

Spring 2011

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William W. Berry III

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### Recommended Citation

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## REPUDIATING DEATH

WILLIAM W. BERRY III\*

*In recent years, three Supreme Court Justices, Powell, Blackmun, and Stevens, have all called for the abolition of the death penalty, repudiating their prior approval of the use of capital punishment. This Article conceptualizes these reversals not as normative shifts on the morality of capital punishment, but instead as shifts in the Justices' views concerning their own need to exercise judicial restraint towards the states with respect to the death penalty.*

*Two separate decisions comprise their abandonment of judicial restraint. First, Justices Powell, Blackmun, and Stevens all acquiesce to the decision of the Court to use the Eighth Amendment to regulate the states' administration of capital punishment. Later, each of the three Justices separately advocates interpreting the Eighth Amendment to prohibit the states' use of the death penalty entirely. This Article argues that both of these decisions to abandon deference to the states reflect, on the part of Justices Powell, Blackmun, and Stevens, a diminishing view of the Court's duty to exercise judicial restraint with respect to state legislatures and their use of the death penalty.*

*In addition to explaining why their respective rejections of the death penalty were institutional (and not moral) choices, this Article argues that these repudiations were the inevitable consequence of the initial decision to use the Eighth Amendment to regulate the death penalty. The experience of these Justices and the Court over the past thirty-five years demonstrates the extreme difficulty in interpreting and applying the Eighth Amendment in a manner that ensures that states' administration of the death penalty is fair and non-arbitrary. When one premises his support of capital punishment*

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\* Assistant Professor of Law, University of Mississippi. D.Phil. Candidate, University of Oxford (UK). J.D., Vanderbilt University; M.Sc., University of Oxford; B.A., University of Virginia. The author would like to thank Jack Nowlin, Marc DeGirolami, Vincent Chaio, Vera Bergelson, and the participants in a recent Law & Society Conference for their helpful comments and suggestions during the early stages of this project. In addition, the author would like to thank Abbie Eason, Bradley Ellison, Surya Gunasekera, Matthew Macaw, Kiger Sigh, Ali Wren, and Thomas Leitner for their capable research assistance on the Article. Finally, the author would like to thank the editors of the *Journal of Criminal Law & Criminology* for their outstanding assistance in preparing this Article for publication.

*upon the notion that the application of the Eighth Amendment can achieve these goals, as Justices Powell, Blackmun, and Stevens did, the futility of trying to correct the myriad of problems with the states' use of the death penalty leads to the conclusion that no fruitful remedy exists other than abolishing capital punishment.*

## I. INTRODUCTION

"In order to learn, one must change one's mind."

—Orson Scott Card

It is a rare occurrence for a Supreme Court Justice to reverse his or her stance on a particular issue. And yet, that is what has happened with three Justices' views as to the use of capital punishment in the United States. All three had voted to uphold capital punishment as constitutional under the Eighth Amendment beginning in the 1970s, and one by one, most recently in 2008, each concluded that capital punishment should be abolished after twenty years of deciding capital cases on the United States Supreme Court.<sup>1</sup>

First, there was the repudiation of the use of the death penalty by Justice Lewis Powell, who dissented in *Furman v. Georgia*,<sup>2</sup> voted with the three-Justice plurality in *Gregg v. Georgia*,<sup>3</sup> and authored the majority opinion in *McCleskey v. Kemp*.<sup>4</sup> During a conversation with his former law clerk John Jeffries in the summer of 1991, retired Justice Powell was asked whether he would change his vote in any prior case.<sup>5</sup> Their conversation went as follows:

"Yes, *McCleskey v. Kemp*."<sup>6</sup>

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<sup>1</sup> As explained below, both Justices Blackmun and Powell initially rejected the application of the Eighth Amendment to capital punishment in 1972, and Justice Stevens voted to uphold the constitutionality of the death penalty in 1976. Justice Powell rejected use of the death penalty in its entirety after his retirement in 1991, Justice Blackmun rejected it in 1994, and Justice Stevens rejected it in 2008.

<sup>2</sup> 408 U.S. 238 (1972). *Furman* held that the death penalty violated the Eighth Amendment because its application was so arbitrary as to constitute "cruel and unusual" punishment, temporarily abolishing its use in the United States. See discussion *infra* Parts II and III.

<sup>3</sup> 428 U.S. 153 (1976). *Gregg* held that punishment of death for the crime of murder did not, under all circumstances, violate the Eighth and Fourteenth Amendments, reinstating the use of the death penalty. See discussion *infra* Parts II and III.

<sup>4</sup> 481 U.S. 279 (1987). *McCleskey* upheld the death penalty even though social science studies demonstrated racial bias in the administration of the death penalty, namely based on the race of the victim. *Id.* at 313.

<sup>5</sup> This conversation was recorded for a biography of Justice Powell that Jeffries wrote. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994).

<sup>6</sup> Ironically, *McCleskey* had only been decided four years prior (in 1987) to Justice Powell's repudiation of capital punishment. *McCleskey*, 481 U.S. at 279.

“Do you mean you would now accept the argument from statistics?”

“No, I would vote the other way in any capital case.”

“In *any* capital case?”

“Yes.”

“Even in *Furman v. Georgia*?”

“Yes. I have come to think that capital punishment should be abolished.”<sup>7</sup>

Justice Harry Blackmun followed in Justice Powell’s footsteps in 1994, when he likewise concluded that the death penalty should be abolished. Like Justice Powell, Justice Blackmun had been a dissenter in *Furman*<sup>8</sup> and concurred in *Gregg*.<sup>9</sup> Just weeks before he retired from the Supreme Court in 1994, Justice Blackmun dissented to the denial of certiorari in *Callins v. Collins*, and in doing so, wrote:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants “deserve” to die?—cannot be answered in the affirmative.<sup>10</sup>

As with Justices Powell and Blackmun, Justice John Paul Stevens reached the conclusion that the death penalty should be abolished. Justice Stevens was not on the Court at the time of *Furman*, but joined with Justice Powell in the three-Justice plurality that wrote *Gregg*.<sup>11</sup> Nonetheless, in *Baze v. Rees*,<sup>12</sup> decided in June 2008, Justice Stevens wrote the following in his concurrence:

In sum, just as Justice White ultimately based his conclusion in *Furman* on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.” A penalty with

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<sup>7</sup> See JEFFRIES, *supra* note 5, at 451.

<sup>8</sup> 408 U.S. 238 (1972).

<sup>9</sup> Interestingly, both Justices Blackmun and Stevens dissented from Justice Powell’s opinion in *McCleskey*. See discussions *infra* subparts III.A. and III.B.

<sup>10</sup> *Callins v. Collins*, 510 U.S. 1141, 1145–46 (1994) (dissenting from denial of certiorari) (citation omitted).

<sup>11</sup> See *supra* note 3.

<sup>12</sup> 128 S.Ct. 1520 (2008). The Court in *Baze* held that the risk of improper administration of the first drug did not render the three-drug protocol cruel and unusual under the Eighth Amendment of the Constitution. *Id.*

such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.<sup>13</sup>

It is clear that Justices Powell, Blackmun, and Stevens believe that the *Furman* experiment—that is, the Court’s attempt, beginning in *Gregg*, to remedy the constitutional flaws of capital punishment—has failed. But, there has been no systematic attempt to explore *how* and *why* each Justice reached the same conclusion and the degree to which these rationales relate to each other. This Article attempts to fill that void in several ways.

First, this Article conceptualizes these reversals not as normative shifts on the morality of capital punishment, but instead as shifts in the Justices’ views concerning judicial restraint towards the states with respect to the death penalty.<sup>14</sup>

Two separate decisions comprise the Justices’ abandonment of judicial restraint. Justices Powell, Blackmun, and Stevens first all acquiesce to the decision of the Court to use the Eighth Amendment to regulate the states’ administration of capital punishment. Later, each of the three Justices separately advocates interpreting the Eighth Amendment to prohibit the states’ use of the death penalty entirely. This Article argues that both of these decisions to abandon deference to the states reflect, on the part of Justices Powell, Blackmun, and Stevens, a diminishing view of the Court’s duty to exercise judicial restraint with respect to state legislatures and their use of the death penalty.

In addition to explaining why their respective rejections of the death penalty were institutional (and not moral) choices, the Article argues that these repudiations were the inevitable consequence of the initial decision to use the Eighth Amendment to regulate the death penalty. The experience of these Justices and the Court over the past thirty-five years demonstrates the extreme difficulty in interpreting and applying the Eighth Amendment in a manner that ensures that states’ administration of the death penalty is fair and non-arbitrary. When one premises his support of capital punishment upon the notion that the application of the Eighth Amendment can achieve these goals, as Justices Powell, Blackmun, and Stevens did, the futility of trying to correct the myriad of problems with the states’ use of the death penalty leads to the conclusion that no fruitful remedy exists other than abolishing capital punishment.

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<sup>13</sup> *Id.* at 1551.

<sup>14</sup> *See infra* Part II. As explained in Part II, “judicial restraint” refers to the role of the Court in interpreting the constitution and the degree to which it defers to state legislative action. Here, in the capital context, the three Justices slowly abandoned their initial deferential approaches, finding the Constitution to apply to, regulate, and ultimately forbid the use of capital punishment.

Part II of the Article outlines the Court's doctrines of judicial restraint and frames the two separate decisions to abandon judicial restraint in the context of the Eighth Amendment. Part III traces the two shifts in each Justice's conception of judicial restraint: (1) the shift from a view of complete deference to the states' use of the death penalty to one of regulating its use, and (2) the shift from regulating the states' use of the death penalty to a view that the Court should abolish the use of the death penalty by the states altogether. Finally, Part IV explains why the conclusion that the death penalty should be abolished was an inevitable consequence of the Justices' initial decision to constitutionalize the death penalty.

## II. JUDICIAL RESTRAINT IN CAPITAL CASES

"For nowadays, restraint gets you friends, honesty gets you hated."

—Terence

### A. THE PRINCIPLE OF JUDICIAL RESTRAINT

Since *Marbury v. Madison*<sup>15</sup> established that the Supreme Court had the primary responsibility of interpreting the Constitution, the Court has grappled with the concept of judicial restraint.<sup>16</sup> The Court has been

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<sup>15</sup> 5 U.S. (1 Cranch) 137 (1803). The scholarship on the role of the Supreme Court with respect to state legislatures is an extensive body of literature, as is the scholarship addressing the various competing methods of constitutional interpretation. See, e.g., Paul D. Carrington & Roger C. Crampton, *Judicial Independence In Excess: Reviving The Judicial Duty Of The Supreme Court*, 94 CORNELL L. REV. 587 (2009); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828 (1999); Benjamin C. Mizer, *The Bureaucratic Court*, 105 MICH. L. REV. 1301 (2006); see also Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959–2001*, 29 LAW & SOC. INQUIRY 127 (2004); David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373 (1990); Willard C. Shih, *Assisted Suicide, the Due Process Clause and "Fidelity In Translation"*, 63 FORDHAM L. REV. 1245 (1995).

<sup>16</sup> For purposes of this Article, the concept of "judicial restraint" is limited to the ways in which Justices Powell, Blackmun, and Stevens refer to it in the Eighth Amendment context. See discussion *infra* in Part III. It is worth noting that the use of the phrases "judicial activism" and "judicial restraint," have been used in a variety of different ways. Indeed, judicial restraint has been characterized as a "contestable concept open to a variety of definitions." Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT 271, 274 (2005); see also Matthew J. Franck, *Depends on What the Meaning of Judicial Activism Is*, NAT'L REV. ONLINE (Sept. 13, 2006), <http://nationalreview.com/search/> (search for "Matthew Franck" under date 9/13/06) (arguing that activism can be pretty neutrally defined as the wrongful use of power we call judicial review). Some have tried to resuscitate these terms by defining their various meanings, see Keenan Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 CALIF. L. REV. 1441 (2004) (describing the various derogatory connotations of "judicial activism," all of which involve judges improperly usurping power properly belonging to

hesitant, in theory, to interpret the Constitution in such a way as to substitute its own judgment for that of the state legislatures or the Congress, particularly when applying open-ended and ambiguous constitutional language.<sup>17</sup> In its cases, the Court has articulated several canons of interpretation that counsel against both constitutionalizing an issue in the first place and against deciding constitutional questions unless it is absolutely necessary to do so.<sup>18</sup>

Thus, despite the presence of the Supremacy Clause and the holding of *Marbury*, the Supreme Court has placed value on the concept of judicial restraint in its application of the Constitution to state and federal statutes.<sup>19</sup> Justice Black perhaps best summarized this sentiment in his *Griswold v. Connecticut* dissent:

While I completely subscribe to the holding of *Marbury v. Madison* and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct."<sup>20</sup>

In other words, at least for purposes of this Article, judicial restraint means interpreting the Constitution in such a way so as not to prohibit the exercise of power by state legislatures unless such an exercise clearly contravenes the Constitution.<sup>21</sup> Accordingly, this Article considers judicial

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other democratic entities, and trying to propose a series of different types of "activism" to give the term meaning), or trying to distinguish between various types of activism, see Caprice Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567 (2007); see also Lori A. Ringhand, *The Rehnquist Court: A "By The Numbers" Retrospective*, 9 U. PA. J. CONST. L. 1033 (2007) (using a statistical analysis to argue that the Rehnquist Court was more activist than its predecessors).

<sup>17</sup> In practice, of course, the Court often applies the Constitution in such a way as to usurp power from the states or the Congress in the name of applying the Constitution, but its opinions nonetheless often discuss the value of the Court exercising restraint.

<sup>18</sup> See, e.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

<sup>19</sup> U.S. CONST., art. VI, cl. 2.

<sup>20</sup> 381 U.S. 479, 513 (1965) (Black, J., dissenting) (citation omitted).

<sup>21</sup> Judicial restraint as it is used here can encompass (but does not have to) various methods constitutional interpretation, including interpreting the constitution with fidelity to the "original" meaning of the Constitution ("originalism"), with fidelity to the "plain" meaning of the text of the Constitution ("textualism"), and interpreting the Constitution consistent with prior interpretations by the Court ("stare decisis"). See, e.g., Andrew M. Jacobs, *God Save This Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric*, 63 U. CIN. L. REV. 1119, 1178 n.320 (1995); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 52

restraint in the manner that Powell, Blackmun, and Stevens do in the capital context—only with reference to either the decision to use the Constitution to regulate the exercise of power by state legislatures or the decision to prohibit such an exercise altogether.<sup>22</sup>

Further, the concept of judicial restraint requires the Justices to put aside their own political views when assessing the constitutionality of a state statute. The concern, of course, is that Justices will use various constitutional interpretive methods as a pretext for overriding the will of the majority, as expressed through the state legislatures, where the Justice has a philosophical or moral (as opposed to constitutional) problem with the statute.<sup>23</sup>

#### B. JUDICIAL RESTRAINT AND THE EIGHTH AMENDMENT: AN OVERVIEW

In the Eighth Amendment context, the concept of judicial restraint as herein construed refers to two thresholds. The first is the decision to constitutionalize the death penalty in the first place, and make its use by the states subject to constitutional restrictions (as interpreted by the Court). In other words, the first opportunity for the Justices to restrain themselves is to avoid applying the Eighth Amendment to capital punishment at all, and allow state legislatures alone to regulate its use (and choose to allow or disallow it) entirely.<sup>24</sup>

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(2001) (noting that “if one believes in the determinacy of the underlying legal texts” then judicial restraint may mean “fidelity to the texts themselves”).

