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I. INTRODUCTION

Shortly before retiring from the Supreme Court in 1994, Justice Harry Blackmun issued a stinging dissenting opinion from the denial of certiorari in a capital case.[1] In his opinion, Justice Blackmun announced his opposition to capital punishment and asserted that:

> 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 aesthetics, and abdicating its statutorily and constitutionally imposed duty to provide meaningful judicial oversight to the administration of death by the states.[2]

This article demonstrates that Justice Blackmun correctly asserted that the death penalty has been deregulated. In recent years, the Supreme Court has demonstrated a willingness to completely overlook unfair procedures in death penalty cases. The Court has placed almost no restrictions on the manner in

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1. Callins v. Collins, 510 U.S. 1141, 1145 (1993) (Blackmun, J., dissenting).
2. *Id.*

which states impose the death penalty. Further, the Court and Congress have eliminated most federal court regulations of death penalty sentences. For example, the Supreme Court and Congress have placed restrictions on the filing of writs of habeas corpus, created the harmless error rule, and established the non-retroactivity doctrine, all of which prevent death row inmates from obtaining relief. Justice Blackmun called these restrictions the "Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."[3] In addition, the Supreme Court—either through the creation of a death penalty friendly doctrine and manipulation of that doctrine, or by ignoring and refusing to address certain important issues, such as racial discrimination in the imposition of the death penalty—upholds the death penalty at all costs. This result occurs even at the cost of constitutional rights. More disturbingly, this deregulation takes place as the use of the death penalty expands.

This article attempts to "make the record," as Stephen Reinhardt, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, has suggested,[4] to show the difficulties the Supreme Court places on inmates sentenced to death to vindicate their constitutional rights. The article demonstrates how the U.S. Supreme Court, through a series of decisions and denials of certiorari since 1976, abdicates its constitutional responsibility to ensure that the death penalty is fairly administered. The article also discusses Congress's role in simultaneously expanding the death penalty and deregulating the federal role in ensuring its fair administration. Furthermore, this article offers reasons why deregulation occurs and analyzes whether the state courts can fairly administer the death penalty. Finally, this article concludes with reasons why the federal courts' role in administering the death penalty is so vital.

3. Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

4. *See* Stephen Reinhardt, The Anatomy of An Execution: Fairness vs. Process 1 (2000) (unpublished manuscript) (on file with author) ("[I]t is nevertheless the duty of the academy and the legal profession to make the record that will be necessary when the pendulum swings.").

II. EXPANSION OF THE DEATH PENALTY

Deregulation of the death penalty is important given its recent expansion. This recent expansion includes increases in the numbers of crimes punishable by death, inmates executed, and states adopting the death penalty. In 1994, Congress passed, and the President signed, the Violent Crime Control and Law Enforcement Act of 1994.[5] The new law dramatically expands the number of federal offenses punishable by death.[6] Newly created offenses now punishable by death include drive-by shootings resulting in death;[7] drug trafficking in large quantities;[8] attempting, authorizing, or advising the killing of any public officer, juror, or witness in a case involving a continuing criminal enterprise;[9] smuggling aliens where death results;[10] and torture resulting in death outside the United States.[11] Congress further expanded the death penalty by making certain existing federal crimes punishable by death[12] and by resurrecting death penalty statutes deemed unconstitutional by purportedly curing their constitutional deficiencies.[13]

The number of inmates executed in recent years has increased dramatically. From 1976, when the Supreme Court reinstated the death penalty,[14] to 1990, 143 inmates were executed.[15] Between 1990 and 1999, however, 478 executions oc-

5. *See* Randall Coyne, *The Federal Death Penalty Explosion, reprinted in* RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 151 (Supp. 1998). *See also* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

6. *See* COYNE, *supra* note 5, at 151.

7. *See* 18 U.S.C.A. § 36 (West Supp. 1999).

8. *See id.* § 3591(b)(1).

9. *See id.* § 3591(b)(2).

10. *See id.* 8 U.S.C.A. § 1324(a)(1)(B)(iv) (West 1999).

11. *See* 18 U.S.C.A. § 2340(A). For an exhaustive list of newly created federal crimes punishable by death, *see* COYNE, *supra* note 5, at 151–53.

12. Existing federal crimes made capital offenses include: (1) car jacking resulting in death, *see* 18 U.S.C. § 2119 (West Supp. 1999); (2) child molestation committed within federal territorial jurisdiction, such as a federal day care, resulting in death, *see id.* § 2245; (3) genocide, *see id.* § 1091; (4) hostage taking resulting in death, *see id.* § 1203; (5) murder for hire, *see id.* § 1958; (6) murder in order to aid racketeering activity, *see id.* § 1959; and (7) civil rights violations where death results, *see id.* §§ 241, 242, 245, 247.

13. *See, e.g.*, 18 U.S.C. § 1751(a) (West 1994) (assassination of the President or Vice-President); *id.* § 2381 (treason).

14. *See* Gregg v. Georgia, 428 U.S. 153 (1976) (reinstating the death penalty).

15. *See* Mark Warren, *Death Penalty Information Center* (last visited Jan.

curred.[16] Thus, in a nine-year period, the number of executions more than tripled the number carried out during the previous fourteen-year period.

Finally, during the 1990s both New York[17] and Kansas[18] reinstated the death penalty. Given the increase in crimes punishable by death, the recent increase in executions, and the addition of New York and Kansas as death penalty jurisdictions, the number of individuals sentenced to death and the number of executions will certainly rise in the foreseeable future. As this article demonstrates, the courts ironically retreat from their constitutional obligation to police the death penalty at the very time such policing is most needed.

III. THE WRIT OF HABEAS CORPUS

A. *History and Purpose*

The federal courts routinely review death sentences after inmates file writs of habeas corpus. As a result, a review of the history of the writ and its importance to death row inmates follows.

The writ of habeas corpus, as is the case with most American law, originated in England. In 1641, the Habeas Corpus Act was passed, providing that anyone imprisoned by a court, the king, his counsel, or his councils had the right to be brought upon demand to judges of the King's bench or to the court of Common Pleas without delay.[19]

The colonies then introduced habeas corpus into the American legal scheme.[20] At the time of the Constitutional Convention in 1787, all but one of the original member states had adopted either an express constitutional provision pertinent to habeas corpus or a practice allowing it.[21] As a result, there was no debate about the habeas corpus provision in the U.S. Constitution. The Judiciary Act of 1789 granted the fed-

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14, 1999) <http://www.essential.org/dpic/foreignnatl.html>.

16. *See id.*

17. *See* Alan Finder, *Death Penalty Is Challenged in State Court*, N.Y. TIMES, Oct. 15, 1998, at B1.

18. *See* Tony Rizzo, *Amendment May Affect Death Penalty in Kansas*, KAN. CITY STAR, July 2, 1998, at A1.

19. *See* John T. Philipsborn, *The Constitution and Habeas Corpus*, 16 THE CHAMPION 22, 26 (1992).

20. *See id.*

21. *See id.*

eral judiciary the power to issue writs of habeas corpus.[22] The Habeas Corpus Act of 1867 made the writ applicable to state prisoners.[23] The inclusion of habeas corpus in the federal Constitution resulted from the belief that the writ provided important protections for the individual against the sovereign.[24] Although the Constitution includes a provision permitting the suspension of the writ,[25] only during the Civil War was the writ suspended.[26] Thus, throughout United States history the writ of habeas corpus has been available to defendants who claim deprivation of mandated procedural protections, whether convicted by either the federal government or the states.

B. *Importance of the Writ in Death Penalty Proceedings*

The primary target of deregulation efforts has been the federal writ of habeas corpus. A death row inmate's best chance of having his conviction and sentence overturned and his constitutional rights vindicated traditionally occurs after filing a writ of habeas corpus in federal court. Federal habeas writs result in reversals of approximately fifty percent of all death sentences.[27] There are several reasons why death row inmates achieve greater success during the federal habeas procedure. First, convictions often occur because defendants lack the resources to hire talented and motivated counsel.[28] As a result, indigent capital defendants must frequently rely on court-appointed attorneys who often lack the skills, re-

22. *See* STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 7.02 (2d ed. 1992).

23. *See* CHILDRESS & DAVIS, *supra* note 22, § 7.02.

24. *See* Philipsborn, *supra* note 19, at 27.

25. *See* U.S. CONST. art. I, § 9, cl. 2.

26. *See* Philipsborn, *supra* note 19, at 27.

27. *See* Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 526 (1996) (estimating that death row inmates received relief in 47% of habeas cases decided between 1976 and 1991); *see also* EDWARD LAZARUS, CLOSED CHAMBERS 148 (1998) ("On habeas, the Fifth and Eleventh circuits (which included most of the southern states) overturned capital convictions or death sentences in the vast majority of the cases they decided, even though state courts in the same cases previously had found no constitutional violations."); Nicholas J. Trenticosta, *A Constitutional Crisis: Justice Without Post-Conviction Representation*, 44 LA. B.J. 232, 233 (1996) ("[I]t is known that at least 40 percent of the federal habeas corpus cases have resulted in the death sentences being reversed . . . in Louisiana . . . a whopping 48 percent have been reversed.").

28. *See* LAZARUS, *supra* note 27, at 127.

sources, and commitment to handle capital cases.[29] "Almost without exception, a prerequisite for receiving a death sentence is the inability to hire a lawyer sufficiently talented or motivated to mount a credible defense either at trial or at the separate sentencing proceeding, which followed on conviction."[30] Somewhat ironically, death row inmates receive better representation during federal habeas proceedings. Some of the best advocates in the country, attorneys from organizations such as the NAACP Legal Defense and Educational Fund, the American Civil Liberties Union, the Southern Poverty Law Center, and the California Appellate Project, take on habeas petitions. These attorneys offer the type of brilliant, dedicated representation that is often lacking during the initial trial.[31]

Second, death row inmates are not likely to succeed on direct appeal. Appellate attorneys, often appointed by the same court that appointed trial counsel, are frequently as incompetent as trial attorneys.[32] Even when appellate counsel is competent and discovers constitutional violations, appellate courts often deny relief because the trial counsel failed to object or the court finds the violation harmless.[33]

Finally, relief is also unlikely on direct appeal since most state judges are elected[34] and the consequences for overturning death sentences have often proven fatal.[35] Federal judges, by contrast, do not endure elections, receiving life tenure upon appointment. This distinction is important to death row inmates since their direct appeals are decided by state judges, who must justify their decisions to the typically pro-capital

29. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) [hereinafter Bright, *Counsel for the Poor*].

30. *See* LAZARUS, *supra* note 27, at 127.

31. *See* Robert Weisberg, *Who Defends Capital Defendants?*, 35 SANTA CLARA L. REV. 535, 537 (1995).

32. *See* Bright, *Counsel for the Poor, supra* note 29, at 1848 ("The poor person sentenced to death may be represented by a lawyer with little or no appellate experience, no knowledge of capital punishment law, and little or no incentive or inclination to provide vigorous advocacy.").

33. *See* Weisberg, *supra* note 31, at 537.

34. Judges face elections in 41 states. *See* Alan Ellis, *Habeas Corpus and the Clinton Administration*, 16 CHAMPION 24, 24 (1992).

35. *See* Stephen B. Bright, *The Politics of Capital Punishment: The Sacrifice of Fairness for Executions*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 117, 124 (James R. Acker et al. eds., 1998) [hereinafter Bright, *The Politics of Capital Punishment*].

punishment voters.

Proponents of capital punishment recognize the importance of the federal habeas proceedings. After its expansion by the Warren Court, these proponents began an assault on the writ, culminating with the Anti-Terrorism and Effective Death Penalty Act of 1996.[36]

C. *The Warren Court and Expansion of the Writ*

Three decisions of the Warren Court during the 1960s greatly expanded the use of the federal writ of habeas corpus. In *Fay v. Noia*,[37] after a murder defendant failed to perfect a timely appeal of his conviction, he filed a federal habeas petition.[38] The federal district court denied relief on the grounds that the defendant's failure to timely appeal in the state reviewing court constituted a procedural default of his claims.[39] However, the U.S. Supreme Court reversed, holding that the procedural failure of the petitioner did not deny him federal habeas relief unless the defendant deliberately bypassed state procedures and intentionally forfeited an opportunity for state review.[40] In *Townsend v. Sain*,[41] the Supreme Court held that habeas proceedings generally entitle petitioners to an evidentiary hearing on any unresolved factual issues concerning their claims in federal court.[42] Finally, in *Sanders v. United States*,[43] the Court held that relief could be granted to a successor habeas petition, after denial of an earlier petition. The lone exception to the *Sanders* rule is if counsel had knowledge of the successor claim when filing the earlier petition and deliberately failed to raise the claim.[44] In these three cases, the Warren Court sent a clear message that it would

36. 28 U.S.C.A. §§ 2241–2266 (West Supp. 1999). *See infra* Part III.F.

37. Fay v. Noia, 372 U.S. 391 (1963).

38. *See id.* at 396–97.

39. *See id.* at 396.

40. *See id.* at 438.

41. Townsend v. Sain, 372 U.S. 293 (1963).

42. *See id.* Habeas petitioners were entitled to an evidentiary hearing if: (1) the merits of any factual dispute had not been resolved; (2) the state courts' findings were not supported by the record; (3) the fact finding procedures employed by the state court were inadequate; (4) there was newly discovered evidence; (5) crucial evidence was not adequately developed at the state hearing; or (6) if it appears that the state trier of fact did not afford the applicant a full and fair hearing. *See id.* at 313–18.

