuss *In Whose Name?'s* emphasis on soft law. I am doubtful as to its potential as a source of democratic legitimacy, and the authors seem slightly dubitative as well. For the authors, "[t]he democratic content of (decisions by international political institutions) is not clear at all. Usually soft law is rather seen as an instrument of technocratic global governance. At this point, our theory walks a middle way between uncritical endorsement and categorical rejection" (Von Bogdandy and Venzke, *supra* note 2, 204). This caution seems well warranted. Soft law may be effective for advancing certain arguments or agenda, and thus read as legitimate in its effectiveness, but its democratic credentials, in basic terms of representativeness, transparency, or deliberation, are not beyond question. For an early argument in this sense, see Klabbers, J. (1998), "The Undesirability of Soft Law", *Nordic Journal of International Law* 67(4), 381. For an

A "standard of review" refers to the level of scrutiny that an adjudicator applies when reviewing the decision of a lower court or of another institution.[6] The notion comes from domestic judicial review, and is inspired by the appropriate balance of powers between high courts, lower courts, and institutions in other branches of power.[7] Put simply, a standard of review sets the questions asked of the primary decision. Thus, in domestic law, standards of review are often pictured as a continuum, with completely new review of the primary decision on one end and complete deference to that decision on the other.[8] Thus, when engaging in judicial review, a court has the option of applying a very strict level of scrutiny, considering and deciding the legal question anew—in effect substituting the primary decision-maker via judicial review. Alternatively, in the other extreme, the reviewing court has the option of adopting a highly deferential standard, under which it will give more weight to the primary decision-maker.

In this context, the connection between standard of review and democratic legitimacy emerges, in at least two senses. First, the primary decision may carry some kid of democratic pedigree, due to the way in which the decision-maker was elected, or to the process through which the decision was reached. In that case, such democratic pedigree may play a role into deciding the appropriate standard of review – most usually, by a triggering a more deferential approach towards a more democratic primary decision.[9] Second, the primary decision may *hinder* the democratic process. That is the case, for example, in John Hart Ely's argument for judicial review as a mechanism for "representation reinforcement": if the process of demo-

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example of soft law as a tool for progressive social change with regards to internally displaced populations in Colombia (and no consideration of its democratic pedigree), see Sanchez, B. (2009), "Cuando los Derechos son la Jaula: Transplante rígido del soft law para la gestión del desplazamiento forzado", *Estudios Políticos* 35, 11–32.

6 The following description of standard of review is based on Urueña, R. (2016), "Subsidiarity and the Public–Private Distinction in Investment Treaty Arbitration", *Law and Contemporary Problems* 79(2), 99–121.

7 Peters, A. (2009), "The Meaning, Measure, and Misuse of Standards of Review", *Lewis & Clark Law Review* 13(1), 233.

8 For a discussion of US law, see generally Hofer, R.R. (1991), "Standards of Review – Looking beyond the Labels", *Marquette Law Review* 74(2), 231.

9 See Kavanagh, A. (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" In: G. Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory.* Cambridge/New York: Cambridge University Press, 184.

cratic representation fails, then judicial review is in principle justified,[10] and hence, I would add, a stricter standard of review is justified.

In international law, the question of standards of review has taken on characteristics of its own.[11] International courts are often not reviewing a decision by a lower court, but they rather review the decision of one of the parties to the litigation—often, a state. Consequently, the issue of standard of review involves pondering the legitimate policy space of states, which risks being unduly restricted, hence triggering the problem of democratic legitimacy. Should international courts be deferential to the decisions of domestic institutions or, on the contrary, should they engage in *de novo* review of primary decisions? Exceptionally, in certain specialized regimes, the language contained in the relevant treaty answers this question.[12] Most international legal regimes, though, leave the question of standard of review open for the relevant court to decide. That is the case of the Inter-American Court of Human Rights, which has been reluctant to specify its own approach to standard of review. And this, in contrast with the European Court of Human Rights, which has developed, through its "margin of appreciation" doctrine, one of the few analytical tools in international law that explicitly discuss the level of scrutiny to be applied when assessing reviewing domestic measures[13].

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10 See generally Ely, J.H. (1980), *Democracy and Distrust: A Theory of Judicial Review*. Cambridge: Harvard University Press.

11 The following discussion of standards of review in international law is based on Urueña, *supra* note 6.

12 Such is the case of dumping litigation at the World Trade Organization (WTO), for which the Article 17.6 Anti-Dumping Agreement provides a specific standard of review in anti-dumping proceedings. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201.

13 For an introduction to the doctrine, see Legg, A. (2012), *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (1st ed). Oxford: Oxford University Press. The other explicit approach to the appropriate standard of review in international law can be found in international trade law. The General Agreement on Tariffs and Trade Article XX permits the adoption of certain exceptional trade-restrictive measures in order to protect public goals such as morality, security, or the environment. Such exceptional measures must be necessary to achieve the stated goal. Thus, when deciding whether the measure is truly necessary, the WTO panel and Appellate Body have developed a consistent body of case law that assesses whether the state has taken the least restrictive measure reasonably available that meets its permissible objective under General Agreement on Tariffs and Trade Article XX. To meet this standard, the defendant state must make a prima facie argument that the exceptional measure was necessary in its context. In that case, the panel or Appellate Body will have a deferential