<sup>22</sup> Thus, this Article does not consider the use of judicial restraint in the context of the Court’s restrictions on Congressional or federal executive power.

<sup>23</sup> There is no dearth of modern constitutional law scholarship that attempts to address the countermajoritarian difficulty, that is, to explain why, notwithstanding our commitment to rule by the people, it is permissible for judges to be innovators in matters of social policy. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AND THE BAR ON POLITICS 17–20* (Yale University Press 1986) (1962); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (seeking to explain how the innovations of the Warren Court were consistent with a basic commitment to democracy). For an historical perspective, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road To Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L. J. 153 (2002).

<sup>24</sup> Indeed, prior to *Furman v. Georgia*, this had been the Court’s practice for almost two hundred years, as it had never considered the constitutionality of the death penalty under the Eighth Amendment.



Once this first threshold of restraint is crossed and the Court decides to apply the Eighth Amendment to capital punishment, the Court is in the position of regulating its use under the Eighth Amendment, applying the open-ended concept of “cruel and unusual punishment” to determine which capital practices are permissible and which are unconstitutional.<sup>25</sup>

The second threshold is the decision to prohibit the use of the death penalty altogether. The exercise of restraint here would be to allow the states to continue to modify their capital punishment schemes and statutes to comply with the requirements of the Eighth Amendment.<sup>26</sup> The decision to cross the second threshold means deciding that the states no longer can use the death penalty.

While there are varying levels of restraint in between these two thresholds, the concept of judicial restraint here refers primarily to the decision to cross each of these thresholds. This Article thus is conceptualizing the parallel decisions of Justices Powell, Blackmun, and Stevens to cross these two thresholds and abandon their prior positions of restraint as to each one.

As explained in more detail below, the use of the concept of judicial restraint by Justices Powell and Blackmun, and later Justice Stevens, as a reason for not crossing each of these thresholds serves as the source of this conceptualization. Indeed, the Justices (at least Powell and Blackmun)<sup>27</sup> initially believed that the Court should not cross the first threshold, that is, apply the Constitution to the death penalty at all.<sup>28</sup> Over time, however, each of the three Justices has advocated crossing not only the first, but also the second threshold by holding that the Constitution bars the use of the death penalty entirely.<sup>29</sup>

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<sup>25</sup> See U.S. CONST. amend. VIII.

<sup>26</sup> Interestingly, many believed at the time that it was decided that *Furman v. Georgia* crossed both thresholds in its interpretation of the Eighth Amendment, but the Court proved otherwise in *Gregg v. Georgia* four years later. See Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1 (2007).

<sup>27</sup> Justice Stevens was not yet on the Court at that time. Based on his initial decisions when he first was appointed to the Court, however, one can infer that he would have held similar initial views to those of Justice Blackmun and Justice Powell. See *infra* subpart III.C.

<sup>28</sup> See *infra* Part III.

<sup>29</sup> *Id.*

## III. THE ABANDONMENT OF JUDICIAL RESTRAINT

“When you have faults, do not fear to abandon them.”

—Confucius

Before exploring the evolving positions of each of the three Justices on matters related to capital punishment, it is important to note that none of the three has ever based their holdings in capital cases on normative (moral or philosophical) grounds. Unlike Justices Brennan and Marshall on the left, or Justices Rehnquist and Burger on the right, these three Justices have sought to apply the constitutionality of capital punishment not on ideological grounds but instead on pragmatic ones.<sup>30</sup> Indeed, the question for them is not whether capital punishment *ought* to be applied in the philosophical sense, but instead whether it can be applied even-handedly and if so, *how* the criminal justice system should be structured, including adding necessary safeguards, to insure that the *process* is equitable.<sup>31</sup> As we will see, it is in part the absence of a broader ideological, normative commitment to the death penalty on the part of Justices Powell, Blackmun, and Stevens that ultimately provides the freedom to change their respective views.

From the ratification of the Constitution in 1791 until the 1960s, the constitutionality of capital punishment in the United States was never addressed by the Supreme Court.<sup>32</sup> This is unsurprising as the use of capital punishment was widespread in the United States in the eighteenth and nineteenth centuries.<sup>33</sup> Further, the plain language of the Constitution seemed to presume that capital punishment would be used. The Fifth Amendment to the United States Constitution provides that:

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<sup>30</sup> See discussion, *infra*, subparts III.A, III.B, and III.C.

<sup>31</sup> I have argued elsewhere that the perception of the equity and fairness of capital procedures plays a significant role in the degree to which the death penalty is actually utilized in the United States. See William W. Berry III, *American Procedural Exceptionalism*, 17 CORNELL J.L. & PUB. POL’Y 481 (2008).

<sup>32</sup> See John F. Stinneford, *The Original Meaning of ‘Unusual’: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008); see also Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969) (arguing “cruel and unusual” was a kind of “constitutional ‘boilerplate’”).

<sup>33</sup> See J. Caleb Rackley, *Legal Ethics in Capital Cases: Looking for Virtue in Roberts v. Dretke and Assessing the Ethical Implications of the Death Row Volunteer*, 36 ST. MARY’S L.J. 1119 (2005); Joanna M. Shepherd, *Murders of Passion, Execution Delays and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283 (2004); Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396 (2005).

No person shall be held to answer for a *capital*, or otherwise infamous crime. . . nor shall any person be subject for the same offense to be twice put in *jeopardy of life* or limb. . . nor be *deprived of life*, liberty, or property, without due process of law. . .<sup>34</sup>

Similarly, the Fourteenth Amendment, in adopting the due process language of the Fifth Amendment, provides: “[N]or shall any State *deprive any person of life*, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>35</sup>

These constitutional provisions plainly allow for the possibility that federal and state governments may choose to use capital punishment; some crimes will be “capital” and the government, whether state or federal, may deprive its citizens of life after according them the requisite due process of law. It does not address the degree to which the Constitution may be used, if at all, to regulate the use of capital punishment, but instead merely implies the potential availability of the death penalty.

In the landmark case of *Furman v. Georgia*, the United States Supreme Court held five to four that the death penalty, as applied by the various states, constituted “cruel and unusual” punishment in violation of the Eighth Amendment.<sup>36</sup> As discussed below, Justices Powell and Blackmun both dissented from the majority opinion largely on grounds of judicial restraint—that is, neither believed that the problems identified with the capital system in Georgia were significant enough to permit the Justices to interpret the Constitution to prohibit the death penalty.<sup>37</sup> Justice Powell found that the references to capital punishment in the text of the Constitution,<sup>38</sup> the intent of the Framers, and the precedents of the Court all cautioned against interpreting the Eighth Amendment in a way that precluded the use of the death penalty.<sup>39</sup> Justice Blackmun cited these same reasons as the basis for exercising judicial restraint (and preserving the role of state legislatures) in deciding how and when to use the death penalty.<sup>40</sup> He underscored the importance of such restraint with his own admission that if he were a legislator, he would vote against capital punishment.<sup>41</sup>

When the Supreme Court reinstated the death penalty in *Gregg v. Georgia*, Justice Stevens joined Justices Powell and Stewart as the

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<sup>34</sup> U.S. CONST. amend. V (emphasis added).

<sup>35</sup> U.S. CONST. amend. XIV (emphasis added).

<sup>36</sup> 408 U.S. 238 (1972).

<sup>37</sup> *Id.* at 464 (Powell, J., dissenting). As mentioned above, Justice Stevens was not yet a member of the Supreme Court.

<sup>38</sup> *Id.* at 417–20.

<sup>39</sup> *Id.* at 431.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 406 (Blackmun, J., dissenting).

triumvirate that wrote the controlling plurality opinion.<sup>42</sup> Their language in *Gregg* made clear that the principle of judicial restraint remained a significant consideration in the application of the Eighth Amendment to state statutes:

Of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power . . . . But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators . . . . Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.<sup>43</sup>

Justices Stevens, Powell, and Stewart concluded that “in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity . . . . [A] heavy burden rests on those who would attack the judgment of the representatives of the people.”<sup>44</sup> Thus, in the context of capital punishment, the Court in *Gregg* concluded that its role in applying the Eighth Amendment was one of deference to the state legislatures, with certain limitations.<sup>45</sup>

The Court’s role, then, in applying the Eighth Amendment was one of restraint, in which states could remedy their constitutional defects and legislative actions, and for the most part be respected. How then did Justices Powell, Blackmun, and Stevens all conclude that the Court should relinquish this position and ban capital punishment? As the cases demonstrate, each Justice’s fidelity to the concept of judicial restraint began to wane over time as their confidence in the ability of the states to carry out capital trials in a fair and non-arbitrary way began to dissipate.

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<sup>42</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976). Justice Blackmun adhered to his *Furman* position that the Court should not interfere with the ability of states to use the death penalty, and thus concurred in the decision of the Court in *Gregg*. *Id.*

<sup>43</sup> *Id.* at 174–75.

<sup>44</sup> *Id.* at 175.

<sup>45</sup> These of course included the provision of safeguards such as aggravating and mitigating circumstances, proportionality review by state supreme courts, bifurcated trials, and a prohibition against the use of the mandatory death penalty. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

## A. JUSTICE POWELL

*1. Deferring to Death*

Unlike some of his colleagues,<sup>46</sup> Justice Lewis Powell did not seek to advance a normative position in favor of or against the death penalty.<sup>47</sup> Indeed, in his career before becoming a Justice, Powell felt that “the low numbers of people even sentenced to death were proof that [capital punishment] was not an issue of ‘first importance.’”<sup>48</sup> When faced with the issue in *McGautha* and *Furman*, Justice Powell approached the constitutionality of capital punishment as a pragmatist who prided himself on judicial restraint, particularly in encroaching on the powers conferred upon state and federal legislatures.<sup>49</sup> As one of the four dissenters in *Furman*, Justice Powell found no basis for finding the death penalty unconstitutional.<sup>50</sup> Writing separately, Justice Powell emphasized that “whatever punishments the Framers of the Constitution may have intended to prohibit under the ‘cruel and unusual’ language, there cannot be the slightest doubt that they intended no absolute bar on the Government’s authority to impose the death penalty.”<sup>51</sup> Specifically, Justice Powell wrote that “the Court is not free to read into the Constitution a meaning that is plainly at variance with its language. Both the language of the Fifth and Fourteenth Amendments and the history of the Eighth Amendment confirm beyond doubt that the death penalty was considered to be a constitutionally

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<sup>46</sup> Indeed, Jeffries writes, “On Powell’s first day on the Court, [Justice] Marshall joked, ‘Do you have your capital punishment opinion written yet?’” JEFFRIES, *supra* note 5, at 408; see also BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 205 (1979) (reporting the same exchange).

<sup>47</sup> As previously stated, Justice Powell reserved his decision on capital punishment to the Constitution and restraint to state legislators,

Not only had [Justice Powell] not written an opinion; he actually did not have one. He had never been involved in a capital case and had never really thought about the issue . . . [i]n truth, Powell was neither enthusiastically for nor categorically against capital punishment. He instinctively recoiled from extreme positions, particularly those nonnegotiable ideological commitments that left not room for compromise or debate. This was especially true of capital punishment . . . Powell not only rejected the extremes on either side; he shied away from the debate they dominated. Spared by experience from the necessity of coming to grips with capital punishment and temperamentally disinclined to enter a question so rife with rage and conflict, Powell came to the Court without a fixed view.

JEFFRIES, *supra* note 5, at 408–09.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*; see also *Furman v. Georgia*, 408 U.S. 238 (1972); *McGautha v. California*, 402 U.S. 183 (1971).

<sup>50</sup> *Id.*

<sup>51</sup> *Furman*, 408 U.S. at 419 (Powell, J., dissenting).

permissible punishment.”<sup>52</sup> Further, given the principle of stare decisis, Justice Powell opposed the abolition of the death penalty in *Furman* because “those who today would have this Court undertake the absolute abolition of the death penalty also must reject the opinions of other cases stipulating or assuming the constitutionality of capital punishment.”<sup>53</sup>

While Justice Powell was certainly not oblivious to the concerns of the majority relating to the use of the death penalty in *Furman*, he nonetheless believed that such concerns did not warrant abolition.<sup>54</sup> He explained that “[w]hile there might be specific cases in which capital punishment would be regarded as excessive and shocking to the conscience of the community, it can hardly be argued that the public’s dissatisfaction with the penalty in particular cases would translate into a demand for absolute abolition.”<sup>55</sup> Even though “this criminal sanction [the death penalty] falls more heavily on the relatively impoverished and underprivileged elements of society,” Justice Powell rationalized that “[t]he ‘have-nots’ in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens.”<sup>56</sup> For Justice Powell, “[t]his is, indeed, a tragic byproduct of social and economic deprivation, but it is not an argument of constitutional proportions under the Eighth or Fourteenth Amendment.”<sup>57</sup> And, “[t]he same discriminatory impact argument could be made with equal force and logic with respect to those sentenced to prison terms.”<sup>58</sup>

In particular, Justice Powell emphasized the importance of restraint on issues such as substantive due process and capital punishment to state legislatures. He then chastised the majority’s decision for overreaching in its use of authority. He wrote that the majority’s ruling was “the very sort of judgment that the legislative branch is competent to make and for which the judiciary is ill-equipped.”<sup>59</sup> Justice Powell concluded, “the indicators most likely to reflect the public’s view—legislative bodies, state referenda, and the juries which have the actual responsibility—do not support the contention that evolving standards of decency require total abolition of

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<sup>52</sup> *Id.* at 420.

<sup>53</sup> *Id.* at 424.

<sup>54</sup> *Id.* Indeed, he recognized the problems identified by the majority, but did not find those to be significant enough to warrant “constitutional” intervention by the Court. *Id.*

<sup>55</sup> *Id.* at 445.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 447.

<sup>59</sup> *Id.* at 418.

capital punishment . . .” and that “[t]he assessment of popular opinion is essentially a legislative, not a judicial function.”<sup>60</sup>

This second threshold to cross (in abolition via the Constitution) is important precisely because of its apparent permanency (notwithstanding the Court reversing itself). In other words, once the Court decides that the Constitution bars certain action by state legislatures, there is no opportunity for the state legislatures to cure any constitutional defects of such an action without the Court reversing or modifying its application of the Constitution. Justice Powell clearly grasped this, as he explained in his *Furman* dissent:

It is important to keep in focus the enormity of the step undertaken by the Court today. Not only does it invalidate hundreds of state and federal laws, it deprives those jurisdictions of the power to legislate with respect to capital punishment in the future, except in the manner consistent with the cloudily outlined views of those Justices who do not purport to undertake total abolition . . .