43. Sanders v. United States, 373 U.S. 1 (1963).

44. *See id.* at 18.

monitor violations of federal constitutional rights in state courts and not allow procedural rules to present obstacles to consideration of habeas claims.

D. *The Burger Court and the Beginning of Retrenchment*

The retrenchment of the federal writ began with the Burger Court's decision in *Wainwright v. Sykes*.[45] In *Wainwright*, the Court modified *Fay v. Noia*[46] by holding that when a federal habeas petitioner fails to raise a constitutional claim in state court the petitioner must (1) show cause as to why the a constitutional claim was not raised, and (2) demonstrate that the alleged constitutional violation prejudiced the defendant.[47] This new standard made it more difficult for an inmate to raise issues for the first time in a federal habeas petition. In *Fay*, the Warren Court only required that the inmate not deliberately bypass state court.[48] The more onerous Burger Court standard required a showing of cause and prejudice before an issue could be raised for the first time in a federal habeas petition.[49] This obstacle to bringing a federal habeas petition acted as a precursor to the most serious retrenchment of the federal writ, which came under the Rehnquist Court.

E. *Continued Retrenchment Under the Rehnquist Court*

The Rehnquist Court rendered four decisions that seriously impacted death row inmates' ability to obtain federal habeas relief.

1. Teague *and the Court's Failure to Apply "New" Constitutional Rules to Collateral Appeals*

One major hurdle to obtaining federal habeas relief is the doctrine of retroactivity announced by the Supreme Court in *Teague v. Lane*.[50] In *Teague*, the petitioner, a black man, was convicted by an all-white jury of three counts of attempted murder, two counts of armed robbery, and one count of aggra-

45. Wainwright v. Sykes, 433 U.S. 72 (1977).
46. Fay v. Noia, 372 U.S. 391 (1963).
47. *See Wainwright*, 433 U.S. at 90–91.
48. *See Fay*, 372 U.S. at 438.
49. *See Wainwright*, 433 U.S. at 90–91.
50. Teague v. Lane, 489 U.S. 288 (1989).

vated battery.[51] During jury selection, the prosecutor used all ten of his peremptory challenges to exclude blacks.[52] On appeal, the petitioner argued that the prosecutor's use of its peremptory challenges to strike blacks from the jury denied the defendant his right to trial by a jury that is representative of the community.[53] Both the Illinois Supreme Court and the U.S. Supreme Court rejected the petitioner's claim on direct review.[54] The petitioner subsequently filed a habeas petition in federal court.[55] While the habeas petition was pending in federal court, the U.S. Supreme Court decided *Batson v. Kentucky*, which held that the Equal Protection Clause forbids the prosecution from using its peremptory challenges to exclude venire persons from the jury solely because of their race.[56] In *Teague*, the Court faced the question of whether *Batson* applied to the petitioner on collateral review.[57]

The Court held that it would apply any newly rendered decision to cases still on *direct* review.[58] However, a new decision announcing a "new rule"[59] of constitutional law would not affect cases on *collateral* appeal.[60] Thus, the petitioner in *Teague* did not benefit from the *Batson* decision.

Teague significantly impacts death row inmates because it is often in the habeas process that defendants present their best claims for the first time. Therefore, a death row inmate may present a valid claim during the habeas process that the court will not address because it considers the claim "new."

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51. *See id.* at 292-93.
52. *See id.* at 293.
53. *See id.*
54. *See id.*
55. *See id.*
56. *See* Batson v. Kentucky, 476 U.S. 79 (1986).
57. *See Teague*, 489 U.S. at 288.
58. *See id.* at 303.
59. The Court defined a "new rule" of constitutional law as one not dictated by prior precedent existing at the time the defendant's conviction became final, or one which breaks new ground or imposes new obligations on the states or the federal government. *See id.* at 301.
60. *See id.* The Court did create two exceptions to the rule of nonretroactivity. First, a new rule will be applied retroactively to cases on collateral review "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.* at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)). Second, new rules will be applied retroactively if they require "the observance of those procedures that . . . are implicit in the concept of ordered liberty." *Id.* For this exception to apply, "the procedure at issue must implicate the fundamental fairness of the trial." *Id.* at 313.

Furthermore, *Teague* makes it less likely that the Supreme Court will grant a writ of certiorari in a capital case.

> [I]f a habeas petitioner was seeking relief based on settled law (making him eligible for the Court's consideration), almost by definition his case did not raise the kind of novel and interesting issue that might cause the Justices to grant review. But if a petitioner raised a novel and interesting claim, he'd be "Teagued-out"—disqualified for seeking a new rule. For death row inmates, who were almost always seeking at least a modestly new wrinkle on established principles, this had the makings of a nightmare.[61]

A good illustration of the difficulty *Teague* creates for death row inmates is the Supreme Court's decision in *O'Dell v. Netherland*.[62] In *O'Dell*, a Virginia state court convicted the defendant of murder, rape, and sodomy.[63] The prosecutor argued for a death sentence, claiming the defendant presented a future danger to society.[64] The defendant sought unsuccessfully to inform the jury that under Virginia law, a sentence of life imprisonment renders the defendant ineligible for parole.[65] His direct appeal was denied and his conviction became final in 1988.[66] The defendant subsequently filed a petition for writ of habeas corpus based on his denial of the opportunity to inform the jury of his parole ineligibility.[67] While the writ was pending, the U.S. Supreme Court held, in *Simmons v. South Carolina*, that where a death row inmate's future dangerousness is at issue, due process requires the inmate be permitted to inform the jury of his ineligibility for parole.[68] However, the Supreme Court held that O'Dell could not take advantage of the *Simmons* decision because it was a "new rule" under *Teague*.[69] Thus, despite the unconstitutionality of the imposition of O'Dell's sentence, *Teague* prevented the consideration of O'Dell's claim, and he was later exe-

61. LAZARUS, *supra* note 27, at 501.
62. O'Dell v. Netherland, 521 U.S. 151 (1997).
63. *See id.* at 154.
64. *See id.*
65. *See id.*
66. *See id.* at 157.
67. *See id.* at 154–55.
68. *See* Simmons v. South Carolina, 512 U.S. 154, 169 (1994).
69. *See O'Dell*, 521 U.S. at 166.

cuted.[70]

2. *The New, Harsher Harmless Error Standard*

Those inmates who are not "*Teagued*-out" still likely face tremendous difficulty in obtaining habeas relief as a result of the Rehnquist Court's decision altering the harmless error standard in *Brecht v. Abrahamson*.[71] Prior to *Brecht*, the Supreme Court would not reverse a constitutional error if the error was harmless beyond a reasonable doubt.[72]

In *Brecht*, the prosecutor used a criminal defendant's post-arrest silence to impeach him at trial.[73] The defendant appealed on the ground that the use of his post-arrest silence violated due process.[74] The Wisconsin Supreme Court agreed that the prosecution violated the defendant's rights by using his post-arrest silence to impeach him,[75] however, the court held that the error "was harmless beyond a reasonable doubt."[76] The defendant then filed a habeas petition in federal court.[77] The Supreme Court agreed that the defendant's rights were violated,[78] but adopted a new, more onerous, harmless error standard for habeas review of constitutional error. Under this new standard, a habeas petitioner alleging constitutional error must demonstrate that the error "had substantial and injurious effect or influence in determining the jury's verdict."[79] The new standard requires that the habeas petitioner demonstrate actual prejudice, rather than merely some harm, as a result of the constitutional error. In *Brecht*, the Court held that the defendant was unable to meet this new standard and affirmed his conviction.[80]

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70. *See Man Executed Despite Protest From the Pope*, N.Y. TIMES, July 24, 1997, at A18.

71. Brecht v. Abrahamson, 507 U.S. 619 (1993).

72. *See* Chapman v. California, 386 U.S. 18, 24 (1967).

73. *See Brecht*, 507 U.S. at 625.

74. *See id.* at 625–26.

75. *See id.* at 626.

76. *Id.*

77. *See id.*

78. *See id.* at 628–29 ("[T]he State's references to petitioner's silence . . . crossed the *Doyle* line."). *See generally* Doyle v. Ohio, 426 U.S. 610 (1976) (establishing the principle that a defendant's post-*Miranda* silence cannot be used for impeachment purposes).

79. *Brecht*, 507 U.S. at 637 (citing Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

80. *See id.* at 638–39.

Brecht represents yet another hurdle to relief for death row inmates. Even if an inmate convinces a court that *Teague* does not bar his habeas claims, the new harmless error standard makes obtaining relief difficult. As two commentators noted, when determining whether constitutional error is harmless, the courts simply:

> scrutinize the whole record for other overwhelming evidence of guilt; if it exists, then the admitted error is deemed harmless, because the court (not the jury) finds guilt beyond a reasonable doubt, regardless of the effect of the error on the jury. The reviewing court has become in effect, a super jury.[81]

The same commentators noted that the harmless error doctrine "raises troubling questions for a nation committed to fair processes, meaningful review, and overriding constitutional norms."[82]

As recently as during the 1998–1999 term, the U.S. Supreme Court demonstrated the depths it will go to in order to find a constitutional error harmless. In *Strickler v. Greene*, the Court applied the harmless error principle to uphold the death sentence of a Virginia inmate sentenced to death despite the prosecution's suppression of important evidence.[83] In *Strickler*, eyewitness testimony implicated the defendant in the murder of a college student.[84] According to the Court, this testimony "provided the only disinterested, narrative account of what transpired."[85] This testimony was so important that the prosecutor emphasized it during closing arguments.[86] Prior to testifying at trial, however, the police interviewed the eyewitness who was unable to positively identify the perpetrator at that time.[87] The police and the boyfriend of the deceased aided the witness' recollection at trial.[88] The interviews where the police influenced the witness were not made available to the defense until the federal habeas proceeding.[89] The Court held that the misconduct by the prosecutors did

81. CHILDRESS & DAVIS, *supra* note 22, at 7–8.
82. *Id.* at 7–11.
83. *See* Strickler v. Greene, 527 U.S. 263 (1999).
84. *See id.* at 295.
85. *Id.* at 311.
86. *See id.* at 307.
87. *See id.* at 296–98.
88. *See id.* at 316 (Souter, J., dissenting).
89. *See Strickler*, 527 U.S. at 300.

not prejudice the defendant, although it conceded that the outcome "might have changed" had the prosecution timely disclosed the documents to the defense.[90] As the dissenters noted, if just one juror harbored doubts about the eyewitness's account, the jury may not have rendered the death sentence.[91]

3. *Successor Habeas Petitions*

The Rehnquist Court also created a hurdle for those inmates filing second or successor federal habeas petitions. Second or successor petitions are necessary if the defendant discovered new evidence after the filing of the earlier petition, or the habeas attorney lacked hard evidence to support a claim when filing the initial petition. While the Warren Court opened the door to successor petitions in *Sanders v. United States*,[92] the Rehnquist Court almost completely shut the door to these petitions. In *McClesky v. Zant*,[93] the Court adopted the same cause and prejudice test for successor petitions that it adopted for procedural defaults under *Wainright*.[94] Under *McClesky*, the Court only considers an inmate's successor petition if the defendant demonstrates (1) cause for failing to raise the claim earlier, and (2) prejudice as a result of the alleged constitutional violation.[95] As with procedural default, this strict cause and prejudice standard for successor petitions seriously impedes a death row inmate's ability to receive habeas relief.

4. *Limiting Evidentiary Hearings in Federal Court*

Finally, the Rehnquist Court created a hurdle for those inmates seeking evidentiary hearings in federal court. Death row inmates frequently include factually disputable claims in their habeas petitions.[96] The petitioners need an opportunity to fully develop these facts to accurately resolve the legal claims, which may not be fully developed in state court. The

90. *Id.* at 307.

91. *See id.* at 318 (Souter, J., dissenting).

92. Sanders v. United States, 373 U.S. 1 (1963); *see also supra* text accompanying note 43.

93. McClesky v. Zant, 499 U.S. 467 (1991).

94. *See id.* at 494; *see also supra* Part II.D.

95. *See McClesky*, 499 U.S. at 468.

96. Examples of factually disputable claims often raised are ineffective assistance of counsel and claims of actual innocence.

Warren Court "substantially increased the availability of evidentiary hearings in habeas corpus proceedings and made mandatory much of what had previously been within the broad discretion of the District Court."[97] However, in *Keeney v. Tamayo-Reyes*,[98] the Rehnquist Court applied the same cause and prejudice test from the procedural default and successor petition areas to determine whether to grant an inmate an evidentiary hearing in federal court.[99] Thus, an inmate must demonstrate cause for failing to fully develop facts in state court and demonstrate prejudice to obtain an evidentiary hearing.[100]

F. *AEDPA—Retrenchment Completed*

The cases decided by the Rehnquist Court, especially *Teague,* substantially impaired death row inmates' ability to obtain federal review of their death sentences. Congress joined the Rehnquist Court in making it more difficult for death row inmates to obtain federal habeas review when it passed the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").[101] The goal of the AEDPA is to restrain the federal courts' ability to review death sentences, since death row inmates achieve a great deal of success having their convictions and death sentences overturned in federal court.[102] The

97. Smith v. Yeager, 393 U.S. 122, 125 (1968).

98. Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

99. *See id.* at 8.