As is well known, the margin of appreciation refers to the "'breadth of deference' that the Court is willing to grant to the decisions of national legislative, executive, and judicial decisionmakers".[14] The margin of appreciation is a form of standard of review under which an international court gives weight to the reasoning of the primary decisionmaker for reasons of democratic legitimacy, common practice of the states, or expertise.[15] The Inter-American Court, though, has not followed the European Tribunal's path on this point. While the former has used the expression "margin of appreciation" on certain occasions, it has in fact seemed to be referring to the traditional leeway international law gives states to configure their own domestic law to comply with their international legal obligations, and not to a deferential standard of review. Thus, in *Herrera Ulloa* and in *Barreto Leiva*, the IACtHR explicitly referred to a "margin of appreciation", but used the term as a shortcut to underscore states' sovereign right to regulate domestic remedies.[16] Similarly, in *Castañeda Guzmán*, the Inter-American Court also held that states had a "margin" in configuring their own electoral systems, as long as they were not in violation of the American Convention on Human Rights.[17] Even in cases where the facts would have been conducive to the application of a margin of appreciation doctrine, the Inter-American Court has declined to do so.[18]

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attitude toward the primary decision-maker. Then the burden of proof shifts to the complainant, who must prove that the measure is unnecessary (mainly by proving the reasonable availability of a less trade-restrictive alternative measure). On the standard of review in the WTO, see generally Oesch, M. (2003), "Standards of Review in WTO Dispute Resolution", *Journal of International Economic Law* 6(3), 635–659. Investment arbitration, in contrast, is famously silent on the issue of the appropriate standard of review. See Urueña, *supra* note 6.

14 Burke-White and von Staden, 305.

15 Legg, *supra* note 13, 17.

16 *Herrera Ulloa v. Costa Rica*, IACtHR, Series C No 107, Judgment of 2 July 2004, para. 161; *Barreto Leiva v. Venezuela*, IACtHR Series C No 206, Judgment of 17 November 2009, para. 90.

17 See *Castaneda Guzman v. Mexico*, IACtHR Series C No 184, Judgment of 6 August 2008, para.162.

18 In *La Ultima Tentación de Cristo*, of 2001, the IACtHR had to decide whether Chile was in breach of the American Convention of Human Rights, by preventing the release of Martin Scorsese's 1988 film "The Last Temptation of Christ" on the basis of its alleged anti-Catholic message. The case had obvious coincidences with the case law that developed the margin of appreciation doctrine in Europe – in particular, *Otto-Preminger Institut v. Austria*, of 1995, which dealt with the criminal proceedings against a film institute that wanted to broadcast a series of satirical films on Christianity, and *Wingrove v. UK*, of 1996, which dealt with the prohibition of release of "Visions of Ecstasy", a movie derived from the life of St. Teresa of

Some scholarship in the region has argued that the Inter-American Court does adopt some level of a "margin of appreciation".[19] However, this observation seems questionable. While the IACtHR is interacting with domestic decision-makers in an increasingly close (and sophisticated) fashion, not all these interactions can be read as expressions of deference, or as a margin of appreciation doctrine. In particular, three distinctions need to be made. First, as was pointed out earlier, it is not uncommon for international courts to give states some discretion to configure their domestic law to comply with international legal obligations; this discretion, however, is different from a deferential margin of appreciation.[20] Second, there is an increasingly complex dialogue between the IACtHR and domestic courts,[21] and much of this dialogue implies a certain consideration of the reasoning of national courts.[22] This dialogue does not imply that the regional tribunal is giving primary decision-makers a "margin of appreciation" in their compliance with their human rights obligations. Finally, the Inter-American Court often frames its decisions as a problem of proportionality.[23] This framing often requires that the Court consider the primary decision-maker's own definition of a domestic measure's structure and

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Avila. In its decision, the Inter-American Court decided not to use the margin of appreciation doctrine (despite quoting widely from other European human rights precedent), and adopted a strict standard of review, finding that "[Chile had] to amend its domestic law, within a reasonable period, in order to eliminate prior censorship to allow exhibition of the film "The Last Temptation of Christ", and must provide a report on the measures taken in that respect (…)." See *'La Última Tentación De Cristo' (Olmedo Bustos and others) v. Chile*, IACtHR Series C No 73, Judgment of 5 February 2001, para. 103.

19 See, for example, Barbosa Delgado, F.R. (2012), El margen nacional de apreciación y sus límites en la libertad de expresión: análisis comparado de los sistemas europeo e interamericano de derechos humanos. Bogota: Universidad Externado de Colombia.

20 See Nash Rojas, C. (2018), "La doctrina del margen de apreciación y su nula recepción en la jurisprudencia de la Corte Interamericana de Derechos Humanos", *ACDI – Anuario Colombiano de Derecho Internacional* 11.

21 Acosta Alvarado, P.A. (2015), *Diálogo judicial y constitucionalismo multinivel: el caso interamericano* (1st ed.). Bogota: Universidad Externado de Colombia.

22 See Neves, M. (2013), "Del Diálogo entre las Cortes Supremas y la Corte Interamericana de Derechos Humanos al Transconstitucionalismo en América Latina" In: R. Urueña, G.R. Bandeira Galindo and A. Torres Pérez (eds), *Protección multinivel de derechos humanos*. Barcelona: University Pompeu Fabra, 275–302.