It seems to me that the sweeping judicial action undertaken today reflects a basic lack of faith and confidence in the democratic process. Many may regret, as I do, the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness. Many might decry their failure either to abolish the penalty entirely or selectively, or to establish standards for its enforcement. But impatience with the slowness, or even unresponsiveness, of legislatures is no justification for judicial intrusion upon their historic powers.<sup>61</sup>

In *Gregg* and its companion cases decided the same day, Justice Powell was part of the three-Justice plurality (with Justices Stevens and Stewart) that wrote the controlling opinions in the cases.<sup>62</sup> As described above, the plurality reinstated the death penalty under the Eighth Amendment in *Gregg*, finding that while the Court could place restrictions on the use of capital punishment, the revised Georgia scheme provided enough safeguards to cure its prior constitutional defects.<sup>63</sup> Similarly, in *Proffitt v. Florida*, a Powell plurality upheld the Florida capital system on similar grounds to *Gregg*.<sup>64</sup> After the Florida legislature’s adoption of the

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<sup>60</sup> *Id.* at 442–43.

<sup>61</sup> *Id.* at 461–65.

<sup>62</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976); *see Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). These cases were decided a mere four years after *Furman v. Georgia*.

<sup>63</sup> *Gregg*, 428 U.S. at 198.

<sup>64</sup> *Proffitt*, 428 U.S. 242. As the Court explained, the basic difference between the Florida system and the Georgia system was that, in Florida, the sentence was determined by the trial judge rather than by the jury, which did not create a constitutional problem. *Id.* at 252. It continued: “it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.” *Id.*

new capital scheme, the Court indicated that it was constitutional because it was no longer true that there was “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”<sup>65</sup> Likewise, in *Jurek v. Texas*, the Court upheld the Texas capital scheme because it provided, at least in theory, a way to narrow the class of murderers for whom the death penalty is available.<sup>66</sup>

Justice Powell’s decisions in *Gregg* and its companion cases were an abandonment of his *Furman* position insofar as he agreed to go along with the Court’s decision to constitutionalize capital punishment.<sup>67</sup> This shift in Justice Powell, crossing the threshold that the Supreme Court could now regulate capital punishment, is evident from his votes in these cases as part of the three-Justice plurality that wrote the controlling opinions.

Equally important, these cases defined *when* the Court should intervene and the basis for it doing so. As explained by Justices Stewart, Stevens, and Powell in *Woodson v. North Carolina*,<sup>68</sup> “[t]he Eighth Amendment stands to assure that the State’s power to punish is ‘exercised within the limits of civilized standards.’”<sup>69</sup> As a result, “[c]entral to the application of the Eighth Amendment is a determination of contemporary standards regarding the infliction of punishment . . . .”<sup>70</sup> Further, “[t]he two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society. . . [are] jury determinations and legislative enactments . . . .”<sup>71</sup>

In other words, the initial justification for crossing the first threshold of judicial restraint, and thereby ending the complete autonomy of the state

<sup>65</sup> *Id.* at 254.

<sup>66</sup> *Jurek*, 428 U.S. 268–71. To obtain a death sentence in Texas, the State is required to prove beyond a reasonable doubt that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” *Id.* at 269.

<sup>67</sup> By contrast, Justice Blackmun remained firm to his *Furman* view that the Court ought not to use the Eighth Amendment to regulate the states’ administration of the death penalty. *Id.* at 279 (Blackmun, J., concurring). See discussion *infra*, subpart III.B.

<sup>68</sup> 428 U.S. 280 (1976). In *Woodson*, the plurality of Justices Powell, Stevens, and Stewart voted to strike down the legislative scheme in North Carolina that provided for a mandatory death sentence for murder.

<sup>69</sup> *Id.* at 288 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

<sup>70</sup> *Id.* at 280. The concept of “evolving standards of decency” came from *Trop*, a non-capital case where the Court held that a penalty of loss of citizenship for desertion was unconstitutional—a “cruel and unusual” punishment in violation of the Eighth Amendment. *Trop*, 356 U.S. at 103. For a discussion of the inherent weaknesses with the “evolving standards of decency” doctrine, see William W. Berry III, *Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of “Death is Different” Jurisprudence*, 28 PACE L. REV. 15 (2007).

<sup>71</sup> *Woodson*, 428 U.S. at 293.



legislatures, was the availability of proxies for public opinion.<sup>72</sup> As a result, it was acceptable to abandon judicial restraint and regulate the use of capital punishment if the primary reason for regulation was majoritarian opinion vis-à-vis the juries or the legislatures themselves.

Thus, Justice Powell crossed the threshold of constitutionalizing capital punishment, but did so where the assessment of state statutes rested on the consensus among state legislatures and juries. The Court tempered the judicial restraint lost by declaring one state's capital statutory scheme unconstitutional by the imputation of the practices of a majority of other states.<sup>73</sup> The Court then was not substituting its political judgment for that of the states; rather, it was using the Constitution, via the evolving standards of decency, to eliminate "outliers."<sup>74</sup>

In *Woodson*, the Court relied on the practices of other states to justify its declaration that the mandatory death penalty was unconstitutional.<sup>75</sup> It explained that

legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency. The consistent course charted by the state legislatures and by Congress since the middle of the past century demonstrates that the aversion of jurors to mandatory death penalty statutes is shared by society at large.<sup>76</sup>

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<sup>72</sup> Interestingly, the Court began to slide away from this one year later in *Coker v. Georgia*, when it emphasized that the Court's "own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 433 U.S. 584, 598 (1977).

<sup>73</sup> See Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004).

<sup>74</sup> Ultimately, this leads to a practice of counting states to determine what the contemporary standard of decency is. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (holding executions of people under the age of eighteen at the time the crime is committed is "cruel and unusual" punishment under the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding executions of mentally retarded people constitute "cruel and unusual" punishment under the Eighth Amendment). This approach has been harshly criticized by others on the Court. See, e.g., *Atkins*, 536 U.S. at 337–38 (Scalia, J., dissenting) ("Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.")

<sup>75</sup> *Woodson*, 428 U.S. at 298. Part of this inquiry also includes surveying the historical practices in assessing "contemporary standards." In *Woodson*, for instance, the Court explained that "[t]he history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid." *Id.* at 292–93.

<sup>76</sup> *Id.* at 294–95. Similarly, the Court held that Louisiana's mandatory death penalty statute was unconstitutional. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

Finally, it is worth noting that the Powell plurality also adopted additional guiding principles as to the constitutionality of state capital statutes under the Eighth Amendment.<sup>77</sup> The Court established these limits not from any objective study of state legislatures, but instead from its own subjective determinations.<sup>78</sup>

First, the Court found the mandatory death penalty statute unconstitutional because it was likely to encourage juries to act lawlessly.<sup>79</sup> As a result, “it does not fulfill *Furman’s* basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.”<sup>80</sup>

Second, and more importantly, *Woodson* articulated the requirement that the particularized aspects of a defendant’s case be considered at sentencing such that an individualized determination is made.<sup>81</sup> Statutory schemes thus must allow the consideration of the facts and circumstances surrounding the individual defendant.<sup>82</sup>

## 2. Regulating Death

The Court embarked on the process of regulating the use of the death penalty among the various states by using evolving standards of decency and the contemporary state legislative trend, combined with its own judgment. In such cases, Justice Powell voted on several occasions to restrict certain state practices, but all within the broader shadow of the consensus of the other states.<sup>83</sup> Even on such occasions, however, he was

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<sup>77</sup> *Woodson*, 428 U.S. at 293.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 303.

<sup>81</sup> *Id.*

<sup>82</sup> This principle was extended to prevent states from limiting the mitigating evidence that a defendant could put on at sentencing. See *Lockett v. Ohio*, 438 U.S. 586 (1978) (striking down Ohio’s statute for failure to allow defendant unfettered ability to put on mitigating evidence as required by *Woodson’s* holding that each defendant is entitled to an individualized determination).

<sup>83</sup> This is not surprising as Justice Powell was known for being hesitant about the Court usurping power on social issues. As explained by Judge J. Harvie Wilkinson:

Perhaps the most distinctive feature of the Powellian approach, however, is its emphasis on the judicial role in facilitating the development of consensus over potentially divisive social issues. Our history is, unfortunately, replete with judicial attempts to preempt social conflict through constitutional decree—attempts that have all too often aggravated such conflict rather than ameliorated it. The Powell approach sought to ensure that the most volatile issues in our society did not quickly achieve definitive outcomes in the courts. He wished both to leave open the channels of judicial debate and to ensure that the “losers” in court (if they so recognized themselves) took not to the streets but rather to the voting booths and to the legislatures.

hesitant to restrict, any more than necessary, the states' legislative freedom in establishing their capital systems.<sup>84</sup>

In *Coker v. Georgia*, for instance, while agreeing that the death penalty was a disproportionate punishment for the rape committed in the instant case, Justice Powell concurred to express his view that the Court should not foreclose the death penalty for rape in all cases.<sup>85</sup> Citing the majority opinion as one that "ranges well beyond what is necessary" and noting that aggravated rape was not before the Court, Justice Powell argued that it was "therefore quite unnecessary for the plurality to write in terms so sweeping as to foreclose each of the 50 state legislatures from creating a narrowly defined substantive crime of aggravated rape punishable by death."<sup>86</sup> Justice Powell thus believed that:

[f]inal resolution of the question [of whether the death penalty was a disproportionate punishment for aggravated rape] must await careful inquiry into objective indicators of society's "evolving standards of decency," particularly legislative enactments and the responses of juries in capital cases.<sup>87</sup>

While acknowledging that the plurality did engage in such an analysis (finding that almost every state had abolished the death penalty for rape), Justice Powell demonstrated his belief in restraint by emphasizing that

it has not been shown that society finds the penalty disproportionate for all rapes. In a proper case a more discriminating inquiry than the plurality undertakes well might discover that both juries and legislatures have reserved the ultimate penalty for the case of an outrageous rape resulting in serious, lasting harm to the victim. I would not prejudge the issue.<sup>88</sup>

While Justice Powell generally agreed with the Court's application of the evolving standards in cases after *Coker*, he gave no indication that he would ultimately cross the second threshold described above. If anything, the cases toward the end of his tenure would have cautioned against any prediction that he would advocate the abolition of the death penalty by the Court and abandon entirely restraint and deference to state legislatures. No

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J. Harvie Wilkinson III, *The Powellian Virtues in a Polarized Era*, 49 WASH. & LEE L. REV. 271, 273 (1992).

<sup>84</sup> See, e.g., *Booth v. Maryland*, 482 U.S. 496 (1987) (holding that the introduction of victim impact statement at sentencing phase of capital murder trial violated the Eighth Amendment, and Maryland statute was invalid to the extent it permitted consideration of that information); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that a sentence of death for the crime of rape of an adult women was disproportionate to the crime and thus in violation of the Eighth Amendment).

<sup>85</sup> *Coker*, 433 U.S. 584, 601-04 (Powell, J., concurring).

<sup>86</sup> *Id.* at 601-02.

<sup>87</sup> *Id.* at 603.

<sup>88</sup> *Id.* at 604.

case, perhaps, better illustrates his commitment to maintain some level of restraint to state legislatures in capital cases than *McCleskey v. Kemp*.<sup>89</sup>

In *McCleskey*, the issue before the Court was whether “a complex statistical study that indicate[d] a risk that racial considerations enter into capital sentencing determinations prove[d] that petitioner McCleskey’s capital sentence [was] unconstitutional under the Eighth or Fourteenth Amendment.”<sup>90</sup> Justice Powell wrote the opinion for a five-to-four majority that upheld McCleskey’s death sentence despite the overwhelming evidence of racial bias in capital cases found in David Baldus’s study.<sup>91</sup>

Justice Powell’s decision can be explained on the basis that there was a lack of evidence that McCleskey personally had been the victim of racial discrimination.<sup>92</sup> Equally important was the possibility that a Court remedy would enable litigation seeking widespread remedy to such systemic discrimination (and not necessarily just in capital cases).<sup>93</sup>

More broadly, however, Justice Powell’s decision fits with his larger concern for restraint and deference to the state legislatures. First, he pointed out that

[t]here was no evidence then, and there is none now, that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose. Nor has McCleskey demonstrated that the legislature maintains the capital punishment statute because of the racially disproportionate impact suggested by the Baldus study. As legislatures necessarily have wide discretion in the choice of criminal laws and penalties, and as there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment, we will not infer a discriminatory purpose on the part of the State of Georgia.<sup>94</sup>

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<sup>89</sup> 481 U.S. 279 (1987).

<sup>90</sup> *Id.* at 282–83.

<sup>91</sup> *Id.* Interestingly, the bias was based most significantly on the race of the victim. *Id.* at 292. Defendants who killed white victims were more likely to receive the death penalty than those who killed African-American victims. *Id.* at 293. The Baldus study was a statistical study that purported to show a disparity in the imposition of death sentences in Georgia based on the murder victim’s race and, to a lesser extent, the defendant’s race. *Id.* The study was based on over 2,000 murder cases that occurred in Georgia during the 1970s, and involved data relating to the victim’s race, the defendant’s race, and the various combinations of such persons’ races. *Id.* The study indicated that black defendants who killed white victims had the greatest likelihood of receiving the death penalty. *Id.*

<sup>92</sup> Justice Powell stressed that “the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey’s case acted with discriminatory purpose.” *Id.* at 297; see Katherine Barnes, David Sloss, & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death Eligible Cases*, 51 ARIZ. L. REV. 305 (2009); Justin D. Levinson, *Race, Death, and the Complicit Mind*, 58 DEPAUL L. REV. 599 (2009).

<sup>93</sup> Justice Powell wrote, “As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey.” *McCleskey*, 481 U.S. at 318.

<sup>94</sup> *Id.* at 298–99 (citations omitted).

In addition, because Georgia's legislature established a capital system that complied with the constitutional requirements articulated in *Furman*,<sup>95</sup> Justice Powell argued that the presence of racial bias in jury decisions was not an adequate ground for declaring the capital system unconstitutional.<sup>96</sup>

Justice Powell also addressed the issue of jury discretion, citing *Woodson* and highlighting the need to defer to the states on such matters in allowing the exercise of discretion.<sup>97</sup> He explained that while "the power to be lenient [also] is the power to discriminate,"<sup>98</sup> requiring "a capital punishment system that did not allow for discretionary acts of leniency 'would be totally alien to our notions of criminal justice.'"<sup>99</sup> Indeed, wrote Justice Powell,

The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not "plac[e] totally unrealistic conditions on its use."<sup>100</sup>

Beyond expressing his belief that the Court ought to defer to state legislatures on such issues, Justice Powell went further, arguing, in fact, that the state legislature, as opposed to the Court, ought to address such issues in the first instance. He wrote:

McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes . . . . Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."<sup>101</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 308 ("Because McCleskey's sentence was imposed under Georgia sentencing procedures that focus discretion 'on the particularized nature of the crime and the particularized characteristics of the individual defendant,' we lawfully may presume that McCleskey's death sentence was not 'wantonly and freakishly' imposed, and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment.") (internal citations omitted).