100. *See id.* at 11.

101. Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C.A. §§ 2241–2266 (West Supp. 1999).

102. For instance, during the congressional debate, Representative Christopher Cox stated:

> My amendment, which I am calling the Harris amendment, provides that a habeas writ will not be granted when State court decision reasonably interprets and Federal law reasonably interprets the facts of the case and reasonably applies the law to the facts, or to put it simply, State decisions that are reasonable on the law and facts will be upheld by a habeas review. . . . Our Federal criminal jurisprudence is a gloss on that State criminal justice system. The Federal procedural rules, in fact, operate in many cases as a frustration to the State system. So we find that there are egregious cases, and all too many of them, of convicted first degree murderers who have run all of their appeals in the State criminal justice system, who then get another bite, and another bite at the apple, seemingly endlessly in the Federal system, and who have been able, through the abuse of the habeas device, to postpone their executions, seemingly indefinitely. . . .

141 CONG. REC. H1416 (daily ed. Feb. 8, 1995) (statement of Rep. Cox). Repre-

key provisions of the Act serve to: (1) place strict time limitations on filing a writ, (2) shift the balance of power to state courts by requiring deference to its findings of facts and conclusions of law, (3) restrict the ability of inmates to file successor habeas petitions, and (4) make it more difficult to appeal adverse district court decisions.[103]

1. *Placing Time Restrictions on Filing the Writ*

Section 2244(d)(1) requires inmates to file federal habeas petitions within one year of the latest of several events, most typically the completion of direct review.[104] However this time period tolls while an inmate's state habeas petition is pending.[105] This new one year statute of limitations is problematic for death row inmates because evidence of their innocence or serious constitutional violations often surface many years after their convictions.[106] Furthermore, with the strict time limit, habeas counsel may no longer have sufficient time to investigate and develop their claims.

2. *Deference to State Courts*

Several provisions of the AEDPA require federal courts to defer to state courts. This deference was adopted despite the fact that the writ of habeas corpus exists to correct unconstitutional state convictions. Thus, the very courts that may have unconstitutionally convicted and sentenced an inmate are now given great deference to recognize and correct their mistakes.

First, section 2254(d)(1) provides that a federal court may not reverse a state court's decision unless it "was contrary to,

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sentative Bill McCollum added:

> If there is a full and fair review of the provisions by the courts, the Federal courts, of what is going on underneath, and if the lower courts have made this decision, why should one Federal judge overturn the rulings of the State court judge, five State intermediate appellate courts and perhaps nine Supreme Court justices . . . ?

141 CONG. REC. H1425, 1426 (daily ed. Feb. 8, 1995) (statement of Rep. McCollum).

103. *See* 28 U.S.C.A. §§ 2241–2246.

104. *See id.* § 2244(d)(1).

105. *See id.* § 2244(d)(2).

106. For instance, after serving 16 years on death row, Anthony Porter was released after a journalism class at Northwestern University located the real killer. *See* John H. White & Brian Jackson, *"I'm Free"; Wrongly Convicted of Double Murder, Porter Off Death Row*, CHI. SUN-TIMES, Feb. 6, 1999, at 1.

or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[107] One federal appeals court interpreted this provision to require that federal courts honor a state court's decision unless that decision is contrary to Supreme Court precedent.[108] Therefore, if a state court decision on a federal constitutional question conflicts with a federal appeals court's interpretation of the same question, the state court decision controls. As the Seventh Circuit explained:

> Think of the Speedy Trial Clause of the Sixth Amendment, which . . . does not prescribe a rule for "how long is too long" but rather establishes a list of factors to consider. The Supreme Court of the United States sets the bounds of what is "reasonable"; a state decision within those limits must be respected—not because it is right, or because federal courts must abandon their independent decision making, but because the grave remedy of upsetting a judgement entered by another judicial system after full litigation is reserved for grave occasions.[109]

Second, the AEDPA makes significant changes in the ability of an inmate to obtain a federal evidentiary hearing during habeas proceedings. The state court's findings of fact are presumed correct.[110] Further, courts may grant an evidentiary hearing only if an inmate's claim relies on a new rule of constitutional law made retroactive by the U.S. Supreme Court,[111] or if the claim relies on a factual predicate that could not have been discovered earlier.[112] In addition, the facts underlying the claim must "be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense."[113] As a result of this provision, only an inmate who makes a persuasive showing of factual innocence obtains a federal evidentiary hearing. Suppose, for instance, that habeas counsel discovers evidence that a death row inmate's trial counsel was romantically involved with the prosecutor and may have divulged confiden-

107. 28 U.S.C.A. § 2254(d)(1).
108. *See* Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996).
109. *Id.* at 871.
110. *See* 28 U.S.C.A. § 2254(e)(1).
111. *See id.* § 2254(e)(2)(A)(i).
112. *See id.* § 2254(e)(2)(A)(ii).
113. *Id.* § 2254(e)(2)(B).

tial information about the inmate's case to the prosecutor. This conflict may have rendered trial counsel ineffective. Suppose further that habeas counsel includes an ineffective assistance of counsel claim in the habeas petition, but the state court refuses to conduct an evidentiary hearing so that habeas counsel could prove the claim. Under the AEDPA, the inmate would not be granted an evidentiary hearing in federal court despite the fact that he did not receive a fair trial, unless he also has evidence demonstrating his innocence. This represents a major change from prior practice. Previously, federal courts had the discretion to conduct an evidentiary hearing into any claim if the inmate demonstrated cause and prejudice.[114]

Third, section 2254(b) mandates an exhaustion of state remedies before filing a habeas petition in federal court.[115] This is consistent with prior practice. However, two new provisions depart from prior practice. First, the federal courts may deny a claim on the merits despite an inmate's failure to exhaust state remedies if the court believes the claim is nonmeritorious.[116] Second, the state must expressly waive the exhaustion requirement.[117] Thus, under the new law, whenever an inmate fails to exhaust state remedies, the state may hope the federal court dismisses the claims.

3. *Restricting Successor Habeas Petitions*

The AEDPA also limits federal habeas review by severely impairing an inmate's ability to file successor habeas petitions. A successor petition is dismissed unless it is both new and the inmate raises an issue of actual innocence that could not have been discovered earlier through due diligence.[118] Suppose, for instance, that after filing the initial writ, habeas counsel comes across a videotape indicating a forced confession. The AEDPA prevents habeas counsel from filing a successor petition unless he has additional evidence of his client's innocence. The new evidence indicating a forced

114. *See* Kenney v. Tamayo-Reyes, 504 U.S. 1, 9 (1992); *see also supra* Part III.E.4.

115. *See* 28 U.S.C.A. § 2254(b).

116. *See id.* § 2254(b)(2).

117. *See id.* § 2254(b)(3); *see also* Granberry v. Greer, 481 U.S. 129 (1987) (holding that the exhaustion requirement is waived unless raised by the State).

118. *See* 28 U.S.C.A. § 2244(b)(1), (b)(2)(B)(i-ii).

confession in violation of the defendant's rights would not permit counsel to file a successor petition as long as the evidence pointing to the defendant's guilt was still strong. Furthermore, an inmate must seek permission from the U.S. Court of Appeals to file such a petition and the court of appeals's decision is non-reviewable.[119] This provision likely creates a dilemma for habeas counsel: if counsel knows of a claim but cannot factually support it, is it better to include the claim in the initial petition where dismissal is likely,[120] or is it better to exclude the claim and wait for further evidence to support the claim while running the risk of an appeals court not permitting a successor petition?

4. *Difficulty in Appealing District Court Decisions*

Finally, the AEDPA places limits on an inmate's ability to appeal an adverse decision of a district court. Previously, an inmate could appeal an adverse district court opinion as long as the district court judge believed that at least one of the inmate's claims warranted appellate consideration.[121] Under the AEDPA, only a circuit justice or judge may issue a certificate of appealability.[122] Further, only if the judge believes that the inmate "has made a substantial showing of a constitutional right" may the judge issue the certificate of appealability.[123] These limitations on the ability to appeal an adverse decision of a district court further hampers the habeas process for death row inmates.

Collectively, the decisions of the U.S. Supreme Court and the provisions of the AEDPA have eviscerated the writ of habeas corpus.[124] The federal courts will certainly no longer re-

119. *See id.* § 2244(b)(3)(A), (E).

120. It is also possible that an attorney may be sanctioned for filing such a claim. *See* FED. R. CIV. P. 11.

121. *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 390 (1996).

122. *See* 28 U.S.C.A. § 2253(c)(1). One commentator has found this change "odd," since the district judge, having already examined the case, is in a better position to determine its appealability. *See* Yackle, *supra* note 121, at 390.

123. 28 U.S.C.A. § 2253(c)(2).

124. During congressional debate, Representative Mel Watt stated:

> All of my colleagues and the American people are getting, if this amendment passes, the Federal courts completely out of the habeas business. You will not have any Federal habeas rights if this bill passes, because in order for you to get in the Federal court, the Federal court would have to find that a decision that was rendered in the State

verse fifty percent of capital convictions.[125] Instead, elected state judges, who are susceptible to political pressure, will review death penalty cases. As a result of *Teague*,[126] *Brecht*,[127] and the tremendous deference given to state court determinations of law and fact under the AEDPA, unconstitutional convictions and death sentences will stand. The lengthy appeals process, although frustrating to the public, is important because this process reveals the innocence of many death row inmates.[128] It is likely that only those inmates who convincingly demonstrate their innocence early in the appeals process will overcome the obstacles Congress and the Supreme Court have placed before them.

IV. THE SUPREME COURT'S EIGHTH AMENDMENT JURISPRUDENCE

Death penalty regulation most appropriately occurs under the cruel and unusual punishment provision of the Eighth Amendment of the United States Constitution.[129] However, the Supreme Court has failed to regulate the death penalty under this provision. Specifically, the Supreme Court fails to police the methods of execution, classes of individuals being

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court was arbitrary or unreasonable interpretation of clearly established Federal law, resulted in a decision that was based on an arbitrary and unreasonable application to the facts, resulted in a decision that was based on an arbitrary and unreasonable determination of the facts in light of the evidence presented in the State proceeding. . . . So the practical effect of what you are doing is to say that you are never going to have any rights in the habeas arena in Federal court.

141 CONG. REC. H1426 (daily ed. Feb. 8, 1995) (statement of Rep. Watt). Representative John Conyers remarked that "[t]his is probably the throwback amendment to habeas corpus of all throwbacks. I mean, this would effectively end habeas corpus today at the Federal level. It almost says that: Let each State do their own thing on habeas corpus and forget Federal habeas review." 141 CONG. REC. H1425 (daily ed. Feb. 8, 1995) (statement of Rep. Conyers).

125. *See supra* note 27 and accompanying text.

126. *See supra* Part III.E.1.

127. *See supra* Part III.E.2.

128. Since 1963, at least 76 individuals have been wrongly convicted and sentenced to death. For instance, James Richardson spent 21 years on Florida's death row before being exonerated. *See* National Conference on Wrongful Convictions and the Death Penalty, *The Wrongly Convicted* (visited Oct. 20, 1998) <http://www.ncwedp.com/wrongly.html>. Anthony Porter spent 16 years on Illinois' death row for a crime he didn't commit. *See* John Carpenter & Alex Rodriguez, *"I'm Free"; Wrongly Convicted of Double Murder, Porter Off Death Row*, CHI. TRIB., Feb. 6, 1999, at 1.

129. *See* U.S. CONST. amend. VIII.

executed, and conditions of death row inmates. After addressing the constitutionalization of the death penalty, this section addresses each of these areas individually.

A. *Constitutionalizing Death*

In *Furman v. Georgia*,[130] a five-to-four majority of the Supreme Court held that capital punishment, as then administered, violated the Eighth Amendment's prohibition against cruel and unusual punishment.[131] For three of the five justices in the majority, the fatal flaw with capital punishment was the arbitrary and discriminatory manner of its imposition.[132] As for Justices Brennan and Marshall, they believed that the death penalty was cruel and unusual under any circumstance.[133]

However, the Supreme Court subsequently reinstated the death penalty in *Gregg v. Georgia*.[134] In doing so, it adopted an agenda-oriented test, which in this case was designed to permit the imposition of the death penalty. First, the Court determined whether the death penalty offended "the evolving standards of decency that mark the progress of a maturing society."[135] In ascertaining these evolving standards of decency, the Court looked to legislative enactments and jury sentencing behavior.[136] Second, the Court held that the death penalty must measurably contribute to the penological goals of retribution and deterrence.[137] Not surprisingly, the death penalty met both elements of the Supreme Court's test.