23 See, for example, *Caso Kimel v. Argentina*, IACtHR Series C No 177, Judgment of 2 May 2008; see also *Caso Fontevecchia y D'Amico v. Argentina*, IACtHR Series C No 238, Judgment of 29 November 2011. Generally, see Clérico, L. (2018), *Derechos y proporcionalidad: violaciones por acción, por insuficiencia y por regresión.*

objectives, as elements of a test of proportionality. However, this consideration does not imply a particular standard of review as, even in the context of a strict proportionality analysis, a court can be more or less deferential.[24] In fact, the Inter-American Court has held that its analysis of proportionality *excludes* the relevance of a "margin of appreciation" doctrine.[25]

Why this reluctance towards deference? Despite the Court's formal silence, by Justice Cançado Trindade, former President of the Inter-American Court, has clearly stated the rationale behind this rejection of deference: "How could we apply [the margin of appreciation doctrine] in the context of a regional human rights system where many countries' judges are subject to intimidation and pressure? How could we apply it in a region where the judicial function does not distinguish between military jurisdiction and ordinary jurisdiction? How could we apply it in the context of national legal systems that are heavily questioned for the failure to combat impunity? […] We have no alternative but to strengthen the international mechanisms for protection … Fortunately, such doctrine has not been developed within the inter-American human rights system."[26]

Miradas locales, interamericanas y comparadas. Querétaro: Instituto de Estudios Constitucionales del Estado de Querétaro, Series "Constitución y Derechos", 156–186.

24 For an example of the different possible combinations of proportionality test and deferential/non-deferential standard of review in investment arbitration, see Henckels, C. (2012), "Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration", *Journal of International Economic Law* 15(1), 223–255.

25 In *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, the IACtHR had to address an explicit argument of Costa Rica, according to which "a margin of appreciation [exists] to grant the status of child to unborn children" (para. 169). For the Inter-American Court, though, the fact that "the [Costa Rican] Constitutional Chamber based itself on an absolute protection of the embryo that, by failing to weigh up or take into account the other competing rights, involved an arbitrary and excessive interference in private and family life that makes this interference disproportionate. Moreover, the interference had discriminatory effects. In addition, taking into account these conclusions about the assessment and the considerations concerning Article 4(1) of the Convention (concluding *that* the embryo cannot be understood to be a person for the purposes of Article 4(1) of the American Convention – RU), the Court does not consider it pertinent to rule on the State's argument that it has a margin of appreciation to establish prohibitions such as the one established by the (Costa Rican) Constitutional Chamber" (para. 316).

26 Cançado Trindade, A.A. (2006), *El derecho internacional de los derechos humanos en el siglo XXI* (2nd ed.). Santiago de Chile: Editorial Jurídica de Chile, 390. The quote is originally in Spanish; this translation and text selection is quoted from Con-

Overall, then, the Inter-American Court of Human Rights has preferred to remain fuzzy about its own standard of review. This lack of clarity, though, in fact implies a very specific non-deferential standard of review. Despite a couple of somewhat haphazard uses of the expression "margin of appreciation", it seems clear that the Inter-American Court has preferred to steer clear of adopting a standard that would give explicit deference to the primary decision-maker, such as the European "margin".[27] As Cançado Trindade makes clear, in the context of a widely perceived failure to prosecute gross violations of human rights domestically, the primary decision-maker cannot enjoy much deference, a choice that, as we will discuss in the next section, gave ground to one of the most controversial decisions ever adopted by the Inter-American Court.

2. Gelman *and the no-deference standard*

Perhaps the clearest expression of the IACtHR's no-deference standard of review is the *Gelman* decision.[28] The case concerned Macarena Gelman, whose Argentinean parents were captured, tortured and killed by the Uruguayan military in 1976, in a joint Argentina-Uruguay action under "Operación Cóndor". Gelman's mother was seven-months pregnant when captured and gave birth in captivity. After the mother's forced disappearance, the infant was raised by a Uruguayan policeman and his wife, unaware of her real identity, until a paternal grandparent managed to track her down in 2000.

These facts are mostly undisputed, confirmed by an official "Peace Commission" report of 2003. However, a 1986 Uruguayan Law that granted amnesty to members and agents of the dictatorship (the "Expiry Law") prevented the prosecution of the perpetrators. The Uruguayan Supreme Court upheld the Law's constitutionality in 1988 by a three-to-

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tesse, J. (2016), "Contestation and Deference in the Inter-American Human Rights System", *Law and Contemporary Problems* 79(2), 134.

27 With the same conclusion, see Duhaime, B. (2014), "Subsidiarity in the Americas: What Room Is There for Deference in the Inter-American System?" In: W.G. Werner and L. Gruszczynski (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*. Oxford/New York: Oxford University Press, 289–318. See also: Contesse, J., *supra* note 26.

28 *Caso Gelman v. Uruguay*, IACtHR Series C No 221, Judgment of 24 February 2011. The following discussion on *Gelman* is drawn from von Bogdandy, A. and Urueña, R. (2020), "International Transformative Constitutionalism", *American Journal of International Law* 114(3).

two majority vote. In 1989, a proposal to derogate its first four articles was rejected in a national referendum, with a 58 % percent voting in favor of the Law. Later on, in 2004, the Supreme Court denied a motion to have portions of the Law declared unconstitutional. However, in 2009, the Supreme Court finally held that certain elements of the Law were unconstitutional. Six days after this last decision, the proposal to derogate the same four articles of the Law was subject to a referendum for a second time. The Law stood by a 52 % majority.

Gelman provides a litmus test of the Inter-American Court's approach to deference. Congress adopted the Expiry Law t, which in three decades was reviewed thrice in its constitutionality by a relatively independent domestic Supreme Court. Moreover, it was subject to a national referendum not once, but twice. At a purely procedural level, it is hard to think of a domestic decision featuring a better formal democratic pedigree.