<sup>97</sup> *Id.* at 312. This is in stark contrast to the federal sentencing guidelines put in place just three years prior, which sought to minimize discretion in sentencing. See, e.g., William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After Booker and Its Progeny*, 40 CONN. L. REV. 631 (2008) (describing the adoption of the sentencing guidelines).

<sup>98</sup> *McCleskey*, 481 U.S. at 312 (quoting KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 170 (1969)).

<sup>99</sup> *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976)).

<sup>100</sup> *Id.* at 319 (quoting *Gregg*, 428 U.S. at 199 n.50).

<sup>101</sup> *Id.* (internal citations omitted).

### 3. Repudiating Death

As described above, Justice Powell never crossed the second threshold—repudiation of the death penalty—during his time on the Court. After his retirement in 1991, however, Justice Powell continued to work on issues related to the administration of justice in the United States. His work on several committees seeking to improve the administration of capital punishment may have contributed in part to his continued assessment of the subject.<sup>102</sup>

In the end, though, Justice Powell clearly repudiated the death penalty in his interview with his former law clerk John Jeffries, which Jeffries made public.<sup>103</sup> As described above, Justice Powell was asked whether he would change any decision he had made while on the Supreme Court. He said that he would change his decision in *McCleskey*, not just because he now disagreed with the outcome, but more significantly, because he now thought “that capital punishment should be abolished.”<sup>104</sup> This change in opinion completed the reversal from viewing capital punishment as a subject to which the Court ought to defer entirely to state legislatures to one in which the Constitution prohibited states from legislating at all.

In his biography of Justice Powell, Professor John Jeffries attempted to explain Justice Powell’s “shift” in position on capital punishment:

Why then did Powell disagree? Why did he side in the end with Brennan and Marshall rather than with his traditional allies? Why did the man who worked so hard to preserve the constitutionality of the death penalty in *Furman v. Georgia* come twenty years later to renounce it?

The answer lay partly in the bitter education of the cases. From them Powell learned that the death penalty would never be routinely applied. Lawyers would exploit every chance for delay, and judges would be sufficiently beset with doubts to give them frequent opportunity. This much he learned from himself. After fifteen years of capital cases, Powell knew firsthand their deadly hold on the judge’s peace of mind. He knew how hard it was not to take a second, third, or fourth look at rejected claims, how easy it seemed to put the whole thing off for one more hearing, how much courage—or callousness—it took to treat death like any other penalty. Some judges could achieve that emotional distance, but Powell came to believe that the system as a whole would always be plagued by doubt and that doubting itself, it would inspire resentment and contempt. *Equally important was Powell’s declining regard for judicial restraint.*<sup>105</sup>

Thus, according to Jeffries, Justice Powell’s repudiation of the death penalty rested on his view that it could not be fairly applied. Rather than

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<sup>102</sup> JEFFRIES, *supra* note 5, at 451.

<sup>103</sup> *See id.*

<sup>104</sup> *See id.*

<sup>105</sup> *See id.* at 452–53 (emphasis added).

continue to give state legislatures a chance to improve the procedures and add safeguards as the Court had done after *Furman* and throughout its evolving standards of decency jurisprudence, Justice Powell's declining regard for the principle of judicial restraint perhaps sealed his view that the Court ought not to continue down the same tortured path. For Justice Powell, there was no longer a reason to continue to defer to institutions, like state legislatures, that were unable or unwilling to remedy clear defects in the system.<sup>106</sup>

## B. JUSTICE BLACKMUN

Just three years after Justice Powell repudiated the death penalty, Justice Blackmun followed suit during his last term on the Supreme Court in 1994.<sup>107</sup> Like Justice Powell, Justice Blackmun's votes and opinions provide evidence that his reversal rested more on his changing view of the role of the Court vis-à-vis the state legislatures than on his normative view of capital punishment.<sup>108</sup>

### 1. *Deferring to Death*

As indicated previously, Justice Blackmun dissented in *Furman* despite his strong feelings of antipathy for capital punishment.<sup>109</sup> He wrote:

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. . . . Were I a legislator, I would vote against the death penalty. . . .<sup>110</sup>

Although Justice Blackmun personally agreed with the argument of the majority in *Furman* regarding the policy choice to abolish capital punishment, his firm belief in judicial restraint prevented him from joining

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<sup>106</sup> The lack of legislative response to the issues in *McCleskey* may also have played a part in Justice Powell repudiating the death penalty.

<sup>107</sup> See *Callins v. Collins*, 510 U.S. 1141, 1143–59 (1994) (Blackmun, J., dissenting).

<sup>108</sup> Whereas Justice Powell appeared largely agnostic about capital punishment when he arrived on the Court, Justice Blackmun had a strong dislike of capital punishment. Indeed, Justice Blackmun's record as a circuit judge revealed "his deep personal distaste for capital punishment, particularly his concerns about racial disparities in its imposition and his preference for the abolition of the death penalty through legislative and executive action rather than via judicial intervention." TINSLEY E. YARBROUGH, HARRY A. BLACKMUN 96 (2008).

<sup>109</sup> 408 U.S. 238, 405–08 (1976) (Blackmun, J., dissenting).

<sup>110</sup> *Id.* at 405–06.

that opinion.<sup>111</sup> In his *Furman* dissent, Justice Blackmun explained his agreement with the majority's argument:

This, for me, is good argument, and it makes some sense. But it is good argument and it makes sense only in a legislative and executive way and not as a judicial expedient. As I have said above, were I a legislator, I would do all I could to sponsor and to vote for legislation abolishing the death penalty. And were I the chief executive of a sovereign State, I would be sorely tempted to exercise executive clemency as Governor Rockefeller of Arkansas did recently just before he departed from office.<sup>112</sup>

At this point, however, Justice Blackmun would not allow his own personal distaste for capital punishment to interfere with his perceived role on the Court.<sup>113</sup> Instead of imposing his own normative view, Justice Blackmun demonstrated the degree to which he valued judicial restraint. He continued by stating:

Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible.<sup>114</sup>

Justice Blackmun perhaps best summed up the tension between his personal views on capital punishment and his view to his role as a Justice and the corresponding requirement of judicial restraint to state legislatures when he said, "Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and has achieved an end."<sup>115</sup>

This view continued as the Court reinstated the death penalty in *Gregg* and a series of companion cases in 1976. In all five cases decided that day, *Gregg*,<sup>116</sup> *Jurek*,<sup>117</sup> *Proffitt*,<sup>118</sup> *Woodson*,<sup>119</sup> and *Roberts*,<sup>120</sup> Justice Blackmun voted in favor of allowing the death penalty under each of the state statutory schemes. He voted to uphold the mandatory death sentence

<sup>111</sup> See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 113 (2005).

<sup>112</sup> *Furman*, 408 U.S. at 405–06 (Blackmun, J., dissenting).

<sup>113</sup> See *supra* note 106 and accompanying text.

<sup>114</sup> *Furman*, 408 U.S. at 411 (Blackmun, J., dissenting).

<sup>115</sup> *Id.* at 414.

<sup>116</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976). See *supra* discussion, Part II, subpart III.A.

<sup>117</sup> *Jurek v. Texas*, 428 U.S. 262 (1976).

<sup>118</sup> *Proffitt v. Florida*, 428 U.S. 242 (1976).

<sup>119</sup> *Woodson v. North Carolina*, 428 U.S. 280 (1976). See *supra* discussion, subpart III.A.

<sup>120</sup> *Roberts v. Louisiana*, 428 U.S. 325 (1976).



schemes in North Carolina and Louisiana, again based on his view of judicial restraint.<sup>121</sup> To Justice Blackmun, the establishment and functioning of such capital schemes was the purview of the state legislatures and not that of the Supreme Court. Thus, Justice Blackmun initially held firm to his *Furman* position that the Court should not use the Constitution (specifically the Eighth Amendment) to restrict the ability of the states to fashion capital schemes in a manner of their own choosing.<sup>122</sup>

## 2. *Regulating Death*

While embracing the view that it was not appropriate for the Court to use its power to abolish the death penalty, Justice Blackmun indicated, not long after the *Gregg* cases, that it was appropriate for the Court to restrict its use in some contexts. Thus, Justice Blackmun went along with the Court's constitutionalizing of the death penalty when he voted with the majority in *Coker v. Georgia*.<sup>123</sup>

Unlike in the *Gregg* cases, where thirty-eight state legislatures had enacted new statutes after *Furman*, only three states provided for death as a penalty for rape after *Furman*.<sup>124</sup> Accordingly, the infringement by the Court on the power of the state legislatures here was comparatively insignificant.

Further, the Court used its majoritarian evolving standards of decency construct as a basis for finding that death as a punishment for rape was cruel and unusual.<sup>125</sup> The Court explained that

if the "most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*," it should also be a telling datum that the public judgment with respect to rape, as reflected in the statutes providing the punishment for that crime, has been dramatically different. In reviving death penalty

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<sup>121</sup> His opinion in all of these cases was almost identical: "I dissent for the reasons set forth in my dissent in *Furman v. Georgia*, and in the other dissenting opinions I joined in that case." *Roberts*, 428 U.S. at 363 (internal citations omitted); *Woodson*, 428 U.S. at 307–08 (internal citations omitted).

<sup>122</sup> Justice Blackmun thus, unlike Justices Powell and Stevens, did not cross the threshold of "constitutionalizing" capital punishment until after *Gregg*.

<sup>123</sup> 433 U.S. 584, 599 (1977) ("[T]he death sentence imposed on *Coker* is a disproportionate punishment for rape."). As discussed *supra*, the Court in *Coker* held that the Constitution prohibited the use of the death penalty for the rape of an adult woman because it was a disproportionate punishment. *Id.*

<sup>124</sup> *Id.* at 594. Indeed, there had never been a majority of death penalty states that permitted death for rape. *Id.*

<sup>125</sup> *Id.* ("This public judgment as to the acceptability of capital punishment, evidenced by the immediate, post-*Furman* legislative reaction in a large majority of the States, heavily influenced the Court to sustain the death penalty for murder in *Gregg v. Georgia*.").

laws to satisfy *Furman*'s mandate, none of the States that had not previously authorized death for rape chose to include rape among capital felonies.<sup>126</sup>

Thus, while “[t]he current judgment with respect to the death penalty for rape [was] not wholly unanimous among state legislatures,”<sup>127</sup> the Court’s application of its evolving standards of decency analysis found that the trend among state legislatures “obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.”<sup>128</sup>

Based upon this language, Justice Blackmun’s willingness to vote with the majority and abandon his deferential approach to state legislatures in agreeing that the Constitution barred the imposition of death for rape does not seem such a significant abandonment of his earlier position.<sup>129</sup> The additional language from the Court in its decision, however, reveals that the Court indeed took a significant step beyond just relying on the majoritarian state legislative trend. The Court stressed that, in addition to examining the trends in the various states, it was required to impose its own independent judgment to determine whether the statute contravened the appropriate evolving standard of decency.<sup>130</sup> The Court explained:

These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment. Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman.<sup>131</sup>

By subscribing to the evolving standards of decency method of interpretation, presumably Justice Blackmun acquiesced to the concept that, based in part on the practices of state legislatures, Justices were to use their own interpretive judgment to decide which state capital practices and procedures violated the Eighth Amendment of the Constitution.<sup>132</sup>

In *Lockett v. Ohio*, Justice Blackmun again showed his hesitancy to use the Eighth Amendment to restrict the power of states to structure their

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<sup>126</sup> *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976)).

<sup>127</sup> *Id.* at 595.

<sup>128</sup> *Id.* at 596.

<sup>129</sup> In many ways, this is not so different from the *Gregg* line of cases. See discussion *supra* Part II.

<sup>130</sup> *Coker*, 433 U.S. at 603 n.2 (Powell, J., concurring).

<sup>131</sup> *Id.* at 597.

<sup>132</sup> In *Gardner v. Florida*, Justice Blackmun again showed his willingness to follow the *Gregg* line. 430 U.S. 349, 364 (1977) (holding that petitioner was denied due process of law when death sentence was imposed on the basis of undisclosed information in the presentence report).

capital schemes as they wished.<sup>133</sup> In *Lockett*, the petitioner, the driver of a get-away car, challenged a state law that limited the ability of a criminal defendant to put on mitigating evidence at a capital sentencing hearing.<sup>134</sup> Eschewing the position of the majority (which applied *Woodson*), Justice Blackmun would have found for the petitioner on alternative criminal procedure grounds, while reaffirming his commitment to judicial restraint.<sup>135</sup> He explained:

Though heretofore I have been unwilling to interfere with the legislative judgment of the States in regard to capital sentencing procedures, . . . this Court's judgment as to disproportionality in *Coker*, in which I joined, and the unusual degree to which Ohio requires capital punishment of a mere aider and abettor in an armed felony resulting in a fatality even where *no* participant specifically intended the fatal use of a weapon, . . . provides a significant occasion for setting some limit to the method by which the States assess punishment for actions less immediately connected to the deliberate taking of human life.<sup>136</sup>

Again, Justice Blackmun was not unduly troubled by this restriction placed on state capital processes because the "impact" was not particularly significant in limiting the practices of large numbers of states. To that point Justice Blackmun acknowledged that, "[o]f 34 States that now have capital statutes, 18 specify that a minor degree of participation in a homicide may be considered by the sentencing authority, and, of the remaining 16 States, 9 allow consideration of any mitigating factor."<sup>137</sup>

Despite these initial concerns for restraint and deference to state legislatures, Justice Blackmun became increasingly, but not always, willing to vote to strike down procedures under the Eighth Amendment that he deemed unfair.<sup>138</sup> In *Barefoot v. Estelle*, Justice Blackmun took a more significant step towards abandoning judicial restraint.<sup>139</sup> Justice Blackmun dissented in *Barefoot*, which held that psychiatric evidence could sustain

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<sup>133</sup> 438 U.S. 586, 613 (1978) (Blackmun, J., concurring in part and concurring in the judgment).

<sup>134</sup> *Id.* at 590–93.

<sup>135</sup> *Id.* at 613–19 (holding the application of the Ohio death penalty statute impermissible on alternative grounds, namely that it did not allow for consideration of Ms. Lockett's *mens rea*) (Blackmun, J., concurring).

<sup>136</sup> *Id.* at 616 (internal citation omitted).

<sup>137</sup> *Id.* at 616–17. Justice Blackmun likewise concurred in *Bell v. Ohio*, 438 U.S. 637, 643 (1978) (Blackmun, J., concurring in part and concurring in the judgment), a companion case to *Lockett*, largely for the same reasons.

<sup>138</sup> For instance, compare *Godfrey v. Georgia*, 446 U.S. 420 (1980) (holding that the imposition of a death sentence violated the Eighth Amendment), with *Eddings v. Oklahoma*, 455 U.S. 104, 120 (1979) (arguing that the Eighth Amendment did not proscribe the imposition of a death sentence).