B. *All Methods of Execution Are Acceptable*

The Supreme Court does not employ the Eighth Amendment to regulate the manner in which executions are carried out in the United States. During the 1999–2000 term, the Supreme Court agreed, for the first time in over 100 years,[138] to decide the constitutionality of the electric chair as a method of punishment. However, in response to the Court's

130. Furman v. Georgia, 408 U.S. 238 (1972).
131. *See id.* at 238.
132. *See id.* at 242–43 (Douglas, J., concurring).
133. *See id.* at 305, 369 (Brennan, J., and Marshall, J., concurring).
134. Gregg v. Georgia, 428 U.S. 153, 169 (1976).
135. *Id.* at 169–77 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).
136. *See id.* at 174 n.19, 181–82.
137. *See id.* at 183–87.
138. *See generally In re* Kemmler, 136 U.S. 436 (1890).

action, Florida passed legislation providing inmates a choice between death by lethal injection or by the electric chair. The Court then dismissed the case as "moot."[139] There are five execution methods presently employed in the United States: electrocution, lethal gas, hanging, firing squad, and lethal injection.[140] Nine states use electrocution.[141] Electrocution involves strapping an inmate to a chair with belts that cross the chest, groin, legs, and arms.[142] The inmate is first given a jolt of electricity between 500 and 2000 volts, which lasts for approximately thirty seconds.[143] Additional volts are given if the inmate is not dead.[144] Newspaper accounts of two executions, although occurring more than 100 years apart, are strikingly similar in detail:

William Kemmler, August 6, 1890 (New York)

> After the first convulsion there was not the slightest movement of Kemmler's body .... Then the eyes that had been momentarily turned from Kemmler's body returned to it and gazed with horror on what they saw. The men rose from their chairs impulsively and groaned at the agony they felt. "Great God! he is alive?" someone said; "Turn on the current," said another ....
>
> Again came that click as before, and again the body of the unconscious wretch in the chair became as rigid as one of bronze. It was awful, and the witnesses were so horrified by the ghastly sight that they could not take their eyes off it. The dynamo did not seem to run smoothly. The current could be heard sharply snapping. Blood began to appear on the face of the wretch in the chair. It stood on the face like sweat ....

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139. *See Court Dismisses Challenge to Florida Executions*, N.Y. TIMES, Jan. 25, 2000, at A21.

140. *See* Roberta M. Harding, *The Gallows to the Gurney: Analyzing the (Un)constitutionality of the Methods of Execution*, 6 B.U. PUB. INT. L.J. 153, 163 (1996).

141. Alabama, Florida, Georgia, Kentucky, Nebraska, Ohio, South Carolina, Tennessee, and Virginia employ the electrocution method. *See* Deborah W. Denno, *Execution and the Forgotten Eighth Amendment, in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 35, at 547, 553. However, only Alabama, Georgia, and Nebraska use it exclusively. *See Court Dismisses Challenge to Florida Executions*, *supra* note 139.

142. *See* Jacob Weisberg, *This Is Your Death,* THE NEW REPUBLIC, July 1, 1991, at 23, 24.

143. *See id.*

144. *See id.*

> An awful odor began to permeate the death chamber, and then, as though to cap the climax of this fearful sight, it was seen that the hair under and around the electrode on the head and the flesh under and around the electrode at the base of the spine was singeing. The stench was unbearable.
>
> Pedro Medina, March 25, 1997 (Florida)
>
> "Immediately" after the executioner applied the electricity, Medina "lurched backward into the chair and balled his hands into fists" while his mask "burst into flames." According to witnesses, "[b]lue and orange flames up to a foot long shot from the right side of Mr. Medina's head and flickered for [six] to [ten] seconds, filling the execution chamber with smoke." The "smell of burnt flesh filled the witness room." Four minutes later, Medina was pronounced dead. Corrections Department spokeswoman Kerry Flack explained that "a maintenance supervisor wearing electrical gloves patted out the flames while another official opened a window to disperse the smoke." Witnesses described the scene as "ghastly." Others claimed they were "nauseated by the sight and the smell." "It was horrible. A solid flame covered his whole head from one side to the other. I had the impression of somebody being burned alive," stated one witness.[145]

Three states employ lethal gas.[146] An inmate in a lethal gas state is fastened into a metal chair in a room with a sealed door.[147] A bowl filled with a mixture of sulfuric acid, distilled water, and one pound of cyanide pellets is below the chair.[148] "[A]n executioner in a separate room flicks a lever that releases the cyanide into the liquid."[149] Hydrogen cyanide gas is released through the holes in the chair.[150] "At first there is evidence of extreme horror, pain, and strangling. The eyes pop. The skin turns purple and the victim begins to drool."[151] It has been described as a "horrible sight."[152] The victim stops wriggling after ten or twelve minutes, at which

145. Denno, *supra* note 141, at 547–48.
146. California, Missouri, and North Carolina utilize the lethal gas method. *See id.* at 553.
147. *See* Weisberg, *supra* note 142, at 26.
148. *See id.*
149. *Id.*
150. *See id.*
151. *Id.*
152. *Id.*

time the doctor pronounces him dead.[153]

Three states employ hanging, the oldest of the five execution methods.[154] The inmate is blindfolded and placed on top of a trap door with a rope fastened around his neck.[155] The trap door is then opened, causing the body to fall through.[156] As a result, the upper cervical vertebrae dislocates and the spinal cord separates from the brain, causing death.[157] Death can take as long as ten minutes.[158]

Idaho and Utah employ the firing squad.[159] A doctor locates the inmate's heart.[160] A circular white cloth target is placed over it.[161] "Five shooters, armed with .30-caliber rifles loaded with single rounds (one of them blank to spare the conscience of the executioners)," fire into the inmate's heart.[162] Death occurs in about two minutes, unless the shooters miss the heart, whereupon the inmate bleeds to death.[163]

Finally, twenty-nine jurisdictions employ lethal injection.[164] Lethal injection is the preferred method of execution because it is deemed the most humane.[165] An inmate is injected with three chemicals: sodium thiopental, pavulon, and potassium chloride.[166] Despite its popularity, there have been more botched lethal injections since 1976 than any other method of execution.[167] Problems with lethal injections include difficulty in locating veins and improper administration of the chemicals.[168] A botched injection can cause prolonged suffering.[169]

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153. *See* Weisberg, *supra* note 142, at 26.
154. *See* Denno, *supra* note 141, at 553.
155. *See* Weisberg, *supra* note 142, at 23.
156. *See id.*
157. *See id.* at 24.
158. *See id.*
159. *See* Denno, *supra* note 141, at 553.
160. *See* Weisberg, *supra* note 142, at 24.
161. *See id.*
162. *Id.*
163. *See id.*
164. *See* Harding, *supra* note 140, at 177–78.
165. *See* Weisberg, *supra* note 142, at 27.
166. *See id.*
167. Since 1976, 23 lethal injections have been botched, compared to 18 electrocutions, and eight lethal gas executions. *See* Denno, *supra* note 141, at 572–76.
168. *See id.* at 563-64.
169. For an exhaustive list of botched executions since 1982, see Denno, *supra* note 141, at 572–76.

Electrocution, lethal gas, hanging, and firing squads appear to violate the Supreme Court's "evolving standards of decency" standard. Most states moved from these methods toward lethal injection because it is considered more humane.[170] In contrast, no state has moved from lethal injection to another method of execution.[171] Therefore, there appears to be a national consensus rejecting all methods of execution except lethal injection.[172] Nevertheless, each method, including lethal injection, appears constitutionally suspect since none produces "instantaneous, and, therefore, painless, death."[173]

However, the Supreme Court refuses to address the issue. Since 1976, the Court has taken a broad view of the Eighth Amendment, prohibiting the use of excessive force by prison officials,[174] requiring prison officials to provide medical treatment,[175] and recognizing a duty among prison officials to protect inmates from inmate-against-inmate violence.[176] However, during this same period, the Court has not rendered a decision in a single case challenging a method of execution.[177] Why has the Court prohibited mistreatment of inmates by prison officials yet permitted these same officials to inflict death in a painful, barbaric fashion? The Court's treatment of this issue again demonstrates its political agenda in favor of the death penalty. The Court does not apply its Eighth Amendment jurisprudence to the methods of execution because no method of execution is constitutional. Instead, the Court avoids the issue by simply denying certiorari.

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170. *See id.* at 560.
171. *See id.*
172. *See id.* at 561.
173. *In re* Kemmler, 136 U.S. 436, 443 (1890).
174. *See* Hudson v. McMillian, 503 U.S. 1, 4 (1992).
175. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976).
176. *See* Farmer v. Brennan, 511 U.S. 825 (1994).
177. The Court did grant certiorari in a case challenging Florida's use of the electric chair. However, after the Florida legislature passed legislation providing for death by lethal injection, unless an inmate preferred the chair, the Court dismissed the challenge as moot. *See Court Dismisses Challenge to Florida Executions*, *supra* note 139, at A18. Furthermore, after the Ninth Circuit held California's former statute authorizing execution by lethal gas unconstitutionally cruel and unusual, *see* Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996), the Supreme Court vacated the Ninth Circuit's decision, *see* Gomez v. Fierro, 519 U.S. 918 (1996).

C. *Executing Kids and the Mentally Retarded*

The Supreme Court refuses to regulate the classes of individuals susceptible to the death penalty.[178] In 1989, the U.S. Supreme Court found no Eighth Amendment violation when the state executed offenders who were sixteen or seventeen years old at the time of their offense.[179] By permitting the execution of sixteen and seventeen year-old offenders, the Court failed to apply its own Eighth Amendment "evolving standards" doctrine. The Court permitted the execution of sixteen and seventeen year-old offenders despite the fact that a majority of states do not permit such executions.[180] In addition, only one year earlier, the Court held that the execution of a fifteen year-old offender makes no "measurable contribution to the goals that capital punishment is intended to achieve."[181] Moreover, the Court specifically refused to consider the tremendous international condemnation of executing juveniles[182] in determining whether the practice offended

178. The Court did prohibit the execution of the insane in *Ford v. Wainwright*, 477 U.S. 399 (1986).

179. *See* Stanford v. Kentucky, 492 U.S. 361 (1989).

180. *See* Mark Warren, *Death Penalty Information Center* (visited Jan. 14, 1999) <http://www.essential.org/dpic/foreignnatl.html>. Twelve states and the District of Columbia do not allow the imposition of the death penalty at all (Alaska, Hawaii, North Dakota, Minnesota, Wisconsin, Iowa, Michigan, West Virginia, Maine, Vermont, Rhode Island, and Massachusetts). *See id.* Fourteen states and the Federal Government do not permit the execution of individuals under eighteen (California, Colorado, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, and Washington). *See id.*

181. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (finding that retribution was not appropriate for juveniles "given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children"). Furthermore, it found the deterrent rationale unacceptable for juvenile offenders:

> The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent. And, even if one posits such a cold-blooded calculation by a 15 year-old, it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century.

Id. at 838.

182. Numerous international treaties prohibit the execution of offenders younger than 18. *See, e.g.*, United Nations Convention on the Rights of the Child, Nov. 20, 1989, art. 37(a), U.N. Doc. A/44/736 (1989) ("Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6(5), 999 U.N.T.S. 171 ("Sentence of death shall not be imposed for crimes committed by

evolving standards of decency.[183]

In *Penry v. Lynaugh*,[184] the Supreme Court refused to prohibit the execution of the mentally retarded.[185] Again, whether the execution of mentally retarded individuals comports with the Eighth Amendment is highly questionable, given the fact that a majority of Americans do not support such executions.[186] In addition, it is highly doubtful that mentally retarded individuals can be deterred or can appreciate the purpose of their punishment. Permitting the execution of juveniles and the mentally retarded exemplifies the Supreme Court's failure to regulate capital punishment.

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persons below eighteen years of age . . . ."); American Convention on Human Rights, Nov. 22, 1969, art. 4(5), 1144 U.N.T.S. 143 ("Capital Punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age . . . ."); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 75 U.N.T.S. 287, *reprinted in* INT'L COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF AUGUST 12 1949, at 179 (1997) (Fourth Geneva Convention) ("In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offense."); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 10, 1977, art. 77(5), 1125 U.N.T.S. 3, *reprinted in* INT'L COMM. OF THE RED CROSS, PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 95 (1977) ("The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed."); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 7, 1978, art. 6(4), 1125 U.N.T.S. 609, *reprinted in* INT'L COMM. OF THE RED CROSS, PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 95 (1977) ("The death penalty shall not be pronounced on persons who were under the age of eighteen at the time of the offence . . . ."). In addition, since 1985, only Bangladesh, Iran, Iraq, Nigeria, Pakistan, Saudi Arabia, the United States, and Yemen have executed juvenile offenders. *See* Amnesty International, *Juveniles and the Death Penalty; Executions Worldwide Since 1985* (visited Mar. 15, 2000) <http://www.amnesty.org/ailib/aipub/1998/SUM/A5000298.htm>.

183. *See Stanford*, 492 U.S. at 370 n.1 ("We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici that the sentencing practices of other countries are relevant . . . .").

184. Penry v. Lynaugh, 492 U.S. 302 (1989).

185. *See id.*

186. *See* Victor L. Streib, *Executing Women, Children, and the Retarded: Second Class Citizens, in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 35, at 215, 218.

D. *No Confinement Is Too Long*

Another Eighth Amendment issue the Court ignores and refuses to regulate is "the death row phenomenon."[187] The "death row phenomenon" constitutes the inordinate delay in carrying out an execution, resulting in an inmate suffering extreme psychological trauma.[188] The psychological trauma such an inmate suffers has been described as follows:

> From the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanizing environment of near hopelessness. He is in a place where the sole object is to preserve his life so that he may be executed. The condemned prisoner is "the living dead." . . . Throughout all this time the condemned prisoner constantly broods over his fate. . . . The horrifying specter of being [executed] is, if at all, never far from mind.[189]

Although some amount of suffering is perhaps an incidental part of processing a condemned inmate's appeals prior to carrying out an execution, such suffering becomes unnecessary—and possibly unconstitutional—when state actors cause a substantial, unwarranted delay.[190] Such long-term gratuitous suffering becomes a separate form of punishment, which may be equivalent to or greater than the actual execution.[191]

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187. The European Court of Human Rights used the term to describe the length of time spent on death row due to the United States appeal system. *See* Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) at 464 (1989).