However, the Law openly collided with a consistent theme in Inter-American jurisprudence, especially in relation to the democratic transition, which emphasizes the obligation of states to ensure victims' right to the truth,[29] to a judicial process, and to full reparation for wrongdoing.[30] By the time of the *Gelman* case, the IACtHR had already rejected blanket amnesties in transitional justice processes in Peru.[31] Specifically, the roadblock for the Uruguayan Expiry Law was the 2001 decision in *Barrios Altos*[32] and the 2006 decision in *La Cantuta*[33], according to which amnesties constituted a violation of the American Convention on Human Rights and therefore "lacked legal effects"[34].

29 Antkowiak, T.M. (2002), "Truth as Right and Remedy in International Human Rights Experience", *Michigan Journal of International Law* 23(4), 977–1013.

30 See Pasqualucci, J.M. (2012), *The Practice and Procedure of the Inter-American Court of Human Rights*. Cambridge: Cambridge University Press, 230–288.

31 *Caso Barrios Altos v. Perú*, IACtHR Series C No 75, Judgment of 14 March 2001, paras 41–44.

32 *Ibid*. See generally Binder, C. (2011), "The Prohibition of Amnesties by the Inter-American Court of Human Rights", German Law Journal 12(5), 1203–30.

33 *La Cantuta v. Peru,* IACtHR Series C No 162, Judgment of 29 November 2006, para. 189.

34 In his separate opinion to *La Cantuta v. Peru*, Segio García Ramírez argues that domestic laws that violate the Convention are "basically invalid" (paras 4–5).

To be sure, such a non-deferential stance by the Inter-American Court implied an astonishing move,[35] and a first of its kind in international law.[36] However, the Peruvian amnesties, if understood in their context, prove to be a very different animal to the Uruguayan Law. The Peruvian amnesties were, in fact, "auto-amnesties", adopted by a Congress put in place by the same government responsible for the atrocities, after Fujimori closed the democratically elected Congress in his 1992 "auto-coup".[37] After Fujimori's fall from power, transitional Peruvian President Paniagua was opposed to maintaining the amnesties, but was bound by domestically valid laws, and lacked the political majorities in Congress to immediately overturn them.[38] In that context, Peru's agent put forward before the Inter-American Court the question of what to do with these formally valid amnesty laws,[39] thus opening the space for the IACtHR to strike down directly a piece of legislation that was not only contrary to Inter-American human rights law, but also inconvenient to the new administration.

The Uruguayan situation was quite different. Nevertheless, despite these important differences, the cards were already played at the Inter-American system when the *Gelman* case came about. With statements such as those in *Barrios Altos* and *La Cantuta*, the regional Court had already played its hand. It comes, therefore, as no surprise that it maintained its strict no-deference standard of review, and held that the Uruguayan Expiry Law, despite its democratic pedigree, was still in breach of the Inter-American Convention, and had to be reformed.

To do so, the Court drew a line between democratic support for a measure and its legality under human rights law, as the former does not imply the latter. Human rights, for the Court, belong to sphere of public decision-making that is, at last instance, immune from majoritarian rule. For the Court, "the fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not auto-

35 See, generally, Huneeus, A. (2017), "The institutional limits of Inter-American constitutionalism" In: R. Dixon and T. Ginsburg (eds), *Comparative Constitutional Law in Latin America*. Cheltenham/Northampton: Edward Edgar, 300–324.

36 Cassese, A. (2002), "Y-a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?" In: A. Cassese & M. Delmas-Marty (eds), *Crimes Internationaux et Juridictions Internationales.* Paris: Presses Universitaires de France, 13–29, 16, quoted in: Binder, *supra* note 32, 1212.

37 See, generally, Levitsky, S. (1999), "Fujimori and post-party politics in Peru", *Journal of Democracy* 10(3), 78–92.

38 García-Sayán, D. (2017), *Cambiando el Futuro*. Lima: Lapix, 172–173.

39 *Ibid*., 173.

matically or by itself grant legitimacy under International Law […]. The bare existence of a democratic regime does not guarantee, *per se*, the permanent respect of International Law […] The democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties, such as the American Convention, in such a form that the existence of [a] true democratic regime is determined by both its formal and substantial characteristics, and therefore, particularly in cases of serious violations of [peremptory] norms of International Law, the protection of human rights constitutes a[n] impassable limit to the rule of the majority, that is, to the forum of the "possible to be decided" by the majorities in the democratic instance […]."[40]

This line of reasoning has evident implications for the idea of democratic legitimation of international courts through political embeddedness, as suggested by *In Whose Name?* The Inter-American Court staked its legitimacy on a strategy that is the exact opposite of political embeddedness: by *not* being embedded in Uruguay's political process and *not* adopting a deferential standard towards domestic electoral decision-making, the Court justified its controversial decision. In a way, the Inter-American Court purposefully placed itself outside Uruguayan politics, and gave itself the role of drawing the external line of what can, and what cannot, be decided by local democratic processes. In *Gelman* the Expiry Law was "outside" what is decidable, and hence necessarily unlawful under the American Convention of Human Rights.