<sup>139</sup> 463 U.S. 880 (1983).

the death sentence of a defendant under the Texas capital system.<sup>140</sup> Justice Blackmun's opinion took issue not only with the evidence admitted in the case, but also with the Texas system as a whole in its reliance on future dangerousness:

The Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three. The Court reaches this result—even in a capital case—because, it is said, the testimony is subject to cross-examination and impeachment. . . . In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself.<sup>141</sup>

Justice Blackmun likewise dissented in *Barclay v. Florida*, where the Court upheld a death sentence despite the trial court's error in instructing the jury incorrectly as to one of the aggravating factors.<sup>142</sup> Justice Blackmun again valued fairness of process over judicial restraint:

[W]hen a State chooses to impose capital punishment, as this Court has held a State presently has the right to do, it must be imposed by the rule of law. . . [especially based on] the fragility, in Barclay's case, of the application of Florida's established law. The errors and missteps—intentional or otherwise—come close to making a mockery of the Florida statute, and are too much for me to condone.<sup>143</sup>

Justice Blackmun, however, was not yet committed to a complete abandonment of judicial restraint, as evidenced by his majority opinion in *Spaziano v. Florida*.<sup>144</sup> In *Spaziano*, the Court upheld the ability of the judge under Florida's capital punishment scheme to override the jury's

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<sup>140</sup> *Id.* at 916. To obtain a death sentence in Texas, the State is required to prove beyond a reasonable doubt that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” TEX. CODE CRIM. PROC. ANN., art. 37.071(b)(2) (West 1981).

<sup>141</sup> *Barefoot*, 463 U.S. at 916 (Blackmun, J., dissenting). For a more lengthy exposition on the problems of using future dangerousness in capital cases, see William W. Berry III, *Ending Death by Dangerousness*, 52 ARIZ. L. REV. 889 (2010).

<sup>142</sup> 463 U.S. 939 (1983). The trial court improperly considered the defendant's prior criminal record as an aggravating factor. *Id.* at 946. Because there were other aggravating factors and no mitigating factors, the Supreme Court agreed with the lower courts that the error was harmless. *Id.* at 958.

<sup>143</sup> *Id.* at 991 (Blackmun, J., dissenting). Justice Blackmun reached a similar conclusion in *California v. Ramos*, dissenting because “[t]he Court, on its own, redefines the issue in terms of the dangerousness of the respondent, an issue that involves jury consideration of the probability that respondent will commit acts of violence in the future. By doing so the Court approves the Briggs Instruction by substituting an intellectual sleight of hand for legal analysis. This kind of appellate review compounds the original unfairness of the instruction itself, and thereby does the rule of law disservice.” 463 U.S. 992, 1029 (1983) (Blackmun, J., dissenting).

<sup>144</sup> 468 U.S. 447 (1984).

determination and impose a death sentence.<sup>145</sup> Despite a majority of jurisdictions choosing to use the jury, and not the judge, as the final sentencing decisionmaker in capital cases, the Court (and Justice Blackmun) chose to defer to the scheme adopted by the state legislature.<sup>146</sup> The Court explained that “[a]lthough the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment’ is violated by a challenged practice.”<sup>147</sup> Here, the Court stressed that they could not conclude “that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.”<sup>148</sup> Emphasizing their deferential approach, the Court finally noted that:

As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme . . . . We are not persuaded that placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that Florida must be required to alter its scheme and give final authority to the jury to make the life-or-death decision.<sup>149</sup>

Up to this point Justice Blackmun had adhered to the concept of judicial restraint, often deferring to state legislatures while occasionally finding certain procedural aspects of specific state capital punishment schemes to be unconstitutional under the Eighth Amendment. Justice Blackmun, however, would soon find himself on the brink of complete abandonment of any remaining judicial restraint in moving toward the complete repudiation of death.

### 3. Repudiating Death

Two cases arguably accelerated Justice Blackmun’s shift<sup>150</sup> from deference toward abolition: *McCleskey v. Kemp*<sup>151</sup> (discussed above) and

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 464 (“The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.”).

<sup>147</sup> *Id.*

<sup>148</sup> 468 U.S. at 464.

<sup>149</sup> *Id.* at 464–65 (internal citations omitted).

<sup>150</sup> See Stephen L. Wasby, *Justice Harry A. Blackmun: Transformation from “Minnesota Twin” to Independent Voice*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 63, 70 (Charles M. Lamb & Stephen C. Halpern eds., 1991) (noting that “[a]lthough it did not start immediately, since the ‘early Blackmun’ lasted at least several terms, Blackmun’s change, if not completely linear, has been clear over time”).

<sup>151</sup> 481 U.S. 279 (1987).

*Herrera v. Collins*.<sup>152</sup> In *McCleskey*, Justice Blackmun wrote separately in dissent to express his dismay with the outcome:

The Court today sanctions the execution of a man despite his presentation of evidence that establishes a constitutionally intolerable level of racially based discrimination leading to the imposition of his death sentence. I am disappointed with the Court's action not only because of its denial of constitutional guarantees to petitioner McCleskey individually, but also because of its departure from what seems to me to be well-developed constitutional jurisprudence.<sup>153</sup>

To Justice Blackmun, the Baldus study showed that “there exist[ed] in the Georgia capital sentencing scheme a risk of racially based discrimination that is so acute that it violates the Eighth Amendment”; the *Furman* problem had reappeared, and the Georgia death sentence should be declared unconstitutional.<sup>154</sup> He explained that “because capital cases involve the State’s imposition of a punishment that is unique both in kind and degree, the decision in such cases must reflect a heightened degree of reliability under the Amendment’s prohibition of the infliction of cruel and unusual punishments.”<sup>155</sup> The clear absence of reliability, as shown by Baldus, and the grim prospects of the states curing this defect may have moved Blackmun one step closer to abandoning restraint entirely.

In *Herrera v. Collins*, the Supreme Court upheld procedural bars to Herrera’s claim of actual innocence on habeas appeal.<sup>156</sup> Justice Blackmun again dissented, expressing shock at the decision to foreclose the ability to bring a claim of innocence, even though technically procedurally barred, stating, “Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent.”<sup>157</sup>

He continued:

The Court’s enumeration of the constitutional rights of criminal defendants surely is entirely beside the point. These protections sometimes fail. We really are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence. Despite the State of Texas’ astonishing protestation to the contrary, I do not see how the answer can be anything but “yes.”<sup>158</sup>

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<sup>152</sup> 506 U.S. 390 (1993).

<sup>153</sup> *McCleskey*, 481 U.S. at 345 (Blackmun, J., dissenting).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> 506 U.S. 390 (1993). Herrera sought to prove his innocence by introducing an affidavit signed by his then-deceased brother that admitted to committing the homicide for which Herrera was found guilty. *Id.* at 393.

<sup>157</sup> *Id.* at 430 (Blackmun, J., dissenting) (internal citations omitted).

<sup>158</sup> *Id.* at 430–31 (internal citations omitted).

After a lengthy exposition of his view of the shortcomings in the majority's reasoning, Justice Blackmun concluded by criticizing the Court's restraint to the state legislatures in capital cases:

I have voiced disappointment over this Court's obvious eagerness to do away with any restriction on the States' power to execute whomever and however they please. I have also expressed doubts about whether, in the absence of such restrictions, capital punishment remains constitutional at all. Of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to simple murder.<sup>159</sup>

Indeed, Justice Blackmun appeared ready to repudiate the death penalty in his *Herrera* dissent.<sup>160</sup>

It was not until *Callins v. Collins* that Justice Blackmun truly crossed the second threshold, repudiating the death penalty in a dissent to the denial of certiorari.<sup>161</sup> After the opinion was released, Justice Brennan, "frail and four years into retirement, telephoned and left word for Blackmun: thank you for 'the present.'" <sup>162</sup> In his dissent, Justice Blackmun gave an extensive exposition of why he had reversed his position.<sup>163</sup>

First, he cited what he saw as the Supreme Court's abdication of its duty to oversee the state legislatures in the administration of the death penalty. In other words, Justice Blackmun believed that the Court had accorded the states too much deference by not holding them accountable to the requirements of *Furman* (restrictions that he ironically opposed in the first place). He explained:

On their face, these goals of individual fairness, reasonable consistency, and absence of error appear to be attainable: Courts are in the very business of erecting procedural devices from which fair, equitable, and reliable outcomes are presumed to flow. Yet, in the death penalty area, this Court, in my view, has engaged in a futile effort to balance these constitutional demands, and now is retreating not only from the *Furman*

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<sup>159</sup> *Id.* at 446 (citations omitted).

<sup>160</sup> See GREENHOUSE, *supra* note 111, at 176 ("In his *Herrera* dissent, Blackmun had come close to disavowing capital punishment entirely. But still he did not cross the line, as his longtime colleagues William Brennan and Thurgood Marshall had done.").

<sup>161</sup> 510 U.S. 1141, 1143–59 (1994) (Blackmun, J., dissenting from denial of certiorari). Linda Greenhouse describes this turning point in her biography of Blackmun: "Now, approaching his eighty-fifth birthday, it was time. He told his law clerks to go ahead and draft an opinion by which he would renounce the death penalty." See GREENHOUSE, *supra* note 111, at 177. She explained, "[f]or him, capital punishment remained conceptually acceptable, at a level of theory; he had decided that in practice, it could not be made to operate in a constitutionally acceptable way." *Id.* at 179.

<sup>162</sup> See GREENHOUSE, *supra* note 111, at 179.

<sup>163</sup> *Callins*, 510 U.S. at 1149 (Blackmun, J., dissenting) (stating that discretion could not be eliminated from capital sentencing without threatening the fundamental fairness due a defendant when life is at stake).

promise of consistency and rationality, but from the requirement of individualized sentencing as well. Having virtually conceded that both fairness and rationality cannot be achieved in the administration of the death penalty, the Court has chosen to deregulate the entire enterprise, replacing, it would seem, substantive constitutional requirements with mere esthetics, and abdicating its statutorily and constitutionally imposed duty to provide meaningful judicial oversight to the administration of death by the States.<sup>164</sup>

Interestingly, though, Justice Blackmun's solution was not to reinforce the *Furman* principles and demand that the states be brought back into line, like the Court did in *Furman* and *Gregg*. Instead, he chose, as indicated in the famous quote below, to repudiate the death penalty by having the Court remove the ability of the states to use capital punishment. Justice Blackmun wrote:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants “deserve” to die?—cannot be answered in the affirmative . . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.<sup>165</sup>

Justice Blackmun thus concluded that the abandonment of judicial restraint was justified by the impossibility of creating a system that was acceptable under the Constitution. In this vein, Justice Blackmun revisited *Furman*, stating that “[t]here is little doubt now that *Furman*'s essential holding was correct,”<sup>166</sup> as “it surely is beyond dispute that if the death penalty cannot be administered consistently and rationally, it may not be administered at all.”<sup>167</sup> He explained his abandonment of restraint as follows:

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<sup>164</sup> *Id.* at 1144–45 (citing *McCleskey v. Kemp*, 481 U.S. 279, 313 n.37 (1987)).

<sup>165</sup> *Id.* at 1130 (Blackmun, J., dissenting).

<sup>166</sup> *Id.* at 1147. Justice Blackmun explained further, “in my mind, the real meaning of *Furman*'s diverse concurring opinions did not emerge until some years after *Furman* was decided” and stated that “*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” *Id.* at 1147–48 (quoting *Gregg v. Georgia*, 428 U.S. at 189 (opinion of Stewart, Powell, & Stevens, JJ.)).

<sup>167</sup> *Id.* (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)).



I have explained at length on numerous occasions that my willingness to enforce the capital punishment statutes enacted by the States and the Federal Government, “notwithstanding my own deep moral reservations . . . has always rested on an understanding that certain procedural safeguards, chief among them the federal judiciary’s power to reach and correct claims of constitutional error on federal habeas review, would ensure that death sentences are fairly imposed.” In recent years, I have grown increasingly skeptical that “the death penalty really can be imposed fairly and in accordance with the requirements of the Eighth Amendment,” given the now limited ability of the federal courts to remedy constitutional errors.<sup>168</sup>

Finally, Justice Blackmun concluded his repudiation of death with a note of hopefulness.<sup>169</sup> It was not a hope that the states could somehow right their course and devise (with the Court’s help) a death penalty scheme that satisfied the requirements of *Furman* and the Eighth Amendment.<sup>170</sup> Instead, it was a hope that a majority of Justices would reach the same conclusion that he had and repudiate the death penalty.<sup>171</sup>

### C. JUSTICE STEVENS

#### 1. *Deferring to Death*

Justice John Paul Stevens did not join the United States Supreme Court until 1975, three years after *Furman v. Georgia* had been decided. Like Justices Powell and Blackmun, Justice Stevens valued judicial restraint to other political institutions in his early years as a judge.<sup>172</sup> Just a year before his appointment to the Supreme Court, Justice Stevens, then a circuit judge, explained his views on restraint in a speech at Northwestern University School of Law:

The prevalence of widespread potential for error among other decisionmakers is one of the factors that repeatedly prompts invitations to federal judges to substitute their views for the erroneous conclusions of others . . . . [T]he temptation to accept and invitation of this kind is always alluring, but whenever the federal judiciary does accept, three things inevitably happen. First, our workload increases and our ability to process it effectively diminishes . . . . Second, the potential for diverse decisions by other decisionmakers is diminished and another step in the direction of nationwide uniformity is taken . . . . And third, we substitute our mistakes for the mistakes theretofore made by others. Sometimes that price is well worth paying; it is, however, a cost of which we should always be conscious.<sup>173</sup>

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<sup>168</sup> *Id.* at 1157 (citations omitted).

<sup>169</sup> *Id.* at 1159.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> ROBERT JUDD SICKELS, JOHN PAUL STEVENS AND THE CONSTITUTION: THE SEARCH FOR BALANCE 30 (1988) (explaining how Justice Stevens retained, at least for a while, a strong belief in restraint).

<sup>173</sup> *Id.*

During his confirmation hearing, then-Judge Stevens was asked about his view of judicial restraint:

Senator Scott of Virginia: So I ask you, and I think it is entirely proper to ask, when you become a member of the Supreme Court—and I have no real doubt that you will—is it your intention to exercise judicial restraint?

Judge Stevens: Yes, it is, Senator. I think it is the business of a judge to decide cases that come before him. From time to time, in the process of deciding cases, important decisions are made and the law takes a little different turn from time to time. But it has always been my philosophy to decide cases on the narrowest ground possible and not to reach out for constitutional questions. I think that is the tradition of the work of the Supreme Court and I think the Court is most effective when it does its own business the best.<sup>174</sup>

Thus, Justice Stevens shared the initial perspective of Justices Powell and Blackmun that the role of the Supreme Court Justice was not to substitute his or her personal political views for the prior law, whether common law or statutory.