188. *See id.* at 474.

189. Catholic Comm'n for Justice & Peace in Zimb. v. Attorney Gen., No. S.C. 73/93 (Zimb. June 24, 1993) (reported in 14 HUM. RTS. L.J. 323 (1993)).

190. *See, e.g.*, Elledge v. Florida, 119 S. Ct. 366 (1998) (mem.). A Florida death row inmate spent more than 23 years in prison, his successful appeals accounting for 18 of the 23 years and a fourth appeal—unsuccessful because of a four-to-two vote of the Florida Supreme Court—accounting for the other five years. In fact, Florida conceded that "all delays were a result of [petitioner's] 'successful litigation' in the appellate courts of Florida and the federal system." *Id.* at 366.

191. *See, e.g.*, Sullivan v. Wainwright, 464 U.S. 109, 112 (1983) (Burger, C.J., concurring) ("The argument so often advanced by the dissenters that capital punishment is cruel and unusual is dwarfed by the cruelty of 10 years on death row inflicted upon this guilty defendant by his lawyers seeking to turn the administration of justice into the sporting contest that Roscoe Pound denounced three-quarters of a century ago."); *see also* Furman v. Georgia, 408 U.S. 238, 288-89 (1972) (Brennan, J., concurring) ("[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."); *id.* at 382

The practice of forcing a condemned man to wait an inordinate amount of time before execution was condemned by English common law. In 1752, the English Parliament enacted the "Act for better preventing the horrid Crime of Murder," which provided that all persons convicted of murder should be executed two days after sentencing.[192]

Common law in America followed the English common law practice of swift executions. Colonial New York, for example, executed convicted felons within a few days of sentencing.[193] Similarly, in colonial New England, "[c]apital offenders were put to death without moral qualms, but they were dispatched swiftly without unnecessary suffering."[194] Many framers shared this view. Thomas Jefferson wrote that "whenever sentence of death shall have been pronounced

(Burger, C.J., dissenting) ("[A] man awaiting execution must inevitably experience extraordinary mental anguish . . . ."); People v. Anderson, 493 P.2d 880 (Cal. 1972) ("Penologists and medical experts agree that the [protracted] process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."); Commonwealth v. O'Neal, 339 N.E.2d 676, 680–81 (Mass. 1975) (Tauro, C.J., concurring) ("The convicted felon suffers extreme anguish in anticipation of the extinction of his existence."); Hopkinson v. State, 632 P.2d 79, 209–11 (Wyo. 1981) (Rose, C.J., dissenting in part) (recognizing "the dehumanizing effects of long imprisonment pending execution"); Vatheeswaran v. State of Tamil Nadu, (1983) 2 S.C.R. 348, 353 (India) (criticizing the "dehumanizing character of the delay" in carrying out an execution).

Similar views have been expressed by mental health experts. *See, e.g.*, ALBERT CAMUS, REFLECTIONS ON THE GUILLOTINE, RESISTANCE, REBELLION & DEATH 205 (1966) ("As a general rule, a man is undone waiting for capital punishment well before he dies."); *see also* DUFFY & HIRSHBERG, EIGHTY-EIGHT MEN AND TWO WOMEN 254 (1962) ("One night on death row is too long, and the length of time spent there by [some inmates] constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad."); Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOL. REV. 141, 157–60 (1979); Richard Stafer, *Symposium on Death Penalty Issues: Volunteering for Execution*, 74 J. CRIM. L. & CRIMINOLOGY 860, 861 & n.10 (1983) (citing studies); Louis Jolyun West, *Psychiatric Reflections on the Death Penalty*, 45 AMER. J. ORTHOPSYCHIATRY 689, 694–95 (1975); Barbara A. Wood, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 37–39 (1986) ("The physical and psychological pressure besetting capital inmates has been widely noted . . . courts and commentators have argued that the extreme psychological stress accompanying death row confinement is an eighth amendment violation in itself. . . .").

192. *See* The Murder Act, 1751, 25 Geo. 2, ch. 37 (Eng.).

193. *See* PHILIP ENGLISH MACKEY, HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT MOVEMENT IN NEW YORK STATE 17, 20 (1982).

194. EDJAR J. MCMANUS, LAW AND LIBERTY IN EARLY NEW ENGLAND 182 (1993).

against any person for treason or murder, execution shall be done on the next day but one after such sentence, unless it be Sunday, and then on the Monday following."[195] In a 1777 letter, George Washington stated that the execution of a soldier "better be done quickly and in a public manner as possible."[196] Chief Justice John Marshall stated in response to a clemency petition:

> [I]t is a consideration of some weight with [the undersigned petitioners], that the prisoner hath languished a long time [from April to September 1793] in jail [awaiting execution], in a situation which must have added to the miseries [sic] of imprisonment, & the horrors of execution, which agony alone hath suspended.[197]

Finally, Supreme Court Justice James Wilson, another leading framer, wrote:

> The principles both of utility and of justice require, that the commission of a crime should be followed by speedy infliction of the punishment.
>
> . . . .
>
> After conviction, the punishment assigned to an inferior offen[s]e should be inflicted with much expedition. This will strengthen the useful association between them; one appearing as the immediate and unavoidable consequence of the other. When a sentence of death is pronounced, such an interval should be permitted to elapse before its execution, as will render the language of political expediency consonant to the language of religion.
>
> Under these qualifications, the speedy punishment should form a part of every system of criminal jurisprudence.[198]

Foreign tribunals have also addressed this issue. Several international tribunals declare that extended confinements

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195. THOMAS JEFFERSON, A BILL FOR PROPORTIONING CRIMES AND PUNISHMENTS (1779), *reprinted in* THE COMPLETE JEFFERSON 90, 95 (S. Padover ed. 1943).

196. Letter to Colonel George Gibson, March 11, 1778, vol. XI, *in* THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-99 (U.S. Gov't Printing Office 1931–44).

197. THE PAPERS OF JOHN MARSHALL (Herbert A. Johnson ed., Univ. Va. Press 1977).

198. ROBERT GREEN MCCLOSKEY, THE WORKS OF JAMES WILSON VOL. II 628-30 (1967).

on death row are cruel and unusual punishment.[199] Most notably, the British Privy Council—the highest judicial body in the United Kingdom—concluded that forcing a condemned man to wait many years between sentencing at trial and actual execution was "cruel and unusual punishment."[200] In addition, the European Court of Human Rights refused to extradite a capital murder defendant to Virginia because of the risk of delay before execution.[201]

Despite these condemnations of the "death row phenomenon," the U.S. Supreme Court refuses to address the issue of whether delay in carrying out an execution is cruel and unusual punishment.[202] The Court's refusal to address the issue continues in spite of the fact that the Framers did not tolerate such delays at the time of adopting the Bill of Rights, as discussed earlier, and therefore, the practice violates the Eighth Amendment.[203] In addition, the Court's refusal to address the "death row phenomenon" contrasts the seriousness with which foreign jurisdictions treat the issue. Failure to recognize the "death row phenomenon" and to consider international developments[204] again demonstrates the Supreme Court's willingness to deregulate the death penalty.

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199. *See, e.g.,* Pratt v. Attorney Gen. for Jam., 4 All E.R. 769 (P.C. 1993) (en banc); Catholic Comm'n for Justice & Peace in Zimb. v. Attorney Gen., No. S.C. 73/93 (Zimb. June 24, 1993) (reported in 14 HUM. RTS. L.J. 323 (1993)); State v. Makwanyane, 1995 (6) BCLR 665 (SA).

200. *See Pratt*, 4 All E.R. at 788–89.

201. *See* Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) at 439 (1989).

202. Several inmates have raised the issue in petitions to the Supreme Court, but certiorari has been denied in each. *See, e.g.*, Elledge v. Florida, __ U.S. __, 119 S. Ct. 366 (1998) (mem.); White v. Johnson, 519 U.S. 911 (1996); Lackey v. Johnson, 519 U.S. 911 (1996). However, Justices Breyer and Stevens have recognized the importance of the issue and have dissented from the denial of certiorari. *See Elledge*, 119 S. Ct. at 366 (Breyer, & Stevens, JJ. dissenting) ("Petitioner in this case has spent more than 23 years in prison under sentence of death. His claim—that the Constitution forbids his execution after a delay of this length—is a serious one."); Gomez v. Fierro, 519 U.S. 918, 919 (1996) (Breyer, & Stevens, JJ. dissenting) ("[T]he Court has exhibited a callous indifference to these concerns . . . ."). Lower courts have ruled that the issue presents a new claim and is therefore barred by *Teague v. Lane*. *See, e.g.,* White v. Johnson 79 F.3d 432 (5th Cir. 1996), *reh'g denied,* 85 F.3d 627 (5th Cir. 1996).

203. "There is little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." Ford v. Wainwright, 477 U.S. 399, 405 (1986). *See also* Stanford v. Kentucky, 492 U.S. 361, 368 (1989); Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

204. *See supra* note 189 and accompanying text.

V. RACE AND THE DEATH PENALTY

Deregulation of the death penalty occurs despite overwhelming evidence that the imposition is racially discriminatory. No other area of American society permits the blatant racism found in the capital punishment system. Overtly racist statements have been made during death penalty proceedings by trial judges,[205] prosecutors,[206] and defense counsel[207] with impunity. Evidence that jurors impermissibly considered race in imposing the death penalty has also been disregarded.[208]

The U.S. Supreme Court has confronted the issue of racism in the imposition of the death penalty in two contexts: sentencing and jury selection. First, despite the fact that approximately half of the homicide victims in the United States are African-American,[209] most of their killers do not receive the death penalty. Rather, in approximately eighty-three percent of the cases resulting in death sentences the victim was white.[210] Furthermore, the General Accounting Office summarized its analysis of twenty-eight death penalty studies as follows:

> In [eighty-two] percent of the studies, race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets,

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205. *See, e.g.*, Dobbs v. Zant, 720 F. Supp. 1566, 1578 (N.D. Ga. 1989), *aff'd*, 963 F.2d 1403 (11th Cir. 1991), *rev'd*, 506 U.S. 357 (1993) ("Defendant referred to by trial judge as colored."); Peek v. Florida, 488 So. 2d 52, 56 (Fla. 1986) (acknowledging that the trial judge referred to parents of an African-American defendant as the "nigger mom and dad").

206. *See Dobbs*, 720 F. Supp. at 1578.

207. *See id*; *see also* Goodwin v. Balkom, 684 F.2d 794, 805 n.13 (11th Cir. 1982) (recognizing that defense counsel called defendant "a little old nigger boy" during closing argument); Dungee v. Kemp, 778 F.2d 1482 (11th Cir. 1985), *decided sub nom.* Issacs v. Kemp, 778 F.2d 1482 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986) (stating that the five African-American defendants were referred to as "niggers" by defense counsel during trial).

208. *See, e.g.*, Spencer v. State, 398 S.E.2d 179, 184–85 (Ga. 1990), *cert. denied*, 500 U.S. 960 (1991) (identifying that jurors used racial slurs during their deliberations).

209. *See* Erik Eckholm, *Studies Find Death Penalty often Tied to Victim's Race*, N.Y. TIMES, Feb. 24, 1995, at A1.

210. *See* NAACP LEGAL DEFENSE & EDUCATION FUND, DEATH ROW U.S.A. 1 (1997).

states, data collection methods, and analytic techniques.[211]

In *McCleskey v. Kemp*,[212] the defendant presented the Supreme Court with a highly reliable statistical study indicating that "after taking into account some 230 nonracial factors that might legitimately influence a sentencer, the jury more likely than not would have spared [the defendant's] life had his victim been black."[213] This study determined that "blacks who kill whites are sentenced to death at nearly [twenty-two] times the rate of blacks who kill blacks."[214] Despite the overwhelming evidence that race plays a significant role in determining who receives death sentences, the Supreme Court found that the study failed to establish a prima facie case of racial discrimination.[215] The Court claimed the study established "at most . . . a discrepancy that appears to correlate with race."[216] In addition, the Court adopted a crippling standard of proof that required the petitioner to present evidence that the decision-makers in his particular case acted with a discriminatory purpose.[217] As a result of the *McCleskey* standard, many state and federal courts deny hearings when presented with evidence of gross racial disparities.[218]

Criticism of the *McClesky* decision has been widespread.[219] Although the *McClesky* Court insisted on a showing of discriminatory purpose, this requirement has not been uniformly applied in other contexts. For instance, in voting

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211. U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990).

212. McCleskey v. Kemp, 481 U.S. 279 (1987).

213. *Id.* at 325 (Brennan, J., dissenting) (emphasis omitted).

214. *Id.* at 327 (Brennan, J., dissenting).

215. *See id.* at 327 (Brennan, J., dissenting).

216. *Id.* at 312–13.

217. *See id.* at 292.

218. *See* Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 463, 474–75 (1995) [hereinafter Bright, *Discrimination, Death and Denial*].