3. *Regional democracy, political embeddedness, and the Inter-American community of human rights practice:*

Gelman drew criticism from different fronts. To be sure, some of it came from states that see in a non-deferential Inter-American Court the risk of possible accountability for their own human rights violations. This line of critique, while politically relevant, is not particularly interesting in its substance. More interesting is the critique of scholars like Roberto Gargarella, who consider that the *Gelman* precedent is problematic in three senses. First, because the Inter-American Court overlooks that "reasonable and persistent differences of opinion persist with regards to justice and rights". Second, because the Court is not "sufficiently respectful to democracy or, more precisely, to what local communities democratically decide". Third,

40 *Gelman*, *supra* note 28, paras 238–239.

because the regional Tribunal seems biased towards a particular method of criminal punishment (prison) and fails to consider other alternatives that may provide a stronger basis for a democratic transition.[41]

In this section, I will discuss the thrust of the two first dimensions of the critique, and will assess them from the perspective of political embeddedness and from the democratic legitimacy of the Inter-American Court of Human Rights.[42]

The first critique, then, relates to the "fact of disagreement". For Gargarella, "we disagree over what [human] rights should be, and what their content and contours are" and, therefore, "we should not simply treat the idea of rights as isolated from or lacking any contact whatsoever with the

41 Gargarella, R. (2015), "Democracy and Rights in *Gelman v. Uruguay*", *AJIL Unbound* 109, 115–119. Expanding the argument: Gargarella, R. (2015), "La democracia frente a los crímenes masivos: una reflexión a la luz del caso Gelman", *Revista Latinoamericana de Derecho Internacional* 2, 1–15; Gargarella, R. (2016), *Castigar al prójimo: por una refundación democrática del derecho penal*. Buenos Aires: Siglo XXI, 91–124. For a similar critique, see Contesse, J. (2017), "The final word? Constitutional dialogue and the Inter-American Court of Human Rights", *International Journal of Constitutional Law* 15(2), 414–435; and Contesse, J. (2016), "Contestation and deference in the Inter-American human rights system", *Law & Contemporary Problems* 79(2), 123–145. Reviewing the critique from a criminal policy perspective, see Chehtman, A. (2018), "Amnistías, democracia y castigo en Castigar al prójimo", *Revista Jurídica de la Universidad de Palermo* 16(1), 155–165. The following discussion is drawn in part from Urueña, R. (forthcoming), "Democracy and Human Rights Adjudication in The Inter-American Legal Space" In: P. Zumbansen (ed.), *Oxford Handbook of Transnational Law*. Oxford: Oxford University Press.

42 The third dimension of the critique, namely, that of alternative forms of punishment and criminal reproach is, of course, relevant, but can be read as an example of the first two critiques, if considered as problem of standard of review and the (possible) deference that the Inter-American should show the primarily (national) decision-maker in this respect. If, on the other hand, it is not considered as a problem of deference, but rather as a substantive problem regarding the choice of punishment favoured by the Inter-American Court (as in, for example, Chehtman, *supra* note 41), then the critique becomes an intervention in the wider debate on the transitional governance framework preferred by the Inter-American Court. This debate, though, exceeds the scope of this chapter. On that latter issue, see Carvalho Veçoso, F.F. (2016), "Whose Exceptionalism? Debating the Inter-American View on Amnesty and the Brazilian Case" In: K. Engle, Z. Miller and D.M. Davis (eds), *Anti-Impunity and the Human Rights Agenda*. Cambridge: Cambridge University Press, 185–215. In the Colombian context, see Acosta-López, J.I. (2016), "The Inter-American Human Rights System and the Colombian Peace: Redefining the Fight Against Impunity", *AJIL Unbound* 110, 178–182.

notion of majority rule"[43]. This critique, while appropriate in targeting the Inter-American Court's definition of the "non-decidable" in the *Gelman* case, still misrepresents the implications of the indeterminacy thesis in human rights.

It is clear that human rights texts fail to define, in themselves, the outcome of a given conflict of rights. In their indeterminacy, human rights only find content in a contextual process of interpretation and decision-making. As Martti Koskenniemi pointed out almost two decades ago, "rights do not exist as such – 'fact-like' – outside the structures of political deliberation. They are not a limit, but an effect of politics"[44]. Ultimately, rights-talk "runs out", and finding appropriate solutions to specific rights-conflicts requires that the adjudicator turn to other tools of argumentation, outside the text establishing rights. Legal materials (such as the definition of a "right") *always* fail to provide a univocal outcome – a reality that opens the space to all sorts of strategic behavior on behalf of the interpreter,[45] often through argumentative devices such as rule/exception structures,[46] or proportionality analysis.[47]

The Inter-American Court plays down such indeterminacy of human rights in *Gelman*, where it fails to recognize that its application of the Peruvian amnesty jurisprudence is not the only possible outcome, but rather one of several reasonable possible answers. That is the thrust of Gargarella's "disagreement" critique, and he is right in pointing it out. But then again, *that is what courts do* – not only the Inter-American Court, but *all* court mobilize legal meaning in such a way that (dissenting opinions notwithstanding) they present their particular solution as the *only* possible answer.[48]

In terms of legal reasoning, *Gelman* is not different from any human rights case, as they all involve indeterminate rights whose interpretation is connected to the political context. Gargarella is wrong when he suggests

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43 Gargarella, "Democracy and Rights in *Gelman v. Uruguay*", *supra* not 41, 118.

44 Koskenniemi, M. (2001), "Human rights, politics, and love", *Mennesker & Rettigheder* 4, 33–45.

45 See Kennedy, D. (2007), "A left phenomenological critique of the Hart/Kelsen theory of legal interpretation", *Kritische Justiz* 40(3), 296–305.