As discussed above in subpart III.A, Justice Stevens, as one of the three Justices in the controlling plurality (termed the “Powell plurality” above), agreed to cross the initial threshold of constitutionalizing capital punishment by applying the Eighth Amendment to it, but did so in large part because the chosen standard, the evolving standards of decency, still accorded significant restraint to state legislatures.<sup>175</sup>

Similarly, Justice Stevens agreed with the majority (and Justice Blackmun) in *Coker*, where as discussed above the Court took two important steps in establishing the evolving standards of decency approach.<sup>176</sup> First, the Court emphasized that state legislatures (and juries) determined, in large part, what the appropriate standard was.<sup>177</sup> Second, the Court explained that its own judgment as to the appropriate standard of decency, and not its examination of the states’ practices, ultimately determined what practices were constitutional under the Eighth Amendment.<sup>178</sup> Thus, while seemingly resting its decision on the notion of

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<sup>174</sup> *Nomination of John Paul Stevens to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 94th Cong. 35–36, reprinted in 8A THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916–1975, at 35–36 (Roy M. Mersky & J. Myron Jacobstein eds., 1977) (testimony of John Paul Stevens, Dec. 8, 1975).

<sup>175</sup> *See id.*; see also Berry, *supra* note 70.

<sup>176</sup> *See* discussion *supra* subpart III.B.

<sup>177</sup> *See* discussion *supra* subpart III.B; *Coker v. Georgia*, 433 U.S. 584 (1977).

<sup>178</sup> *Coker*, 433 U.S. at 584 (“[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”)

restraint to the states, the majority (including Justice Stevens) was careful to carve out analytical room to choose not to defer in the future.<sup>179</sup> The Court reiterated both of these views years later in *Atkins v. Virginia* and again in *Roper v. Simmons*.<sup>180</sup>

## 2. Regulating Death

Two competing principles framed Justice Stevens's approach in the post-*Gregg* cases. On the one hand, because there can be no perfect way to administer a death penalty system, the Court ought to defer generally to state legislatures unless their administration of capital punishment is fundamentally unfair.<sup>181</sup> On the other hand, Justice Stevens recognized the heightened need for the Court to intervene to ensure the reliability and fairness of the imposition of death sentences.<sup>182</sup> This second principle was based in large part on the Justices' notion that "death is different," and accordingly gave the Court a stronger interest in regulating its use by the states.<sup>183</sup> Thus, concluded Justice Stevens, "although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error."<sup>184</sup>

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<sup>179</sup> *Id.*

<sup>180</sup> See discussion *infra* Part III.

<sup>181</sup> See, e.g., *Beck v. Alabama*, 447 U.S. 625, 638 n. 13 (1980); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 192–95 (1976).

<sup>182</sup> See, e.g., *Ring v. Arizona*, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (noting that, as "death is not reversible," DNA evidence that the convictions of numerous persons on death row were erroneous is especially alarming); *Spaziano v. Florida*, 468 U.S. 447, 460 n.7 (1984) ("[T]he death sentence is unique in its severity and in its irrevocability . . ."); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability."); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (stating that death differs from life imprisonment because of its "finality"); see also Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117 (2004).

<sup>183</sup> See, e.g., *Zant v. Stephens*, 462 U.S. 862, 884–85 (1983) ("Two themes have been reiterated in our opinions discussing the procedures required by the Constitution in capital sentencing determinations. On the one hand . . . there can be no perfect procedure for deciding in which cases governmental authority should be used to impose death. On the other hand, because there is a qualitative difference between death and any other permissible form of punishment, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.") (internal citations omitted). This is true, of course, because "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* at 885 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

<sup>184</sup> *Id.* at 885.

Although Justice Stevens voted in the *Gregg* majority, he only voted that way because he believed that states would provide significant procedural safeguards to capital punishment defendants.<sup>185</sup> Justice Stevens was a firm believer in fundamental fairness and making sure the states comported with due process.<sup>186</sup> In *Barclay v. Florida*, Justice Stevens explained, “[f]urther, a constant theme of our cases—from *Gregg* and *Proffitt* through *Godfrey*, *Eddings*, and most recently *Zant*—has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner[.]”<sup>187</sup> again reasoning that procedural and fundamental fairness were essential to death penalty jurisprudence. What is more important, however, is the first sign of Justice Stevens’s personal view of the death penalty: “The cursory analysis in the two opinions upholding petitioner’s death sentence—which admittedly I do not applaud—does not require us to set aside the sentence when we have determined that the sentence itself does not suffer from any constitutional flaw.”<sup>188</sup>

Indeed, in *Pulley v. Harris*, Justice Stevens voted to uphold the state’s procedure, despite a clear opportunity to do otherwise.<sup>189</sup> He concurred with Justice White’s majority opinion, which held that the Constitution did not require states to implement proportionality review.<sup>190</sup> The Court’s belief here was that the states could implement capital punishment via a number of different legislative mechanisms so long as they provided some level of safeguard as required by *Furman*.<sup>191</sup> Justice Stevens therefore was willing to defer to the *method* adopted by the state legislatures so long as it achieved the proper *ends*: protection against arbitrariness. He thus voted to defer to the state’s scheme despite his belief that “the case law does establish that appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by *Furman v. Georgia*, and hence that some form of meaningful appellate review is constitutionally required.”<sup>192</sup> Justice Stevens’s view that appellate review was an essential element stemmed back to *Furman v. Georgia* and its basic concept of eliminating the arbitrariness and capriciousness for death penalty imposition.<sup>193</sup>

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<sup>185</sup> *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

<sup>186</sup> *Id.* at 358.

<sup>187</sup> *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring).

<sup>188</sup> *Id.* at 974 (emphasis added).

<sup>189</sup> 465 U.S. 37 (1984).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 54 (Stevens, J., concurring) (citation omitted).

<sup>193</sup> *Id.* at 55.

Even as Justice Stevens was advocating judicial restraint, he began to develop the fundamental fairness principle in other cases, as evidenced by his opinion in *Spaziano v. Florida*.<sup>194</sup> Justice Stevens's *Spaziano* opinion disagreed with the majority view that the judge could overrule the jury sentence in a death case.<sup>195</sup> He based his lack of restraint toward the Florida scheme on the second of the above principles—that the uniqueness of death supported heightened scrutiny.<sup>196</sup> He explained:

The concept of due process permits no such deprivation—whether of life, liberty, or property—to occur if it is grossly excessive in the particular case—if it is “cruel and unusual punishment” proscribed by the Eighth Amendment . . . [f]or although we look to state law as the source of the right to property, “it is not the source of liberty, and surely not the exclusive source.” Because a deprivation of liberty is qualitatively different from a deprivation of property, heightened procedural safeguards are a hallmark of Anglo-American criminal jurisprudence. But that jurisprudence has also unequivocally established that a State’s deprivation of a person’s life is also qualitatively different from any lesser intrusion on liberty.<sup>197</sup>

Justice Stevens then explained why allowing a judge to overrule a jury contravenes the role of the community as the ultimate decisionmaker of life or death:

Because it is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the community’s outrage—its sense that an individual has lost his moral entitlement to live—I am convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury, rather than by a single governmental official.<sup>198</sup>

He added:

If the State wishes to execute a citizen, it must persuade a jury of his peers that death is an appropriate punishment for his offense. If it cannot do so, then I do not believe it

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<sup>194</sup> 468 U.S. 447 (1984).

<sup>195</sup> *Id.* at 467 (Stevens, J., concurring in part and dissenting in part).

<sup>196</sup> As Justice Stevens pointed out, every member of the Court had, at that point, subscribed to the “death is different” doctrine: “In the 12 years since *Furman v. Georgia*, every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.” *Id.* at 468 (citation omitted); see *Solem v. Helm*, 463 U.S. 227, 289 (1983); *id.* at 306 (Burger, C.J., dissenting); *Enmund v. Florida*, 458 U. S. 782, 797 (1982); *Beck v. Alabama*, 447 U. S. 625, 637–638 (1980); *Rummel v. Estelle*, 445 U. S. 263, 272 (1980); *Lockett v. Ohio*, 438 U. S. 586, 604–605 (1978) (plurality opinion); *Coker v. Georgia*, 433 U. S. 584, 598 (1977) (plurality opinion); *Gardner v. Florida*, 430 U. S. 349, 357–58 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U. S. 153, 188 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

<sup>197</sup> *Spaziano*, 468 U.S. at 468 (Stevens, J., concurring in part and dissenting in part).

<sup>198</sup> *Id.* at 469–70.

can be said with an acceptable degree of assurance that imposition of the death penalty would be consistent with the community's sense of proportionality.<sup>199</sup>

For Justice Stevens, then, the Court ought to intervene where the decision to sentence a defendant to death did not reflect the community sentiment. In other words, like Justice Blackmun, Justice Stevens was willing to use the death-is-different principle as a means to regulate state legislatures when doing so did not undermine the popular political will (as reflected in jury decisions).

Justice Stevens reiterated this principle in *McCleskey*.<sup>200</sup> Citing *Gardner*,<sup>201</sup> *Zant*,<sup>202</sup> and *Spaziano*,<sup>203</sup> he emphasized the importance of scrutinizing death decisions and the requirement that such decisions be based on reason and not emotion, particularly where the jury decision may have been influenced by race.<sup>204</sup> For Justice Stevens, “[t]his sort of disparity is constitutionally intolerable.”<sup>205</sup>

While Justice Stevens then pointed out that the majority's opinion “flagrantly violate[d] the Court's prior ‘insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all,’”<sup>206</sup> he did not think that the Baldus study's results necessarily foreclosed the use of the death penalty. As he explained,

One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.<sup>207</sup>

Therefore, while *McCleskey* moved Justice Blackmun towards repudiation, Justice Stevens again saw a possibility for forcing the states to continue to improve upon the capital sentencing process to cure its defects.

Nonetheless, Justice Stevens continued over time to intervene deeper and deeper into the state capital processes, voting repeatedly to restrict the death penalty in various ways. Again, fundamental fairness played the

<sup>199</sup> *Id.* at 490.

<sup>200</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987); see discussion *supra*, subparts III.A and III.B. (describing the majority opinion by Justice Powell and Justice Blackmun's dissenting opinion).

<sup>201</sup> 430 U.S. at 358.

<sup>202</sup> *Zant v. Stephens*, 462 U.S. 862, 885 (1982).

<sup>203</sup> *Spaziano*, 468 U.S. at 469 (Stevens, J., dissenting).

<sup>204</sup> *McCleskey*, 481 U.S. at 366 (Stevens, J., dissenting).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 366–67 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)).

<sup>207</sup> *Id.* at 367.

central role in Justice Stevens's views.<sup>208</sup> The most significant of these decisions are the victim impact evidence cases and the "defendant characteristics" cases. In *Booth v. Maryland*,<sup>209</sup> *South Carolina v. Gathers*,<sup>210</sup> and *Payne v. Tennessee*,<sup>211</sup> Justice Stevens voted against allowing victim impact testimony and evidence into evidence at death penalty trials, holding that admission of such evidence during the penalty phase of a capital trial was unconstitutional. In his dissent in *Payne*, Justice Stevens explained why he believed that such evidence violates the Constitution:

The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support. What is not obvious, however, is the way in which the character or reputation in one case may differ from that of other possible victims. Evidence offered to prove such differences can only be intended to identify some victims as more worthy of protection than others. Such proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white, but to accept a plea bargain if the victim is black.<sup>212</sup>

Perhaps more importantly, Justice Stevens revealed a growing distrust with state institutions based on the rise of penal populism:<sup>213</sup>

Given the current popularity of capital punishment in a crime-ridden society, the political appeal of arguments that assume that increasing the severity of sentences is the best cure for the cancer of crime, and the political strength of the "victims' rights" movement, I recognize that today's decision will be greeted with enthusiasm by a large number of concerned and thoughtful citizens. The great tragedy of the decision, however, is the danger that the "hydraulic pressure" of public opinion that Justice Holmes once described—and that properly influences the deliberations of democratic legislatures—has played a role not only in the Court's decision to hear this case, and in its decision to reach the constitutional question without pausing to consider affirming on the basis of the Tennessee Supreme Court's rationale, but even in its resolution of the constitutional issue involved. Today is a sad day for a great institution.<sup>214</sup>

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<sup>208</sup> See *Murray v. Giarratano*, 492 U.S. 1, 23 (1989) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)) ("It is therefore an integral component of a State's constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.").

<sup>209</sup> 482 U.S. 496, 509 (1987).

<sup>210</sup> 490 U.S. 805, 812 (1990).

<sup>211</sup> 501 U.S. 808, 866 (1991).

<sup>212</sup> *Id.* at 866 (Stevens, J., dissenting).

<sup>213</sup> See generally DAVID GARLAND, *THE CULTURE OF CONTROL* (2001); JOHN PRATT, *PENAL POPULISM* (2006). See also William W. Berry III, *Extraordinary and Compelling: A Re-examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850 (2009) (discussing the rampant level of imprisonment in the United States).

<sup>214</sup> *Payne*, 501 U.S. at 867 (Stevens, J., dissenting).

From 1991 to 2002, Justice Stevens continued to move toward repudiating capital punishment.<sup>215</sup> He consistently voted to restrict the use of the death penalty where he believed that the states' use was "fundamentally unfair" or infringed upon "human dignity."<sup>216</sup>

Justice Stevens's increasing disdain for states and their inability to use the death penalty in a fair way paralleled the Court's broadening of the evolving standards of decency doctrine that began in 2002. In *Atkins v. Virginia*,<sup>217</sup> Justice Stevens wrote the majority opinion banning the execution of individuals who are mentally retarded, reversing the Court's decision in *Penry v. Lynaugh* just thirteen years earlier.<sup>218</sup> Applying the evolving standards of decency standard, the Court found that, even though a majority of states had not banned capital punishment for mentally retarded individuals (eighteen states),<sup>219</sup> the trend among the states was *moving in the direction* of banning execution of such individuals.<sup>220</sup> In light of several states recently banning the execution of mentally retarded individuals, Justice Stevens reasoned that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."<sup>221</sup> Perhaps equally important was the fact that "even among those States that

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<sup>215</sup> See *infra* note 217.

<sup>216</sup> See *Sawyer v. Whitley*, 505 U.S. 333, 361 (1992) ("[F]undamental fairness is more than accuracy at trial."); *Lockhart v. Fretwell*, 506 U.S. 364, 377 (1993) (Stevens, J., dissenting) (quoting *Fretwell v. Lockhart*, 754 F. 2d 258 (8th Cir. 1991)) ("[F]undamental unfairness exists when a prisoner receives a death sentence rather than life imprisonment solely because of his attorney's error."); *Tuilaepa v. California*, 512 U.S. 967, 981 (1994) ("I believe, that the failure to characterize factors such as the age of the defendant or the circumstances of the crime as either aggravating or mitigating is also unobjectionable."); *Jacobs v. Scott*, 513 U.S. 1067, 1067 (1995) (Stevens, J., dissenting from denial of certiorari) ("In my opinion, it is fundamentally unfair for the State of Texas to go forward with the execution of Jesse Dewayne Jacobs."); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 293–94 (1998) ("For 'death is a different kind of punishment from any other which may be imposed in this country.'"); *Mickens v. Taylor*, 535 U.S. 162, 189 (2002) (Stevens, J., dissenting) ("A rule that allows the State to foist a murder victim's lawyer onto his accused is not only capricious; it poisons the integrity of our adversary system of justice.").