219. *See* A. Leon Higginbotham, Jr. et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1602–03 (1994); *see also* S. GROSS & R. MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1988); Bright, *Discrimination, Death and Denial, supra* note 218, at 433; Sherri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Randall Kennedy, McClesky v. Kemp*: Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); *The Supreme Court, 1986 Term: Leading Cases*, 101 HARV. L. REV. 119, 155–59 (1987); Hugo A. Bedau, *Someday McClesky Will Be Death Penalty's Dred Scott*, L.A. TIMES, May 1, 1987, § 2, at 5.

rights cases, where white plaintiffs challenge minority-majority districts, the white challengers are not required to show discriminatory purpose.[220] Instead, the challengers may state an equal protection claim by alleging that the shape of the district along with its racial makeup, "cannot be understood as anything other than" a distinction based upon race.[221] Yet, when confronted with the powerful and unrefuted *McClesky* statistics, which also "cannot be understood as anything other than" a distinction based upon race,[222] the Court required a showing of discriminatory purpose. This led the late Judge A. Leon Higgonbatham to conclude that the Court's decision making "lacks any principled basis under its equal protection precedent."[223] Thus, under its equal protection jurisprudence, the Court is willing to infer discrimination from the shape of a congressional district and its racial makeup, but not from the powerful and unrefuted statistics presented to it in *McClesky*.

Why the differences in application of the equal protection clause? This article posits that the different application reflects the politics of the Court. On the one hand, the Court does not require a showing of discriminatory purpose in challenges to minority-majority congressional districts because it looks favorably upon these challenges. On the other hand, the Court requires death row inmates to show discriminatory purpose in order to continue to find the death penalty constitutional despite its serious flaws.

Second, prosecutors disproportionately remove African-Americans from capital juries because juries with African-American members are less likely to render death sentences.[224] Prosecutors struck as many as twenty-six African-American prospective jurors in one case.[225] Evidence reveals that some prosecutors have a policy to routinely strike African-Americans from capital juries.[226] Excluding African-

220. *See* Higginbotham et al., *supra* note 219, at 1602–03.

221. Shaw v. Reno, 509 U.S. 630, 649 (1993).

222. *Id.*

223. Higginbotham et al., *supra* note 219, at 1603.

224. *See* Bright, *Discrimination, Death and Denial*, *supra* note 218, at 458.

225. *See id.* at 448.

226. For instance, a videotape was disclosed during the 1997 campaign for Philadelphia District Attorney in which the Republican candidate, while working as an assistant prosecutor, advised young prosecutors to avoid picking blacks from low-income areas to sit on juries. *See* L. Stuart Ditzen et al., *To*

Americans from juries occurs despite the Supreme Court's decision in *Batson v. Kentucky*,[227] which purports to make it easier to establish a prima facie case of discrimination in jury selection.[228] However, *Batson* fails because the Court put no teeth into the decision. Courts routinely accept any justification offered by the prosecution for striking African-Americans, thus denying any discrimination claim under *Batson*.[229] In *Tompkins v. Texas*,[230] the Court denied an opportunity to strengthen the principles of *Batson* by requiring trial judges to examine a prosecutor's motive in exercising its peremptory challenges.

Collectively, *McCleskey* and *Batson* demonstrate the Court's political agenda in favor of the death penalty. The statistics presented to the Court in *McClesky* were so overwhelming that in order to seriously confront them, the Court would have been forced to strike down the death penalty. Similarly, if the Court put teeth into *Batson*, the widespread practice of excluding African-Americans from juries would cease. Therefore, juries would be more racially diverse, probably resulting in fewer death sentences.

VI. THE RIGHT TO COUNSEL

The Supreme Court also fails to regulate the quality of counsel appointed to represent death row inmates.

Win, Limit Black Jurors, McMahon Said, PHILADELPHIA INQUIRER, April 1, 1997, at A1. An Alabama federal court found that the "standard operating procedure of the Tuscaloosa County District Attorney's Office . . . was to use the peremptory challenges to strike as many blacks as possible from venires in cases involving serious crimes." Jackson v. Thigpen, 752 F. Supp. 1551, 1554 (N.D. Ala. 1990), *rev'd in part and aff'd in part sub nom.* Jackson v. Herring, 42 F.3d 1350 (11th Cir. 1995). Prosecutors in the Harris County (Texas) District Attorney's Office have remarked that race is "something you have to look at" during jury selection. LAZARUS, *supra* note 27, at 58. Finally, between 1974 and 1994, the District Attorney for the Ocmulgee Judicial Circuit in Georgia, Joseph Briley, used 94% of his jury challenges in cases involving black defendants and white victims against African-Americans. *See* Horton v. Zant, 941 F.2d 1449, 1458 (11th Cir. 1991), *cert. denied*, 503 U.S. 952 (1992).

227. Batson v. Kentucky, 476 U.S. 79 (1986).

228. *See id.* (holding that a prima facie case of racial discrimination could be established by disparate strikes against minority jurors in a particular case).

229. For an excellent illustration, see LAZARUS, *supra* note 27, at 52–60.

230. Tompkins v. Texas, 490 U.S. 754 (1989). For an inside perspective on the politics behind the Court's denial of certiorari in *Tompkins*, see LAZARUS, *supra* note 27, at 60–73.

A. *No Standards to Ensure Effective Assistance*

Rule 23(a) of the Federal Rules of Civil Procedure requires that before certifying a class action lawsuit, the court must scrutinize trial counsel.[231] Trial counsel must be sufficiently skillful to handle the case and free of any conflicts of interest that would hamper the representation.[232] In addition, counsel is paid either a percentage of the amount awarded to the class or his normal hourly rate, adjusted upward in the event of special risks, novelty of the issues, and the like.[233] Courts ensure adequacy of counsel not to protect a constitutional right, but rather to protect the rights of class members.

In contrast to class action lawyers, counsel for death row inmates, whose lives are at stake and who possess a constitutional right to counsel,[234] typically do not receive similar scrutiny. Insufficiently skilled counsel is often appointed. For example, counsel for a death row inmate in Georgia could only name one criminal law decision from any court.[235] Further, it is not unusual for appointed counsel to have serious conflicts of interest.[236] Finally, the compensation for court appointed attorneys is so inadequate in most states that, to perform competently, counsel must work for less than minimum wage.[237]

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231. *See* FED. R. CIV. P. 23(a).

232. *See* STEPHEN C. YEAZELL, CIVIL PROCEDURE 968 (4th ed. 1996).

233. *See id.* at 2001.

234. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."); *see also* Gideon v. Wainwright, 372 U.S. 335 (1963) (applying the right to counsel to the states).

235. *See* Bright, *Counsel for the Poor*, *supra* note 29, at 1839. Justice Thurgood Marshall remarked that "capital defendants frequently suffer the consequences of having trial counsel who are ill equipped to handle capital cases." Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 1–2 (1986). *See also* David R. Dow, *The State, The Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694 (1996) (describing the representation of Carl Johnson by trial counsel who was "less than a year out of law school who had never previously tried a capital case").

236. *See, e.g.*, Burger v. Kemp, 483 U.S. 776 (1987).

237. In Alabama, trial counsel is paid $40 per hour for in-court work, $20 per hour for out-of court work. Counsel is limited to $1000 maximum for work done out of court. *See* ALA. CODE § 15-12-21 (Supp. 1999). In Delaware, counsel is paid $50 per hour, but can only earn a maximum of $2000. *See* DEL. SUPER. CT. R. CRIM. P. 44 (West Supp. 1999). In Florida, counsel is limited to $3500. *See* FLA. STAT. ANN. § 925.036 (West Supp. 1999). In Mississippi, the limit is $1000. *See* MISS. CODE ANN. § 9-15-17 (1994).

The Supreme Court is directly responsible for the poor quality of representation death row inmates receive. To establish inadequate representation, a defendant must show that his attorney's performance was unreasonable under the prevailing professional standards and that this performance prejudiced the defense.[238] Defendants usually cannot prevail on an ineffective assistance of counsel claim because courts find either that counsel's actions or inactions were strategic decisions, or that the defendant was not prejudiced by the decision since the evidence against him was so overwhelming. This standard, announced in *Strickland v. Washington*, makes a mockery of the Sixth Amendment right to counsel because it fails to develop minimal standards of representation. For instance, to satisfy the Sixth Amendment, the Court could have required counsel to conduct a reasonable investigation and be free from conflicts of interest. Competent counsel always makes a difference, if not in obtaining an acquittal, in obtaining a sentence less than death.[239] Certainly, if regulation of the adequacy of counsel in civil class actions occurs, standards ensuring that a capital defendant receives more than a warm body at trial is appropriate. As one commentator remarked:

> The Supreme Court's failure is that its definition is so vague that it merely enables courts to do as they please, whether it is to rarely declare a lawyer ineffective or commonly declare the lawyer effective. Armed with this definition, a fact finder—a judge—can render, with justification, virtually any finding of effectiveness. The definition is so imprecise, or so fluid, that it allows courts to achieve the agenda of choice—whether the court wants to declare a lawyer ineffective or effective. Usually, the court finds the lawyer to be effective since few judges want to incur the wrath of the community by giving a defendant a new trial. That doesn't seem right. The law should be

238. *See* Strickland v. Washington, 466 U.S. 668, 687–88, 694 (1984).

239. *See* Riles v. McCotter, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

> The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel . . . . Consequently, accused persons who are represented by "not-legally-ineffective" lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence.

Id.

more precise.[240]

As a result of the Supreme Court's failure to develop more precise standards to determine effectiveness of counsel, lawyers who slept through parts of trials,[241] used racial slurs to refer to their clients,[242] conducted cross-examination without being present for the direct,[243] filed appeal briefs consisting of one page of argument,[244] and were intoxicated during trial,[245] were not rendered ineffective. At a minimum, the Supreme Court should develop a standard that ensures that appointed counsel is sufficiently experienced to handle capital cases, free of conflicts, and adequately compensated.[246]

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240. Greta Van Susteren, *Responsibility of a Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 125, 127 (1996).

241. The trial judge in George McFarland's capital murder trial, when asked to comment on reports that defense counsel slept during parts of the trial, stated, "The Constitution does not say that the lawyer has to be awake." John Makeig, *Asleep on the Job; Slaying Trial Boring, Lawyer Said*, HOUS. CHRON., Aug. 14, 1992, at A35. *See also* Dow, *supra* note 235, at 694 (describing the inept representation of a client by his trial attorney, which included falling asleep during the trial).

242. *See* Goodwin v. Balkcom, 684 F.2d 794, 805 n.13 (11th Cir. 1982) (describing how trial counsel referred to defendant as a "little old nigger boy" during closing argument); *Ex parte* Guzmon, 730 S.W.2d 724, 736 (Tex. Crim. App. 1987) (stating that the defense attorney referred to client as a "wet back").

243. *See* House v. Balkcom, 725 F.2d 608, 612 (11th Cir. 1984).

244. *See* Heath v. Jones, 941 F.2d 1126, 1131–37 (11th Cir. 1991), *cert. denied*, 502 U.S. 1077 (1992) ("The argument section of his subsequent brief to the Alabama Supreme Court was only one page long.").

245. *See* People v. Garrison, 47 Cal. 3d 746, 785–88 (1986) (finding no presumption against the competence of counsel under the influence of alcohol).

246. For instance, the ABA suggests standards to ensure that lead trial counsel:

> ii. are experienced and active trial practitioners with at least five years litigation experience in the field of criminal defense; and
>
> iii. have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials; and
>
> iv. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
>
> v. are familiar with and experience in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence, and . . . .

AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPORTIONMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989).

B. *Elimination of Post-Conviction Capital Defender Organizations*

Another damaging blow to the right to counsel occurred in 1995 when Congress eliminated funding for the Post-Conviction Capital Defender Organizations ("PCDOs").[247] The PCDOs provided post-conviction representation to many death row inmates, located counsel for many others, and assisted volunteer attorneys with the complexity of capital litigation.[248] The PCDOs effectively improved the quality of representation for death row inmates.[249] In fact, their effectiveness contributed to their demise. Because of the PCDOs, many inmates had quality legal representation, which resulted in fewer executions. As a result, PCDOs became targets for those seeking more executions at a swifter pace and, thus, Congress eliminated their funding.

The Supreme Court and Congress delivered a one-two punch to death row inmates' right to counsel. First, because *Strickland* provides no standards to measure effectiveness of counsel, defendants often receive inadequate counsel at the trial level. Second, elimination of the PCDOs results in lower quality of representation at the post-conviction stage.

VII. FURTHER DEREGULATION

A. *Foreign Nationals*

In recent years, courts have grappled with the issue of foreign nationals and the death penalty. A foreign national is "any individual from the sending state who has not renounced citizenship in their country of origin or become a naturalized immigrant in the receiving state."[250] Foreign nationals include "tourists and visitors, migrant workers with temporary permits, alien residents, illegal aliens, asylum-seekers and persons in transit."[251] There are approximately seventy-two foreign nationals presently on death row in the United

247. *See* Eric Zorn, *Cutting Subsidy for Death Appeals to Cost Time, Funds*, CHI. TRIB., Feb. 21, 1996, at 1.

248. *See id.*

249. *See* Tabak, *supra* note 27, at 541.

250. Death Penalty Information Center, *Foreign Nationals and the Death Penalty in the United States* (visited March 6, 2000) <http://www.essential.org/dpic/foreignnatl.html>.