46 Koskenniemi, *supra* note 44, 33–35.

47 See Kennedy, D. (2016), "Proportionality and 'Deference' in Contemporary Constitutional Thought" In: T. Perišin and S. Rodin (eds), *The transformation or reconstitution of Europe: the critical legal studies perspective on the role of the courts in the European Union*. Oxford/Portland: Hart, 29–58.

48 See Kennedy, D. (1986), "Freedom and constraint in adjudication: A critical phenomenology", *Journal of Legal Education* 36(4), 518–562.

that the democratic pedigree of the Uruguayan Expiry Law makes *Gelman* so special that the Inter-American Court should not have posited a non-deferential standard of review as the only right answer. On the contrary, the mere fact that the Inter-American Court fails to draw attention to the contingency of its argumentative choices (and hence, to the latter's deep link to the wider political process) does not make *Gelman* a badly decided case, but rather makes it a squarely traditional human rights decision.

Legal operators (judges, litigants, academics, states) are aware of this indeterminacy. However, such an awareness does not imply that all outcomes are equally acceptable as a matter of fact. Indeterminacy does not simply mean that "law is politics – end of the discussion". On the contrary, certain outcomes are preferred, and the structural bias of institutions is mobilized to achieve those outcomes.[49] Which outcomes are preferred? In the context of human rights indeterminacy, the consensus of an Inter-American community of human rights practice selects acceptable outcomes;[50] a group of people that interact, in the framework of an Inter-American common law of human rights,[51] to push their own agendas and fulfill their mandates.[52] Civil society organizations that bring cases before the IACtHR, grassroots organizations that protect victims on the ground, clinics at law schools that file *amicus* briefs, domestic courts that interpret

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49 This argument is made in Koskenniemi, M. (2005), *From Apology to Utopia: The Structure of International Legal Argument* (2nd ed.). Cambridge: Cambridge University Press, 606–607 ("the system still *de facto* prefers some outcomes or distributive choices to other outcomes or choices").

50 See Adler, E. (2005), *Communitarian International Relations: The Epistemic Foundations of International Relations.* London/New York: Routledge, 11. The following use of the notion of community of practice, as well as the idea of shared understandings, is influenced by Brunnée, J. and Toope, S.J. (2010), *Legitimacy and legality in international law: An interactional account*. Cambridge: Cambridge University Press. Brunné's and Toope's argument, though, seeks to unpack the notion of international legal obligation through a reinterpretation of the Fullerian criteria of inner morality of law. My interest is not in legal obligation, nor in compliance with international law; for that reason, I focus solely on their description of interactional international rule-making, and not in their effort to provide a normative basis for that process.

51 Such is the *Ius Commune Constitutionale en América Latina*, ICCAL. See von Bogdandy, A. (2017), "Ius Constitutionale Commune En América Latina: Observations on Transformative Constitutionalism" In: A. von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*. Oxford: Oxford University Press, 27–48.

52 This discussion of communities of practice is drawn from von Bogdandy and Uruea, *supra* note 28.

and apply that common law, civil servants that work on human rights for domestic governments, scholars writing and teaching Inter-American human rights law, and, the IACtHR itself, among others.[53]

All these participants have different, even conflicting, views of the Inter-American common law of human rights. The community of practice is not a top-down hegemonic regime, but rather a shared common understanding of what they are doing, and why.[54] Such is the function of decisions like *Barrios Altos/Cantuta*; beyond being statements of international legal obligation, they are expression of the consensus of a community of practice, around which that same community interacts. *Gelman* was a reiteration of the consensus of the Inter-American community of practice, crystalized by a legal utterance of the Inter-American Court that establishes a non-deferential standard of review when dealing with amnesties for gross violations of human rights. Thus, despite being textually free to consider other outcomes (in the sense that human rights texts are indeterminate), the Inter-American Court is restrained by the consensus of the Inter-American human rights community of practice, which is the community that, ultimately, will play a key role in implementing the Court's order. To be clear, there are few consensuses as clearly crystalized in that community as the non-deferential standard of *Barrios Altos/Cantuta* and now *Gelman*. The fact that the Inter-American Court is not explicit about its strategy to navigate the tension between textual freedom and adjudicatory restraint does not make it wrong. It makes it *accountable*.

To be sure, consensus in communities of practice are constantly changing, and it can be steered in one direction, or the other. The consensus (such as the non-deferential standard) influences the community's behavior, who tries to influence it back. *Gelman* itself is a crystallization of the current consensus and, at the same time, an effort to reinforce it. In this framework, each actor proposes its view of the Inter-American common law of human rights, and through continuous interaction with other

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based on Urueña, R. (2013), "Global Governance Through Comparative International Law? Inter-American Constitutionalism and The Changing Role of Domestic Courts in the Construction of the International Law", *Jean Monnet Working Paper Series* 21(13), 1–36.

53 For the role of the domestic constitutional lawyers in what I call here the Inter-American community of practice, see Huneeus, A. (2016), "Constitutional Lawyers and the Inter-American Court's Varied Authority", *Law and Contemporary Problems* 79(1), 179–208 (note that Huneeus does not speak of a community of practice).