<sup>217</sup> 536 U.S. 304 (2002).

<sup>218</sup> 492 U.S. 302 (1989).

<sup>219</sup> *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002).

<sup>220</sup> *Id.* at 315–17.

<sup>221</sup> *Id.* at 315. Interestingly, Justice Stevens found this trend more compelling because it moved against the direction of the penal populism he had emphasized in *Payne*. *Id.* at 315–16 ("Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.").



regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry*.”<sup>222</sup>

As in earlier cases, the Court likewise “brought to bear”<sup>223</sup> its own judgment, finding that the evolving standard of decency warranted this prohibition.<sup>224</sup> Justice Stevens explained that “[t]his is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment.”<sup>225</sup>

Separate from its interpretation of the consensus among state legislatures, the Court analyzed the degree to which permitting such executions “will measurably advance the deterrent or the retributive purpose of the death penalty.”<sup>226</sup> In its independent evaluation, the Court explained its belief that:

[t]his consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.<sup>227</sup>

As a result, the Court concluded that “such punishment is excessive and that the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.”<sup>228</sup>

While the Court at the very least feigned some level of restraint to the state legislatures, Justice Stevens (and the Court) made it explicit, in a manner more demonstrated than before, that they could and should be making such policy judgments as the one decided here—whether it was acceptable to execute mentally retarded individuals. Justice Stevens (voting with the majority) became even more brazen in exercising this independent judgment and moving away from any need to defer to the states in the next significant evolving standards of decency case, *Roper v. Simmons*.<sup>229</sup>

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<sup>222</sup> *Id.* at 316. As in *Furman*, the lack of use made “[t]he practice [of executing mentally retarded individuals], therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.” *Id.*

<sup>223</sup> *Coker v. Georgia*, 433 U.S. 584, 597 (1977). As mentioned earlier, the Court’s inquiry is “asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.” *Atkins*, 536 U.S. at 313.

<sup>224</sup> *Atkins*, 536 U.S. at 321.

<sup>225</sup> *Id.* at 313 (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

<sup>226</sup> *Id.* at 321.

<sup>227</sup> *Id.* at 317.

<sup>228</sup> *Id.* at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

<sup>229</sup> 543 U.S. 551 (2005).

The issue in *Roper* was whether the Eighth Amendment permitted states to execute individuals for crimes they committed before reaching the age of eighteen.<sup>230</sup> As with *Atkins*, this case revisited an earlier opinion of the Court on the same issue. In *Stanford v. Kentucky*, the Court had rejected any constitutional limitation on the execution of such individuals so long as they were fifteen or older<sup>231</sup> at the time of the crime.<sup>232</sup>

As in *Atkins*, the Court started with a “review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question.”<sup>233</sup> Like in *Atkins*, a majority of states allowed the state practice at issue.<sup>234</sup> Even worse than *Atkins*, however, there was less evidence of a trend toward the abolition of executing individuals who committed capital crimes before age eighteen.<sup>235</sup>

After somehow finding consensus among state legislatures, the Court in *Roper* unflinchingly exercised its own independent judgment, explaining why it was improper to allow states to execute juvenile offenders:

The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.<sup>236</sup>

Interestingly, the Court then looked to international opinion to justify its exercise of independent judgment.<sup>237</sup> This step beyond the state legislatures belies the shift in restraint. In *Atkins* and *Roper*, Justice Stevens (and the majority) seem to be looking at the practices of the state

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<sup>230</sup> *Id.* at 555–56.

<sup>231</sup> *Stanford v. Kentucky*, 492 U.S. 361 (1989). The Court had set age sixteen (at the time of the crime) as a minimum for death penalty eligibility in an earlier case, *Thompson v. Oklahoma*, 487 U.S. 815 (1988), in which Justice Stevens authored the majority opinion. Following the evolving standards of decency, the Court in *Thompson* explained that no death penalty state that had given express consideration to a minimum age for the death penalty had set the age lower than sixteen. *Id.* at 826–29. In bringing its own independent judgment to bear, the *Thompson* Court also emphasized that “[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.” *Id.* at 835.

<sup>232</sup> *Stanford*, 492 U.S. at 380.

<sup>233</sup> *Roper*, 543 U.S. at 564.

<sup>234</sup> *Id.* at 563–66.

<sup>235</sup> *Id.* at 565–66.

<sup>236</sup> *Id.* at 572–73.

<sup>237</sup> *Id.* at 575–78. The use of international practices as a barometer for evolving standards of decency has not been without controversy. See, e.g., David Fontana, *Refined Comparatism in Constitutional Law*, 49 UCLA L. REV. 539 (2001).

legislatures less out of an obligation to exercise some level of restraint, and more out of a perceived need to legitimize the exercise of their own independent judgment in capital cases.<sup>238</sup> The categorical exclusion of certain groups of individuals seems to be less a decision of regulating state procedures and more of a step toward abolition altogether.

In his *Roper* concurrence, Justice Stevens hinted that the Court ought to be willing to reexamine its prior capital punishment precedents:

Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment. In the best tradition of the common law, the pace of that evolution is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day—Alexander Hamilton, for example—were sitting with us today, I would expect them to join Justice Kennedy's opinion for the Court. In all events, I do so without hesitation.<sup>239</sup>

Further, he foreshadowed his opinion as to whether the Court ought to abandon restraint to state legislatures altogether and abolish the death penalty under the evolving standards of decency doctrine.

### 3. Repudiating Death

After over three decades of allowing states to regulate capital punishment Justice Stevens finally decided that the states could never remedy the problem. In *Baze v. Rees*, the Supreme Court considered the constitutionality of Kentucky's method of execution: its three-drug lethal injection protocol.<sup>240</sup> While the Court upheld Kentucky's procedure, Justice Stevens wrote separately and concluded that capital punishment was unconstitutional under the Eighth Amendment.<sup>241</sup>

Ironically writing a concurrence, Justice Stevens clearly demonstrated his abandonment of restraint in favor of state legislatures.<sup>242</sup> He describes their retention of the death penalty as follows:

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<sup>238</sup> See *Atkins v. Virginia*, 536 U.S. 304, 321–24 (2002); *Roper*, 543 U.S. at 563–66.

<sup>239</sup> *Roper*, 543 U.S. at 587 (Stevens, J., concurring) (citation omitted).

<sup>240</sup> 553 U.S. 35 (2008). The result of the Court's decision to grant certiorari was a hiatus of almost a year in executions in the United States. See, e.g., DEATH PENALTY INFO CTR., <http://www.deathpenaltyinfo.org/executions-united-states> (last visited Feb. 14, 2011).

<sup>241</sup> *Baze*, 553 U.S. at 86 (Stevens, J., concurring).

<sup>242</sup> *Id.* at 87. He explained that his decision that the death penalty is unconstitutional “does not justify a refusal to respect precedents that remain a part of our law,” but this explanation seems, on some level, unconvincing. *Id.*

The thoughtful opinions written by the Chief Justice and by Justice Ginsburg have persuaded me that current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty.<sup>243</sup>

Applying his own independent evolving standards of decency-type analysis, Justice Stevens questioned the utility of the death penalty based on its inability to achieve the purposes of punishment, particularly retribution.<sup>244</sup> As a result, Justice Stevens argued that “[f]ull recognition of the diminishing force of the principal rationales for retaining the death penalty should lead this Court and legislatures to reexamine the question . . . ‘[i]s it time to Kill the Death Penalty?’”<sup>245</sup>

Justice Stevens then explained that the Court’s holdings in *Gregg* and its companion cases afforded a level of judicial restraint toward the states’ use of capital punishment because the Court “relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application . . . arbitrary application . . . and of excessiveness.”<sup>246</sup> As described above, Justice Stevens (and the Court) tempered this restraint with its application of “the premise that ‘death is different’ from every other form of punishment to justify rules minimizing the risk of error in capital cases.”<sup>247</sup> This process, however, had been largely unsuccessful according to Justice Stevens. Despite these purported safeguards, Justice Stevens noted, there were still obvious problems with the administration of the death penalty.<sup>248</sup>

First, Justice Stevens questioned the process by which juries were constructed in capital cases, through “death qualifi[cation],” a process that raised questions as to whether the jury was truly representative of the community.<sup>249</sup> Second, Justice Stevens pointed out that “the risk of error in capital cases may be greater than in other cases because the facts are often so disturbing that the interest in making sure the crime does not go unpunished may overcome residual doubt concerning the identity of the

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<sup>243</sup> *Id.* at 78.

<sup>244</sup> *Id.* at 80–81.

<sup>245</sup> *Id.* at 81 (internal citations omitted).

<sup>246</sup> *Id.* at 84 (internal citations omitted).

<sup>247</sup> *Id.* at 84; *see supra* note 197 (describing the Court’s “death is different” jurisprudence).

<sup>248</sup> *Baze*, 553 U.S. at 84. Justice Stevens also pointed out that “[i]ronically, however, more recent cases have endorsed procedures that provide less protections to capital defendants than to ordinary offenders.” *Id.*

<sup>249</sup> *Id.*

offender.”<sup>250</sup> Like Justice Blackmun, Justice Stevens also expressed concern about the continued “risk of discriminatory application of the death penalty.” Citing the Court’s decision in *McCleskey*, Justice Stevens argued that “the Court has allowed [this risk] to continue to play an unacceptable role in capital cases.”<sup>251</sup>

Ultimately, however, it was the combination of the risk of error described above and the consequences of such error that led Justice Stevens to cross the second threshold and conclude that capital punishment should be abolished, rather than allow the states another opportunity to correct these problems.<sup>252</sup> He emphasized that “[w]hether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses.”<sup>253</sup> Rather than continue to defer to the states to remedy these problems, Justice Stevens concluded that the better answer was to eliminate the death penalty entirely, as “[t]he risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive.”<sup>254</sup> He summed up by quoting Justice White’s *Furman* opinion, suggesting that despite the efforts of the Court and the state legislatures, little had changed:

[J]ust as Justice White ultimately based his conclusion in *Furman* on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such

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<sup>250</sup> *Id.* at 84–85. Not helping matters was the Court’s recent jurisprudence in which its “former emphasis on the importance of ensuring that decisions in death cases be adequately supported by reason rather than emotion has been undercut by more recent decisions placing a thumb on the prosecutor’s side of the scales.” *Id.* at 85. Justice Stevens cited *Kansas v. Marsh*, 548 U.S. 163 (2006), where the Court upheld a state statute that requires imposition of the death penalty when the jury finds that the aggravating and mitigating factors are in equipoise, and *Payne v. Tennessee*, 501 U.S. 808 (1991), described *supra* in section III.C.2, as examples of the Court’s undercutting of this principle.

<sup>251</sup> *Baze*, 553 U.S. at 85. Justice Stevens also cited *Evans v. State*, 914 A.2d 25, 64 (Md. 2006), *cert. denied*, 552 U.S. 835 (2007), where the Court affirmed “a death sentence despite the existence of a study showing that ‘the death penalty is *statistically* more likely to be pursued against a black person who murders a white victim than against a defendant in any other racial combination.’”

<sup>252</sup> *Baze*, 553 U.S. at 86.

<sup>253</sup> *Id.* (citing Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) and D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007)); *see infra* note 269 (discussing the Cameron Todd Willingham case).

<sup>254</sup> *Baze*, 553 U.S. at 86 (Stevens, J., concurring).

negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”<sup>255</sup>

A few months after *Baze*, Justice Stevens joined in the majority opinion in *Kennedy v. Louisiana*, a case that prohibited the use of the death penalty for child rapists.<sup>256</sup> Like *Atkins* and *Roper*, the Court in *Kennedy* applied its evolving standards of decency analysis to the use of child rape by state legislatures.<sup>257</sup> *Kennedy*, like *Coker*, did not require the Court to use its own subjective judgment or trammel on the practices of a number of state legislatures, as almost all states banned execution for child rapists.<sup>258</sup> Nonetheless, the majority was not sympathetic, and demonstrated no desire to offer deference to the Louisiana state legislature.<sup>259</sup>

After his retirement from the Court last summer, Justice Stevens has become an increasingly vocal opponent of capital punishment, and recently explained in a *60 Minutes* interview:

I think we would all be better off if we simply changed course and did away with the death penalty . . . . I think that would be the best rule to follow because that’s basically the rule that is followed in most civilized countries as you know . . . .<sup>260</sup>

Justice Stevens also reviewed David Garland’s book, *Peculiar Institution: America’s Death Penalty in an Age of Abolition*, further supporting the conclusion that Justice Stevens believes that there is no way to administer the death penalty fairly.<sup>261</sup> Justice Stevens explained:

When I wrote those words [that death is different] I was thinking about individual decisions in specific cases. Professor Garland’s book persuades me that my comment is equally applicable to legislative decisions authorizing imposition of death sentences. To be reasonable, legislative imposition of death eligibility must be rooted in benefits for at least one of the five classes of persons affected by capital offenses.<sup>262</sup>

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<sup>255</sup> *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)). Even after *Baze*, Justice Stevens has continued to question the procedures by which the death penalty is administered in the United States. In *Walker v. Georgia*, Justice Stevens dissented to the denial of certiorari in a case where the petitioner challenged the administration of proportionality review by the Georgia Supreme Court. 129 S. Ct. 253 (2008). The petitioner challenged the same process that the Court approved in *Gregg*.

<sup>256</sup> 554 U.S. 407 (2008).

<sup>257</sup> *Id.* at 422.

<sup>258</sup> *Id.* at 422–27.

<sup>259</sup> *Id.* at 423.

<sup>260</sup> *60 Minutes* (CBS television broadcast Nov. 28, 2010), available at <http://www.cbsnews.com/video/watch/?id=7096956n&tag=contentBody;housing>.

<sup>261</sup> John Paul Stevens, *On the Death Sentence*, N.Y. REV. BOOKS (Dec. 23, 2010), <http://www.nybooks.com/articles/archives/2010/dec/23/death-sentence/>.

<sup>262</sup> *Id.*

Justice Stevens concluded by stating that none of the benefits outweighed the costs of keeping the death penalty.<sup>263</sup>

#### IV. PANDORA'S BOX AND THE INEVITABILITY OF REPUDIATION

After arriving among mortals, Pandora opened the lid of a great jar that she had with her, causing a host of evils and disease to be released among the mortals for the first time; for until that moment, men had lived on the earth free from toil and sickness and other ills.<sup>264</sup>

Having established that the three parallel shifts in perspective as to the use of capital punishment are questions of institutional and not normative choice, this Article concludes by claiming that these outcomes are inevitable consequences of the initial decision to constitutionalize capital punishment.