251. *Id.*

States.[252] When charged with a capital crime, foreign nationals are at a severe disadvantage. Most are unfamiliar with U.S. customs, police policies, and criminal proceedings.[253] Further, many are not fluent in English. Foreign nationals may also be susceptible to deception used by police detectives during interrogation.[254] They often face difficulties in developing mitigating evidence, since evidence of this type is likely in their native country rather than in America.[255] Finally, foreign nationals are often victims of bias and racism.[256]

Article 36 of the Vienna Convention on Consular Relations ("Vienna Convention") specifically addresses the issue of foreign nationals charged with crimes while outside their native country.[257] Under Article 36, the detaining state must fa-

252. *See id.* (indicating 42 of the foreign nationals on American death rows are from Mexico and that no other nation has more than four of its citizens on U.S. death rows).

253. *See* S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719, 720 (1995).

254. *See id.*

255. *See id.* at 721.

256. *See id.* at 744.

257. Article 36 provides:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:
>
> (a) consular officials shall be free to communicate with nationals of the sending state and to have access to them. Nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers of the sending state;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
>
> (c) consular officials shall have the right to visit a national of the sending state who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officials shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the

cilitate contact between a detainee and his native consulate. Specifically, the detaining state must: (1) inform a detainee of his or her right to contact his native consulate; (2) facilitate this contact if the detainee requests; and (3) provide the consulate with access to the detainee.[258] Once contacted, the consulate may assist a detainee by obtaining counsel and translators;[259] attempting to counteract potential bias against the detainee by informing the prosecutor and judge early in the process of its interest in the proceedings;[260] providing the detainee with information on the judicial procedures in the detaining state;[261] determining whether the detainee has suffered any physical abuse while in custody; and ensuring the adequacy of the physical conditions of detention.[262]

Since international law is binding on the United States,[263] states must adhere to the requirements of Article 36 when taking a foreigner into custody. However, foreign nationals frequently are not informed of their right to contact their native consulates and death sentences are often imposed in violation of Article 36.[264] The failure of the United States to adhere to Article 36 causes strains in its relations with foreign nations, particularly Mexico.[265] Several death row inmates have raised the issue on appeal and on habeas review. In *Breard v. Greene*,[266] where the U.S. Supreme Court denied certiorari,[267] it uncharacteristically issued a per curiam opinion.[268] In its opinion, the majority refused to decide the case

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rights accorded under this Article are intended.
Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36 (1)(a), 21 U.S.T. 77, 100-01; 596 U.N.T.S. 261, 292. The United States ratified the Convention on November 24, 1969.

258. *See id.*

259. *See* Shank & Quigley, *supra* note 253, at 736.

260. *See id.* at 744.

261. *See id.* at 736.

262. *See id.*

263. *See In re* The Paquete Habana, 175 U.S. 677, 700 (1900) (indicating that international law is U.S. law and must be administered by courts when applicable).

264. *See generally* Shank & Quigley, *supra* note 253.

265. *See, e.g., Executing Mexican Citizens in the U.S. Magnifies Differences of Culture and "The Grudges that Exist between the Two Nations,"* HOUS. CHRON., Sept. 28, 1997, at 1A.

266. Breard v. Greene, 523 U.S. 371 (1998).

267. *See id.*

268. *See id.* It probably did so in order to explain to the government of Paraguay the reasons for its actions.

on the merits, failing to explain why it sanctioned executions in violation of a clear legal commitment made by the United States. Rather, the majority relied on three procedural reasons to avoid addressing the Article 36 issue. First, the claim was procedurally barred because it was not raised initially in state court.[269] Second, the Court found the claim novel, and thus barred on habeas review.[270] Third, it applied the harmless error analysis to the claim: "Even were Beard's claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgement of conviction without some showing that the violation had an effect on the trial. In this case no such showing could even arguably be made."[271] A harmless error analysis of Article 36 violations, however, is improper. Consulate involvement at an early stage likely entails the selection of counsel, which frequently makes a difference, at least in sentencing. By adopting a harmless error analysis, the Court signaled to the states that compliance with Article 36 is completely voluntary and that the Court again is not going to regulate the imposition of death by the states, despite a clear legal violation.

B. *Clemency*

Another important issue left unregulated by the U.S. Supreme Court is the clemency process. After exhausting appeals, a death row inmate may apply for clemency. An application for clemency is a plea for leniency or mercy, where an inmate requests a pardon, (i.e., the conviction is erased and the inmate set free) or, more typically, commutation of the sentence (i.e., reduction of the inmate's death sentence to a life sentence).[272] The clemency process grants the death row inmate an opportunity to tell his or her story fully, without the constraints of the legal technicalities that characterize judicial proceedings.[273] It is designed to consider the humanity of the offender.[274] An early Supreme Court decision remarked that the United States system of justice "would be

269. *See id.* at 375.
270. *See id.* at 377. *See generally supra* Part III.E.1.
271. *Id.*
272. *See* Daniel T. Kobil, *The Evolving Role of Clemency in Capital Cases, in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 35, at 531, 532.
273. *See id.* at 540.
274. *See id.*

most imperfect and deficient in its political morality"[275] without a clemency process.

There are fifty-one different systems of clemency in the United States.[276] Therefore, it is not surprising that the clemency process is fraught with arbitrariness and capriciousness. For example, some governors grant seasonal commutations around Christmas and Thanksgiving.[277] Others have sold pardons and commutations.[278] Further, the Governors of Ohio[279] and Illinois[280] commuted death sentences solely because the applicants were women. Finally, in most states there are few rules governing the clemency process.

In *Ohio Parole Authority v. Woodard*,[281] an Ohio death row inmate challenged the Ohio clemency process on due process grounds.[282] In Ohio, the Parole Authority must conduct a clemency hearing at least forty-five days prior to a scheduled execution.[283] Prior to the hearing, an inmate may request an interview with one or more parole board members.[284] An inmate has no right to have counsel attend and participate in either the interview or hearing.[285] The inmate in *Woodard* filed suit alleging that Ohio's clemency process violated his Fourteenth Amendment right to due process.[286] In particular, he objected to the short notice of the Parole Board interview (seven days before the interview was scheduled) and to the Board's prohibition on legal assistance at the interview. After obtaining success in the U.S. Court of Appeals,[287] the U.S. Su-

275. *Ex parte* Wells, 59 U.S. (18 How.) 307, 310 (1855).

276. *See* Kobil, *supra* note 272, at 531.

277. *See id.* at 535.

278. *See id.*

279. Before leaving office, Governor Richard Celeste of Ohio commuted the sentences of all four women on Ohio's death row, while commuting the sentences of only the four men most likely to be executed during the next four years. *See id.* at 535, 536.

280. Numerous observers speculated that Guinevere Garcia's death sentence was commuted by Governor Jim Edgar, his first in more than five years, because she was a woman. *See, e.g.*, Mark Hansen, *Dead Women Walking: Commuted Death Sentences Raises Question Whether Females are Treated More Leniently*, 82 A.B.A. J. 24 (1996).

281. Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998).

282. *See id.* at 276.

283. *See id.* at 276–77.

284. *See id.* at 277.

285. *See id.*

286. *See id.*

287. The U.S. Court of Appeals for the Sixth Circuit held that while the state was not required to have a clemency process, once it established such a process

preme Court found that Ohio's clemency system did not violate his due process rights because "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review."[288] Thus, the Court essentially concluded that a state's clemency process never violates due process.[289] Under the Court's reasoning, "even procedures infected by bribery, personal or political animosity or the deliberate fabrication of false evidence would be constitutionally acceptable."[290] Furthermore, as Justice O'Connor pointed out, "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."[291] However, without a system as facially arbitrary as Justice O'Connor describes, any clemency system is safe from Supreme Court review.

As a result of *Woodard*, a clemency process such as Texas's can pass constitutional muster. In Texas, before any governor may pardon a defendant, commute a conviction, or commute a sentence, he must receive a favorable recommendation from a majority of the Board of Pardons and Paroles.[292] This Board is not required to meet as a body to determine clemency matters,[293] nor is it required to give any reasons for its recommendations.[294] Board members may, but need not, review documents and letters in support of clemency petitions prior to voting on a clemency application.[295] None of the in-

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it must comport with due process. *See Woodard*, 523 U.S. at 277–78.

288. *Id.* at 280 (quoting Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981)).

289. "The Chief Justice takes a different view essentially concluding that a clemency proceeding could *never* violate the due process clause." *Id.* at 290 (Stevens, J., concurring in part and dissenting in part).

290. *Id.* at 290–91.

291. *Id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment).

292. *See* Faulder v. Tex. Bd. of Pardons & Paroles, No. A 98 CA 801 SS, at 9 (W.D. Tex. Dec. 28, 1998).

293. *See id.* at 10.

294. *See id.*

295. *See id.* at 13. In Joseph Faulder's case, there was evidence that a letter a doctor wrote attacking the competency and validity of the testimony of the state's psychiatric expert in the trial court was never passed on to Board members. In addition, letters from a U.S. congressman and a national organization representing thousands of churches in favor of Faulder's clemency were not

formation provided in support of a clemency petition is investigated or verified.[296] Despite a federal judge's conclusion that "it is abundantly clear the Texas clemency procedure is extremely poor and certainly minimal . . . [and that] administratively, the goal is more to protect the secrecy and autonomy of the system rather than carrying out an efficient, legally sound system,"[297] he felt compelled by *Woodard* to conclude that the Texas clemency procedure did not violate due process.[298] The judge suggested, however, that the Board hold hearings and give reasons for its decisions in the future to ensure "the legality of the system and provide greater protection against arbitrary or improper outcomes."[299]

The Supreme Court has decided not to regulate the clemency system despite a history of arbitrariness in clemency decisions. The Court's inaction signals that no clemency system is too arbitrary for constitutional regulation.

VIII. WHY DEREGULATION HAS OCCURRED

This article demonstrates the failure of both the Supreme Court and Congress to regulate the death penalty. The Court fails to regulate the imposition of the death penalty, the methods of execution, the individuals subject to capital punishment, the conditions on death row, and the clemency process. It further refuses to address the issue of racism, despite overwhelming evidence of a racially discriminatory imposition. The Court also fails to develop standards to ensure that death row inmates have adequate counsel at trial and during the appellate process. Finally, and perhaps most costly for death row inmates, the U.S. Supreme Court, along with Congress, has stripped the federal courts of the power to regulate capital punishment by eviscerating the federal writ of habeas corpus.

The question remains: why has deregulation of the most severe form of punishment, meted out by a seriously flawed

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passed on to Board members. *See id.*

296. *See id.* at 12. The Chairman of the Board of Pardons and Paroles conceded that the Board has not called any hearings, interviewed any petitioners, conducted any investigations, or requested any testimony since 1995, despite considering 57 clemency petitions during this period. *See id.*

297. *Id.* at 16.

298. *See Faulder*, No. A 98 CA 801 SS, at 17.

299. *Id.* at 16–17.

system, occurred? This article proposes two reasons for the deregulation of the death penalty: (1) politics, and (2) a deference of the regulation of capital punishment to legislatures.

A. *Political Reasons for the Deregulation of the Death Penalty*

Recent polls indicate that capital punishment enjoys the overwhelming support of the American public.[300] Therefore, it is a political liability for any candidate for public office to oppose capital punishment or even offer only lukewarm support of the death penalty.[301] Both the Supreme Court and Congress have responded to the public's thirst for the death penalty. By deregulating the death penalty, Congress and the Court have erred in responding to public support.

Congress's role in deregulating the death penalty is understandable, as it is a democratic institution. However, the Supreme Court's response to public support of the death penalty is troubling. The Supreme Court should function as an undemocratic institution—a check on the political process. Professor John Jeffries summarized the role of the Supreme Court as follows:

> [T]he courts should defer to political democracy, unless there is a good reason not to. A good reason would be to correct systemic unfairness in the way democracy is practiced. In this view, judges should abide by the results of the political process (even those they find disagreeable),

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300. *See, e.g., CNN Morning News Transcript #99022505V09* (CNN television broadcast, Feb. 25, 1999). A 1999 Gallup poll found that 71% of the American public supported the death penalty and that 64% believed that it should be utilized more frequently. *See id.*

301. For instance, the Governor of Missouri agreed to honor Pope John Paul II's request for mercy for a condemned killer. The Governor also had decided earlier to run for a seat in the United States Senate. A poll conducted shortly after the Governor's decision to commute the condemned killer's death sentence produced the following results:

> Q. At the request of Pope John Paul II, Carnahan commuted the death-penalty sentence of convicted murderer Darrell Mease. How does this affect your likelihood of voting for the governor?
>
> More likely 7.8%
>
> Less likely 33.9%
>
> No difference 54.4%
>
> Not sure 3.9%

Jo Mannies, *Showing Mercy to Condemned Killer May Have Hurt Carnahan, Poll Finds; Ashcroft Holds Edge in Senate Contest*, ST. LOUIS POST DISPATCH, Mar. 29, 1999, at A1.

> except where the process itself is skewed or distorted. In that event, the courts should step in to see that everyone is treated fairly. Under this reasoning, the courts have a special duty toward those "discrete and insular minorities" who are unable to fend for themselves in majoritarian politics.[302]

In performing this role, the Supreme Court has extended special protections to racial minorities,[303] women,[304] aliens,[305] and illegitimate children,[306] because these groups cannot fend for themselves in the political process. Yet, the Supreme Court refuses to extend necessary protections to death row inmates, although they are the most despised group in America, a constituency without any political representation, and completely unable to fend for themselves in the political process. Instead, the Supreme Court follows public opinion by permitting the death penalty notwithstanding its serious constitutional concerns.