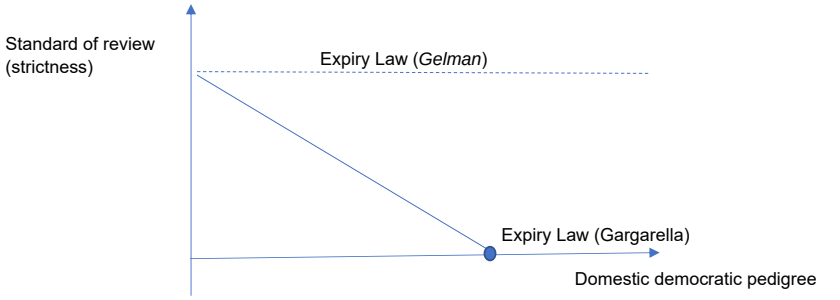
54 Adler, *supra* note 51, 22.

actors, settles the "norm" – which may be unsettled later again, by further interaction. It thus makes sense, that the Inter-American Court defends that the strict non-deferential standard as applied in *Gelman* (that is, as applied to a domestic decision with very high local democratic pedigree) is the *only* right decision allowed by human rights law. However, if one stands outside Court's position, it is also apparent that the *Gelman* non-deferential standards is part of an always-shifting consensus of the community of practice.

This constant interaction of the community of practice implies a second dimension of political embeddedness that escapes the critics of *Gelman*. The political context of the Inter-American Court of Human Rights is not only national politics, but also an Inter-American political process, that includes the Inter-American human rights community of practice. Through a constant process of interaction based on a common law of human right, human rights indeterminacy forges a political process that is distinct from domestic politics, and different to the principal-agent relation between the Organization of American States and its members.[55] In what remains of this section, I will focus on this other Inter-American political context.

As was hinted before, Gargarella's critique of *Gelman* focuses not only on the problem of reasonable disagreement, discussed above, but also on the appropriate consideration that the Inter-American Court should give to domestic democratic processes. In essence, Gargarella argues that the Uruguayan Expiry Law should be distinguished from prior amnesties (for example, those in Peru), due to its democratic pedigree. In his reading, the standard of review is in negative relation with the domestic democratic process of primary decision. This critique suggests a sliding scale, of the following kind:

55 Klabbers has suggested a similar third space with regards to the law of international organizations, as a result of functionalism's inability to dealt with the effects of the organization on third parties. See Klabbers, J. (2015), "The EJIL Foreword: The Transformation of International Organizations Law", *European Journal of International Law* 26(1), 9–82. The following discussion on *Gelman*'s variable standard of review is drawn from Uruena, *supra* note 41.



In this reading, the domestic democratic pedigree is the independent variable (as it is given, not decided by the Court, represented on the X axis), and the strictness of the standard of review is the dependent variable (as it is decided by the Court as a function of the democratic pedigree, represented on the Y axis). In the graphic, then, the higher the domestic democratic pedigree of the measure, the less strict the standard of review should be or, put otherwise, the more deferential the Inter-American Court should be towards the primary decision. Conversely, the lower the democratic pedigree, the stricter the standard of review.

Thus read, this view is not necessarily in conflict with the *Gelman* approach. *Gelman* does not give us evidence that the Inter-American Court rejects a movable standard of review, with democratic pedigree as the independent variable. A difference, though, does emerge with the Inter-American Court's approach to issues that are "non-decidable" through domestic democratic means. Regarding those cases (such as amnesties), the Court suggests that a strict standard of review is always applicable, regardless of the domestic democratic pedigree of the domestic measures (represented above by the dotted line). Critics, in contrast, argue that cases such as *Gelman* are not "non-decidable" but should be decided in reference to the same sliding scale: hence, *Gelman* should be subject to a low standard of review, given its high domestic democratic pedigree, represented by the "Gargarella" point in the graphic.

I find it difficult to agree with the Court's reasoning when drawing the line of the "non-decidable". *Gelman* builds a firewall around human rights adjudication, shielding it from democratic decision-making, that would require a much stronger justification than the Court provides. Such a firewall not only ignores that the indeterminacy of human rights implies a deep connection between the political process and adjudication, but is also ill-advised strategically, as it paints the Court as completely aloof from the

democratic potential in the region. By adopting a non-deferential standard of review based on an alleged issue that is "non-decidable" at the domestic level, the Court tries to take a higher stand, and to extract itself from the domestic political process, but in fact ends up right in the middle of the Uruguayan political debate. As Duncan Kennedy has insightfully pointed out, a strict non-deferential stance is always "based on a simplistic distinction between legal interpretation and law-making. [The judge] cannot escape the usurpation charge simply by ignoring the role of politics in law."[56] Indeed, *Gelman's* critics charge the Court with of usurpation of the local democratic process.

The answer, though, is not adopting a deferent standard of review, as the critics suggest. *Gelman* serves an important function, as it sends a clear signal to the Inter-American human rights community of practice (particularly with an eye to future amnesties backed by plebiscites in other countries, such as Colombia or Venezuela). A deferential standard of review would imply yielding on this process of signaling, thus giving up on the Court's effort to maintain the current consensus of the community of practice concerning amnesties of gross human rights violations.

However, the Court's strategy of appealing to "non-decidable" issues seems too blunt an instrument for that purpose. It is unnecessary to create exceptions to the moving scale of the standard of review described above, and shield human rights adjudication from democracy, as the Court did. The Inter-American Court needs to ponder democratic legitimacy and the appropriate standard of review in all its decisions. However, it must consider not only the national democratic process, but also the Inter-American democratic process as a whole, in which the Inter-American community of practice engages daily.