In reviewing the capital jurisprudence of the United States Supreme Court since *Furman* through the lens of institutional choice, the result of abandoning judicial restraint appears to be one of opening a sort of constitutional Pandora's box.<sup>265</sup> In other words, by constitutionalizing capital punishment through its application of the Eighth Amendment, the Court exposed itself to a complex, multilayered morass of problems that it is ill-equipped to remedy.

These problems began with *Furman*, where a fractured majority (each Justice wrote their own opinion) held capital punishment as instituted by the states was cruel and unusual punishment in violation of the Eighth Amendment.<sup>266</sup> In *Furman*, the Court highlighted many problems with the death penalty, most notably the manner in which the death penalty was arbitrarily and disproportionately applied to certain minority groups.<sup>267</sup> And in recent years, the problems have only magnified, with studies

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<sup>263</sup> *Id.*

<sup>264</sup> ROBIN HARD, *THE ROUTLEDGE HANDBOOK OF GREEK MYTHOLOGY* 95 (2004).

<sup>265</sup> In Hesiod's epic poem *World and Days*, he describes the story of Pandora. After Prometheus stole fire and returned it to mortals, Zeus ordered Hephaestus to create the first woman. The gods named this woman "Allgifts" (Pandora) because she was the gift of all the gods, "a calamity for men," a "precipitous, unmanageable trap." Prometheus had warned his brother Epimetheus not to accept gifts from Zeus, but he did not heed this advice and accepted Pandora as his bride. In anticipation of the marriage, Pandora was given an amphora, or storage jar, as her trousseau. When she opened the amphora out flew "grievous sicknesses that are deadly to men," "grim cares," and "countless troubles," only hope remained in the box. See HESIOD, *THEOGONY AND WORKS AND DAYS* 38–40 (M.L. West trans., 1988).

<sup>266</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>267</sup> *Id.* at 256–57 (Douglas, J., concurring); see also *id.* at 242; *id.* at 308–10 (Stewart, J., concurring); *id.* at 310–11, 313–14 (White, J., concurring).

demonstrating vast amounts of error<sup>268</sup> and increasing discoveries of innocent individuals on death row as well as the likelihood that innocent individuals have, in fact, been executed.<sup>269</sup>

The “discovery” of such a complex and intractable set of problems is certainly not unique to the Eighth Amendment. For instance, the Fourth Amendment’s prohibition against search and seizure has become a complicated mess with no clear rule to determine what constitutes a reasonable search or seizure.<sup>270</sup> The same is true for the voting apportionment cases—once the Court applied the Constitution, the Court opened the door to a number of interpretive problems.<sup>271</sup> The First Amendment Establishment Clause jurisprudence followed the same pattern.<sup>272</sup> The application of the Constitution in a single case to an area formerly controlled by state government legislation opens the door to a series of interpretive problems that are difficult to solve on a case-by-case basis. Thus, despite the Court’s best efforts to limit its involvement in such areas, based on an abundance of caution and restraint in applying such open-ended constitutional language, the outcome is a long series of cases through which it becomes increasingly difficult to establish intelligible principles and bright-line rules.

In all of these examples, experience cautions against the Court’s intervention into matters that have been historically addressed by the state legislatures. This concept of judicial restraint and deference toward state legislatures makes sense at first blush as a matter of institutional choice. State legislatures have a political process that can create nuanced and complex sets of rules, conduct thorough research and inquiry, and modify such rules as experience demonstrates their flaws and shortcomings. Further, state legislatures, as institutions comprised of elected officials, are

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<sup>268</sup> See, e.g., James S. Liebman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209 (2004).

<sup>269</sup> A recent article published in the *New Yorker* makes a strong case that the state of Texas convicted and executed an innocent man. Cameron Todd Willingham was convicted in 1992 for murdering his three daughters. Their deaths were the result of a 1991 fire that broke out in the family’s Corsicana, Texas home. The conviction was largely based on arson evidence that can only be deemed as “junk science,” “myth,” or “folklore” and was later disproved by several experts. Mr. Willingham professed his innocence until his execution. His last words were: “The only statement I want to make is that I am an innocent man convicted of a crime I did not commit. I have been persecuted for twelve years for something I did not do. From God’s dust I came and to dust I will return, so the Earth shall become my throne.” See David Grann, *Trial by Fire*, NEW YORKER, Sept. 7, 2009, at 42.

<sup>270</sup> See, e.g., David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47 (2005).

<sup>271</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>272</sup> See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971).



subject to majoritarian opinions and values. Finally, state legislatures enjoy the ability to compare themselves with each other as competing experimental laboratories. Indeed, one of the important values of our federalist system of government, as Justice Brandeis famously stated, is that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>273</sup>

On the other hand, the Court does have a responsibility to protect the individual rights of citizens against the potential tyrannical overreaching of those same state legislatures. The Constitution, and in particular, the Bill of Rights, relies on the Court to intervene to protect those rights. As Justice White has explained,

Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not.<sup>274</sup>

Given the opaque language of the provision applicable here—“cruel and unusual” punishment—attempting to protect citizens’ rights under a modern understanding<sup>275</sup> of such words<sup>276</sup> invites the opening of a judicial Pandora’s box.<sup>277</sup>

Thus, this Pandora’s box understanding of judicial restraint begins with the premise that certain applications of the Constitution to conduct formerly regulated by the state legislatures open a Pandora’s box of judicial intervention such that the Court must continually intervene to address the myriad of issues that subsequently arise as a by-product of its initial intervention.

In this scenario, the Court is left with three choices: (1) try to close the box, (2) grapple indefinitely with the vast permutations of its original intervention and continue to regulate state legislatures and their legislative schemes on a case-by-case basis as issues happen to reach the Court, or (3) remove the box altogether (and completely prohibit the states from engaging in that area).

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<sup>273</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>274</sup> *Furman v. Georgia*, 408 U.S. 238, 313–14 (1972) (White, J., concurring).

<sup>275</sup> *Weems v. United States*, 217 U.S. 349 (1910).

<sup>276</sup> This is also arguably true under an originalist approach as well. See Granucci, *supra* note 32; Lain, *supra* note 73; Stinneford, *supra* note 32; see also Berry, *supra* note 70.

<sup>277</sup> As indicated *supra* at notes 270–71, this is also certainly true for the First and Fourth Amendments.

Closing the box, although advocated by Justice Scalia in the death penalty context,<sup>278</sup> is often a near-impossibility. Once the Court has engaged in regulating a particular area under the Constitution, it is difficult to go back, particularly given its traditional application of the principle of *stare decisis*.<sup>279</sup> This becomes even more true the longer the Court continues to apply the constitutional provision, as its general application becomes more settled and often more accepted.

Continuing to apply the constitutional provision in a case-by-case basis, no matter how tortured the jurisprudence, has been the traditional practice of the Court. It has always seemed willing to give the states another try and allow state legislatures to remedy the latest constitutional flaw.<sup>280</sup>

Death, however, is different.<sup>281</sup> While speech, freedom from search and seizure, and voting are important constitutional rights, the deprivation of one's life is a far more serious proposition. As the Supreme Court has repeatedly noted, "[t]here is no question that death as a punishment is unique in its severity and irrevocability."<sup>282</sup> Thus, the *consequence* of relying on a case-by-case approach to address constitutional problems is that innocent individuals may be executed by the states.

Death is also different in the sense that capital trials tend to be full of error. According to one recent study, almost seventy percent of capital cases involve at least one serious, reversible error.<sup>283</sup> Ironically, despite all of the Court's constitutional regulation of the death penalty, the problems

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<sup>278</sup> See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 534 U.S. 551 (2005).

<sup>279</sup> See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (explaining the factors to consider when applying *stare decisis*).

<sup>280</sup> See Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed*, 8 GEO. J.L. & PUB. POL'Y 1 (2010) (discussing the Pandora's box analogy in regards to the Privileges and Immunities Clause and *McDonald v. Chicago*, 130 S. Ct. 3020 (2010)).

<sup>281</sup> See e.g., Abramson, *supra* note 182; Rachel Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009). I have recently argued that life without parole should be its own kind of different. See William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109 (2010).

<sup>282</sup> *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); see also *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (death differs from life imprisonment because of its "finality"); *Spaziano v. Florida*, 468 U.S. 447, 460 n.7 (1984) ("the death sentence is unique in its severity and in its irrevocability . . ."); *Ring v. Arizona*, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (as "death is not reversible," DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming).

<sup>283</sup> See Liebman, *supra* note 268 (providing data concerning the type and frequency of error in capital cases).

have only increased over time.<sup>284</sup> Continued doubts about the capital system's ability to avoid imprisoning innocent individuals<sup>285</sup> and perhaps in some cases, execute them, is perhaps the best evidence that the *Furman* experiment has simply failed.

Thus, the second part of the Pandora's box understanding of judicial restraint, as applied to capital punishment, is that, given the ways in which "death is different," pulling the box off of the table is the inevitable conclusion one reaches if one opens the box in the first place.

Justice Powell ultimately concluded that getting rid of the death penalty was the only option after being unable to solve the problem raised by *McCleskey*—that race will always unfairly influence who receives the death penalty.<sup>286</sup> Throughout his jurisprudence, Justice Powell adhered to the principle of judicial restraint, but in the end, concluded that the Pandora's box of capital punishment should be removed from the reach of the states.<sup>287</sup>

Justice Blackmun personally believed that the death penalty should be abolished.<sup>288</sup> Several times during his tenure on the Supreme Court he wrote that if he were a legislator he would cast his vote to strike down capital punishment.<sup>289</sup> Yet, during the early years of his career, Justice Blackmun exercised judicial restraint and refrained from constitutionalizing the issue of capital punishment.<sup>290</sup> Once Pandora's box was open, however, Justice Blackmun slowly began restricting the application of the death penalty in certain circumstances.<sup>291</sup> Ultimately, at the end of his career, the only remaining option was to remove the proverbial box of death penalty jurisprudence and eliminate its existence entirely through abolition of the death penalty.<sup>292</sup> In the end, for Justice Blackmun, all of the tinkering in the

<sup>284</sup> *Id.*

<sup>285</sup> *See, e.g.*, Governor George Ryan, I Must Act, Address at Northwestern University School of Law (Jan. 11, 2003), *published in* AUSTIN SARAT, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* 163 (2003).

<sup>286</sup> *See supra* discussion subpart III.A.

<sup>287</sup> *See supra* discussion subpart III.A.

<sup>288</sup> I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated.

*Furman v. Georgia*, 408 U.S.238, 405 (1972) (Blackmun, J., dissenting).

<sup>289</sup> *See, e.g., id.* at 410.

<sup>290</sup> *See supra* discussion subpart III.B.

<sup>291</sup> *See supra* discussion subpart III.B.

<sup>292</sup> *See supra* discussion subpart III.B.

world by the Supreme Court could not correct the fundamental problems of the administration of the death penalty.<sup>293</sup>

Justice Stevens likewise sought for many years to solve the problems raised by the administration of the death penalty by the various states.<sup>294</sup> He ultimately concluded, though, that despite all of the Court's intervention, the same fundamental errors and flaws still persisted.<sup>295</sup> In the end, for Justice Stevens, Justice White's view in *Furman*—that the costs of allowing capital punishment heavily outweighed any benefit it might offer.<sup>296</sup>

To constitutionalize the death penalty, then, sets one on a path toward its abolition. As the Court's jurisprudence has shown, the Eighth Amendment is not, and never will be, an effective tool that can eliminate the deep and fundamental problems with the capital systems adopted by the states: the propensity for widespread error and the risk (and even likelihood) of innocent individuals being executed.

Is the answer then to not constitutionalize it in the first place and allow the state legislatures complete autonomy to implement their capital systems? As Justice Scalia has argued, “[t]here is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court.”<sup>297</sup>

Certainly not. As the Court explained in *Furman*, the historical implementation of capital punishment has always been full of problems. And as remains true today, “[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”<sup>298</sup> As the jurisprudence of Justices Powell, Blackmun, and Stevens can attest, the error of the Court came not when it “opened the box” in *Furman*, but when it allowed the box back on the table in *Gregg*.

## V. CONCLUSION

This Article has sought to fill the void of a collective analysis of the repudiation of capital punishment by Justices Powell, Blackmun, and Stevens from their initial pro-death penalty positions. It has conceptualized these parallel shifts not as normative changes, but from the perspective of institutional choice.

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<sup>293</sup> See *supra* discussion subpart III.B.

<sup>294</sup> See *supra* discussion subpart III.C.

<sup>295</sup> See *supra* discussion subpart III.C.

<sup>296</sup> See *supra* discussion subpart III.C.

<sup>297</sup> *Atkins v. Virginia*, 536 U.S. 304, 353 (2002) (Scalia, J., dissenting).

<sup>298</sup> *Furman v. Georgia*, 408 U.S.238, 309 (1972) (Stewart, J., concurring).

Thus, this repudiation is a story of abandoning judicial restraint at two levels. First, this Article explored the change at the level of constitutionalizing the death penalty in the first place, and then at the level of abolishing the death penalty altogether.

From this jurisprudence, the Article has argued that the conclusions of each of the three Justices are the inevitable consequence of abandoning judicial restraint because of the Pandora's box nature of such constitutional interpretation. The Article claims that, in the capital context, there are two natural consequences of constitutionalizing capital punishment. First, the initial decision to make the issue a constitutional one rather than one exclusively regulated by state legislatures results in the creation of numerous doctrinal and jurisprudential problems in the use of the death penalty. As with other similar areas, the problem becomes magnified as the Court tries to address these systemic issues one case at a time.

In the capital context, there is a second consequence of constitutionalizing the death penalty. Based on the notion that "death is different" and the high volume of error in capital cases, the inevitable outcome of constitutionalizing capital punishment is the conclusion that capital punishment should be abolished.

In sum, then, the Article has attempted to explore and explain the dramatic shift in the capital jurisprudence of Justices Powell, Blackmun, and Stevens. Perhaps their sentiments can best be summarized by the Frenchman Marquis de Lafayette:

Till the infallibility of human judgments shall have been proved to me, I shall demand the abolition of the penalty of death.<sup>299</sup>

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<sup>299</sup> C. LUCAS, *RECUEIL DES DÉBATS DES ASSEMBLÉES LÉGISLATIVES DE LA FRANCE SUR LA QUESTION DE LA PEINE DE MORT*, pt. 2, at 42 (1831), *quoted in* P. MACKEY, *VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787–1975*, at 98 (1976). His contemporary Marquis de Sade similarly remarked that "[the death penalty] is to be got rid of . . . because it would be difficult to conceive of a poorer calculation than this, by which a man is put to death for having killed another: under the present arrangement the obvious result is not one man the less but, of a sudden, two; such arithmetic is in use only amongst headsmen and fools." MARQUIS DE SADE, *PHILOSOPHY IN THE BEDROOM* (1795), *reprinted in* JUSTINE, *PHILOSOPHY IN THE BEDROOM, AND OTHER WRITINGS* 177, 311 (Richard Seaver & Austryn Wainhouse trans., 1965).