B. *Undue Deference to Legislatures*

The second reason for deregulating the death penalty deserves more respect because it is based on principle. Many believe that courts should not regulate capital punishment, but rather capital punishment should be left to the political process. This was the early view of the late Justice Lewis Powell. Justice Powell argued to let the people decide whether to maintain the death penalty and that Supreme Court intervention reflects "a basic lack of faith and confidence in the democratic process."[307] The legislature, rather than the courts, should correct any defects in the administration of capital punishment:

> Many may regret, as I do, the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness. Many may decry their

302. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 465–66 (1994).

303. *See* Loving v. Virginia, 388 U.S. 1 (1967) (applying strict scrutiny to racial classifications).

304. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (applying heightened scrutiny to gender classifications).

305. *See* Nyquist v. Mauclet, 432 U.S. 1 (1977) (applying heightened scrutiny to alienage classifications).

306. *See* Pickett v. Brown, 462 U.S. 1 (1983) (applying heightened scrutiny to statutory classifications based on illegitimacy).

307. JEFFRIES, *supra* note 302, at 411.

> failure to abolish the penalty entirely or selectively, or to establish nondiscriminatory standards for its enforcement. But impatience with the slowness, and even the unresponsiveness, of legislatures is no justification for judicial intrusion upon their historic powers.[308]

However, Justice Powell's earlier view fails to appreciate the Supreme Court's role as a special protector of certain groups unable to protect themselves in the democratic process. As the Court has recognized, leaving the rights of minorities to the political process often results in the rights of these groups being trampled upon. No group better exemplifies this principle than death row inmates. These inmates face state-sanctioned extinction, are universally despised, have no representation, and are unable to even participate in the political process. After witnessing firsthand the imposition of the death penalty, Justice Powell later abandoned his early view.[309]

With the federal role in regulating the death penalty virtually eliminated, the states stand alone in regulating the imposition of the death penalty. The next section explores why the state courts cannot be entrusted with this awesome task and why the federal role must be reinstituted.

IX. WHY FEDERAL REGULATION IS NEEDED

This section offers three reasons why federal regulation of the death penalty is essential: (1) state courts are not up to the task, (2) the need to deter prosecutorial and police misconduct, and (3) the danger of executing innocent individuals.

A. *Inadequacy of State Courts*

The AEDPA requires federal courts to defer to the state courts' factual and legal findings.[310] As a result, state courts must ensure that capital defendants receive a fair trial and that their death sentences are obtained in accordance with the Constitution. Placing this responsibility with state courts

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308. *Id.*

309. *See id.* at 451. After retiring from the Court, Justice Powell was asked whether he would change his vote in any case. He replied that he "would vote the other way in any capital case . . . [believing now that] capital punishment should be abolished." *Id.*

310. *See* Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C.A. § 2254(d)(1)-(2) (West Supp. 1996); *see also supra* Part III.F.

is a mistake. State courts have a long history of practicing racism, particularly in the South.[311] Furthermore, in forty-one states, judges either face an opponent in partisan or non-partisan elections, or face the voters in retention elections.[312] Therefore, public opinion influences state judges.[313] Since public opinion favors the death penalty, any judge who renders a decision in favor of a capital defendant is endangered. Numerous judges have been voted out of office because of decisions they rendered in capital cases.

For example, in Tennessee, Justice Penny White concurred in a decision entitling a capital defendant to a new sentencing hearing.[314] This was the only capital case before the Tennessee Supreme Court during Justice White's nineteen month tenure.[315] Yet, the Republican Party launched a campaign to unseat Justice White as a result of her concurrence in this one capital case.[316] The campaign succeeded when the voters of Tennessee voted against her retention.[317] The Governor of Tennessee felt that White's unseating sent a message to others on the court: "if I were them I'd be a little worried."[318] In California, voters removed Chief Justice Rose Bird, along with two other Justices, from the bench as a result of their votes in capital cases.[319] In Mississippi, Supreme Court Justice James Robertson was voted off the Mississippi

311. See Stephen B. Bright, *Can Judicial Independence be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817 (1998), for an exhaustive account of the racism practiced by state courts from slavery to the present.

312. *See supra* note 34.

313. For instance, a poll conducted by the Hearst Corp. found that 81% of the public believed that state judges' decisions are influenced by political considerations and 78% agreed with a statement saying elected judges "are influenced by having to raise campaign funds." Steve Lash, *Confidence in Courts is Divided/National Poll Shows Split Across Races*, HOUS. CHRON., May 15, 1999, at 19A.

314. *See* Kirk Loggins, *Death and Politics; A Sentence to Die is Overturned and a Murder Case Turns into a Political Donnybrook*, THE TENNESSEAN, Aug. 4, 1996, at 1D.

315. *See* Bright, *The Politics of Capital Punishment*, *supra* note 35, at 124.

316. A brochure was mailed by the state republican party urging voter to "vote for capital punishment" by "just saying no" to White. *See* Kirk Loggins, *Views Vary on White Aftereffect; Sundquist says Public Staged a 'Spontaneous' Revolt over Rising Crime*, THE TENNESSEAN, Aug. 3, 1996, at 1A

317. *See* Kirk Loggins, *State Turns Out Justice White; Vote Became Death Penalty Referendum*, THE TENNESSEAN, Aug. 2, 1996, at 1A.

318. Loggins, *supra* note 316, at 1A.

319. *See* Bright, *The Politics of Capital Punishment*, *supra* note 35, at 123.

Supreme Court as a result of his concurrence in a capital case where he declared that the Constitution did not permit the death penalty for rape without the loss of life.[320] Justice Robertson simply followed the U.S. Supreme Court, which earlier held that application of the death penalty in such a circumstance was unconstitutional.[321] Finally, in Texas, Stephen Mansfield was elected to the Court of Criminal Appeals after campaigning on a pledge to apply the death penalty more frequently, use the harmless error doctrine more often, and apply sanctions for attorneys filing frivolous appeals in death penalty cases.[322]

These illustrations demonstrate that state judges cannot be entrusted with the responsibilities given them by Congress and the Supreme Court in capital proceedings. Their independence, impartiality, and integrity are too susceptible to political attack to fairly decide capital cases.[323]

B. *Deterrence of Prosecutorial and Police Misconduct*

Prosecutorial misconduct is on the rise.[324] Since 1963, sixty-seven defendants have received a sentence of death as a result of prosecutorial misconduct.[325] Thirty of these individuals were subsequently set free.[326] Prosecutorial misconduct occurs in such greater numbers because of the pressure to win. This pressure is greatest in murder cases, which are

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320. *See id.* at 123–24.

321. *See* Coker v. Georgia, 433 U.S. 584 (1977).

322. *See* Bright, *The Politics of Capital Punishment*, *supra* note 35, at 123.

323. *See* American Bar Ass'n Report of Comm'n on Professionalism (1986) ("[J]udges are far less likely to take . . . tough action if they must run for reelection or retention every few years."); *see also* Walton v. Arizona, 497 U.S. 639, 713 n.4 (Stevens, J., dissenting):

> [E]lected judges too often appear to listen [to] the many voters who generally favor capital punishment but who have far less information about a particular trial than the jurors who have sifted patiently through the details of the relevant and admissible evidence. How else do we account for the disturbing propensity of elected judges to impose the death sentence time after time notwithstanding a jury's recommendation of life?

Id.

324. *See, e.g.*, Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 10, 1999, at 1; Rhonda Bell, *Evidence Flap Has DA on Defensive*, NEW ORLEANS TIMES PICAYUNE, May 31, 1999, at A1.

325. *See* Armstrong & Possley, *supra* note 324, at 1.

326. *See id.*

often high-profile and receive increased public attention.

Efforts to deter prosecutorial misconduct have proven unsuccessful. In *Brady v. Maryland*,[327] the U.S. Supreme Court imposed a constitutional duty upon prosecutors to disclose evidence favorable to the accused. Despite *Brady*, prosecutorial misconduct continues, as the numbers quoted above reflect. Prosecutors rarely face criminal charges for misconduct.[328] In addition, prosecutors enjoy absolute immunity from civil liability.[329] Finally, prosecutors are not held accountable by the voters.

In addition to prosecutorial misconduct, several individuals are on death row as a result of police misconduct.[330] As with prosecutors, no real deterrent to police misconduct exists. The prosecution of police officers occurs infrequently, usually only in high-profile cases where minority communities bring pressure for such prosecutions. Further, police officers enjoy qualified immunity from civil liability.[331] Even where qualified immunity does not apply,[332] the government usually indemnifies the officer for any damages imposed.[333]

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327. Brady v. Maryland, 373 U.S. 83 (1963).

328. *See* Armstrong & Possley, *supra* note 324, at 1 (finding that despite 381 instances of documented prosecutorial misconduct, not a single prosecutor was convicted of a crime nor barred from the practice of law; instead, many went on to become judges or district attorneys).

329. *See* Imbler v. Pachtman, 424 U.S. 409 (1976).

330. For instance, Illinois death row inmate Anthony Porter, freed from death row after 16 years, was convicted primarily because of "the worst kind of railroading" by the police. *See* Carpenter & Rodriguez, *supra* note 128, at A1. Furthermore, Ronald Jones was released from death row after DNA tests performed eight years after he was sentenced to die confirmed that he could not have committed the murder. He said at his trial that he had confessed to the crime because police had beaten him so badly that "I just couldn't take it no more." Dirk Johnson, *12th Death Row Inmate in Illinois Is Cleared*, N.Y. TIMES, May 19, 1999, at A14.

331. Qualified immunity means that a public official is immune from civil liability as long as he or she acted in good faith. *See* Anderson v. Creighton, 483 U.S. 635 (1987); *see also* Malley v. Briggs, 475 U.S. 335 (1986).

332. *See* Alfredo Garcia, *The Scope of Police Immunity from Civil Suit Under Title 42 Section 1983 and Bivens: A Realistic Appraisal*, 11 WHITTIER L. REV. 511, 534 (1989) (concluding that "the individual citizen who seeks redress for a constitutional violation faces a formidable obstacle").

333. For instance, a study of constitutional tort litigation in California found "no case in which court records showed that an individual official had borne the cost of an adverse constitutional tort judgement." *See* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 685–86 (1987).

The only real deterrence to prosecutorial and police misconduct is federal court regulation. State courts cannot effectively regulate the conduct of prosecutors and police because state judges are likely to face the wrath of the voters should they overturn popular convictions. Only federal judges, insulated from public opinion with life tenures, can effectively perform this function. Federal judges may send a message to prosecutors and police that unconstitutionally obtained convictions will not be tolerated. Only by sending this message will misconduct decrease. The federal courts' failure to send this message has lead to the recent increase in misconduct by prosecutors and police. Stringent federal regulation is the only effective mechanism for deterring misconduct by prosecutors and police.

C. *Danger of Executing Innocent Persons*

Since the resumption of the death penalty in 1976, eighty individuals were wrongly sentenced to die.[334] In many cases, evidence of their innocence did not come to light until many years after their initial conviction.[335] This disturbingly high number of innocent individuals receiving death sentences requires courts to thoroughly scrutinize capital cases. Federal judges, with their lifetime appointment and insulation from politics, must control this process. Frustration with the length of the capital appellate process cannot justify sacrificing the accuracy of capital convictions.

X. CONCLUSION

A reader of this article may conclude that the author opposes capital punishment and has written this article to expose the system as dysfunctional and thereby advance an abolitionist agenda. Such a conclusion is inaccurate. The author has no objection to the concept of capital punishment

334. *See* Charles Whitaker, *The Death Penalty Debate: Are We Killing Innocent Black Men?*, EBONY, May 1999, at 100–01.

335. For instance, Anthony Porter spent 16 years on Illinois' death row. *See* White & Jackson, *supra* note 106, at 1. Furthermore, according to Northwestern University's Legal Clinic, James Richardson spent 21 years on Florida's death row, James Robison spent 16 years on Arizona's, Troy Lee Jones spent 14 years on California's, and Roberto Miranda spent 14 years on Nevada's death row. *See* National Conf. on Wrongful Convictions and the Death Penalty, *The Wrongfully Accused* (visited Mar. 16, 2000) <http://www.ncwcdp.com/wrongly.html>.

and actually supports it in certain extreme cases, such as those involving war criminals and multiple murderers. This article simply demonstrates how the Supreme Court and Congress sacrifice fairness, accuracy, and principles, in order to advance the death penalty. This is simply unacceptable in a society that renders the pursuit of justice its bedrock tenet.

Courts appear to lack the integrity required to administer justice in this area. Congress appears irresponsible and bloodthirsty. Juries and judges are ambivalent in meting out the death penalty because of their concern with the fairness of the system. As a result of diminished concerns with accuracy and fairness, more innocent individuals are convicted and suffer the torment of spending a good portion of their lives on death row. The unluckiest individuals will be wrongfully executed.

However, fairness need not be sacrificed in the pursuit of justice. As Justice Douglas stated: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[336]

336. Brady v. Maryland, 373 U.S. 83, 87 (1963).