Such is the limit of the critique to the *Gelman* decision. The Court's "non-decidable" issues argument is question-begging, and there should be a moving scale with regards to the appropriate standard of review. Critics focus solely on national political processes, and fail to take into account the regional process of democratization, in which the Inter-American Court plays a transversal role. It is true that the Court should be more deferential to a primary decision with a high democratic pedigree, but such a democratic pedigree needs to be considered regionally, not only based on national electoral processes, but also on the basis of the primary decision's potential impacts on the democratic process of the region as a whole. Even

56 Kennedy, *supra* note 48, 43. This discussion of democracy in the region is drawn from von Bogdandy and Uruena, *supra* note 28.

if the Uruguayan Expiry Law had sterling national democratic pedigree, it might have had lower *regional* democratic pedigree -- particularly considering the potential impacts of a deferential Inter-American standard of review in the processes of democratization in other countries in the region, different from Uruguay. If that were the case, if the *regional* democratic pedigree is low, then it would have been perfectly reasonable for the Court to apply a strict standard of review – without having to use an ill-defined criterion of "non-decidable" issues.

Ultimately, Gargarella's second line of critique against *Gelman* depends on an extremely narrow national definition of democracy. Of course, thick electoral processes of representation only exist at a national level in Latin America. However, this approach seems to be too reductive, as if democracy were only possible at the level of the nation-state. If one is open to the idea of democracy beyond the state, then the Inter-American scale of the appropriate standard of review should consider that wider notion of democracy.

I am aware that calls for even the thinnest democratic process beyond the state are often met with skepticism.[57] However, the Inter-American common law of human rights is a democratic undertaking that, by definition, goes beyond the state and applies to the whole region – the Inter-American Court is embedded in that regional political process as well. This is not to say that Inter-American democracy is an extension of national democracies – it is, of course, different in character, institutions, and depth. However, it exists as part of wider regional political processes that is transnational. The common law of human rights in the region is, to borrow an expression from the global administrative law literature, a "democratic striving" undertaking.[58] *Gelman's* critics simply ignore this wider regional process, focusing solely on national electoral democracy. By

57 See generally De Búrca, G. (2007), "Developing democracy beyond the state", *Columbia Journal of Transnational Law* 46(2), 221–278. For a summary of the sceptical arguments, see Wheatley, S. (2011), "A Democratic Rule of International Law", *European Journal of International Law* 22(2), 525–548; Bohman, J. (2005), "From Demos to Demoi: Democracy across Borders", *Ratio Juris* 18(3), 293–314.

58 See Kingsbury, B., Vallejo, R. and Donaldson, M. (2016), "Global Administrative Law and Deliberative Democracy" In: A. Orford and F. Hoffman (eds), *The Oxford Handbook of the Theory of International Law*. Oxford: Oxford University Press, 526–544. The global administrative law literature has tried to unbracket the question of democracy by proposing a bottom-up deliberative "democratic striving" global rule of law. Other efforts focus on other possibilities for democracy beyond the state, for example, in Cohen, J. and Sabel, C.F. (2005), "Global democracy?", *New York University Journal of International Law and Politcs* 37(4), 763–798.

doing so, they end up depriving the Inter-American Court of its pivotal role as key promoter of a *regional* democracy, that complements and reinforces national democracies.

4. Conclusion: Good faith in standard of review definition

In whose Name? puts forward the idea of political embeddedness as a source of democratic legitimacy for international courts. This chapter takes up that question, and explores it in reference to *Gelman*. It argues that the balance between the appropriate standard of review and the democratic pedigree of the primary decision is indeed fundamental for the democratic legitimacy of the IACtHR. Yet, such democratic balancing needs to occur in reference to a regional (and not solely national) process of democratization, in which the Inter-American community of human rights practice plays a central role.

Part of the discussion in this chapter builds on an open recognition of the indeterminacy of human rights law. Such indeterminacy creates a deep link between adjudication and the political process, which in turn feeds back to the determination of the appropriate standard of review. The Inter-American Court is reluctant to underscore such indeterminacy, and is consequently reluctant to accept the contingency of certain legal outcomes over others. I argued in this chapter, in descriptive mode, that such reluctance is not surprising, as that is what courts often do when facing open-ended texts. In the context of *Gelman*, it is therefore not surprising that the Inter-American Court presented its non-deference stance as the only right legal answer to a difficult question.

Nevertheless, the normative question does emerge: how open should the Inter-American Court be when considering the tradeoffs of deference to the primary decision-maker? One alternative is to be aware of human rights indeterminacy, and still act as if a strict non-deferential stance is the only legal option available – for example, by deploying a "non-decidable" issue kind of argument. This is, though, a bad faith answer, and risks encouraging other actors of the community of practice to engage in bad faith interpretations of human rights texts, because they know that the Court's answer is contingent, and thus will act accordingly. This scenario would be characterized by a hermeneutics of suspicion, that seems undesir-

able in the region.[59] The Inter-American Court should develop a vocabulary that allows it to ponder the democratic pedigree of primary decisions transparently, without seeing its hands completely tied by domestic electoral processes. To that effect, the notion of *regional* democratization as correlation to a *regional* standard of review seems a useful starting point to unpack the Court's contribution to achieve the democracy we *want*, and not only to defend the democracy we already *have* in the region.

59 See Kennedy, D. (2014), "The hermeneutic of suspicion in contemporary American legal thought", *Law and Critique* 25(2), 91–139. Kennedy, against what is suggested in this chapter, in fact defends a certain measure of bad faith regarding deference and the appropriate standard of review. See Kennedy, *supra* note 47, 53–56.