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AN ARBITRARY DEATH?

Capital Punishment and the Supreme Court

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2014

FOREWORD

In this thesis I examine three pivotal Supreme Court cases on capital punishment and apply theoretical frameworks of constitutional interpretation to explain how the Court reached its decisions.

The thesis is divided into six sections. In the first section I provide a brief introduction to the cases and the questions I will ask. I continue by explaining the theoretical frameworks of interpretation that I will use.

The second section, the briefest part of the thesis, contains an overview of my hypotheses and a cursory explanation of how they may help us understand the outcomes of the cases.

In the third section, I provide an introduction to capital punishment as a policy and practice. I attempt to put the discussion of the death penalty in the context of the greater discussion about criminal law in the United States by explaining the roles of the federal, state and local levels of government in setting policy and implementing the law. This section also discusses the differences in the use of capital punishment state by state, and the role of the Supreme Court in regulating its use.

The fourth section contains a discussion of the cases we will focus on. I explain the questions presented in the cases and the answers offered by the Court. I then go through the Court's decisions, digging into the opinions and their implications.

After the fourth section we launch into the meat of the paper - the argument. Section five takes a systematic approach to answering the thesis questions through both components of my theoretical framework. This section is the most substantial section of the paper.

In section six, we briefly recap the information presented in the thesis and then ask "So what?" I attempt to explain what this research tells us about challenges to capital punishment in the future that are based on evidence of arbitrariness and discrimination.

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I CASES, QUESTIONS, FRAMEWORK

A. Cases and Questions

In this thesis I examine three major Supreme Court cases from the 1970s and 1980s that reshaped capital punishment laws in the United States. The cases, which focused on claims of arbitrariness and discrimination in capital sentencing, include *Furman v. Georgia* (1972), *Gregg v. Georgia* (1976), and *McCleskey v. Kemp* (1987).

In *Furman*, the Court reviewed claims that Georgia's capital punishment statute produced death sentences that were capricious, arbitrary or random. The statute, like those of most other states at the time, gave juries full discretion to reject the death penalty or impose it on any defendant convicted of a capital crime. The Court concluded that Georgia's law violated the Cruel and Unusual Punishments Clause of the Eighth Amendment because it created too great a risk that death sentences would be arbitrarily imposed on a few unfortunate defendants. The justices reasoned that a severe sentence such as the death penalty is "excessive," one of the standards of constitutionality under the Cruel and Unusual Punishment Clause, when imposed randomly on a few defendants who are indistinguishable from those who receive less severe sentences.

The practical impact of *Furman* was significant. Since the majority of states at the time used statutes similar to Georgia's, the ruling imposed a moratorium on capital punishment throughout the United States. However, the moratorium would not last long. In the four years after *Furman*, thirty-five states revised their statutes to meet the standards of *Furman*. They did so by attempting to narrow the discretion granted to juries in capital cases, thus ensuring that death sentences would not be as "wantonly and freakishly" imposed as they had been under Georgia's previous law. The Court found occasion to review these new statutes in 1976 in *Gregg* and several accompanying cases. In these cases, the Court reviewed the statutes of Georgia, Florida, Texas, North Carolina and Louisiana. In *Gregg*, it addressed arguments that the efforts made by

Georgia legislature to channel jury discretion in capital cases were insufficient. The petitioner, Troy Leon Gregg, argued that the new statutes could not ensure that there would be a “meaningful basis to distinguish the few cases in which [the death penalty] is imposed from the many in which it is not.” The Court rejected this argument and upheld the statutes, finding that their provisions adequately reduced the risk of arbitrariness and passed the constitutional standard set by *Furman*.

In the next eleven years the Court heard several other cases that dealt with different aspects of capital punishment. In these cases it continued defining of the window of constitutionally acceptable discretion by adding both expansions and limitations. The Court expanded and protected discretion by requiring that juries have the ability to consider any mitigating evidence and to reject the death penalty in any case. It limited discretion by requiring state supreme courts to interpret sentencing statutes narrowly.

The next major challenge to capital punishment came in *McCleskey*, in which the Court evaluated the argument that Georgia’s death penalty statute violated the Eighth and Fourteenth Amendments because it permitted racial discrimination in capital sentencing.¹ To support this claim, the petitioner Warren McCleskey offered sophisticated statistical evidence of discrimination in capital sentencing. The Court rejected this argument however, ruling that defendants had to provide evidence that discrimination affected the outcome of their own case in order to prevail on claims of discrimination in capital sentencing. Despite the validity of the statistical study providing evidence of discrimination, which the justices explicitly accepted, five justices found that statistical evidence of systemic discrimination is insufficient to prove discrimination impacted any individual case. As a result, the justices ruled that the statute in Georgia did not violate the requirement of *Furman* that death sentences not be random or arbitrary in order to comport with the Cruel and Unusual Punishments Clause of the Eighth Amendment.

¹ I deal exclusively with the Eighth Amendment claim in *McCleskey*. While discussion of the Fourteenth Amendment’s requirements in that case is certainly interesting and important, my research focuses on the notions of arbitrariness and discrimination embedded in the Eighth Amendment.

In the rest of this thesis, **I seek to understand why the Court upheld Georgia's capital punishment statute against Eighth Amendment challenges in both *Gregg* and *McCleskey***. I do so by asking two questions.

Question 1: Why did the Court reject the Eighth Amendment challenges to Georgia's capital punishment statute in Gregg?

Question 2: Why did the Court reject the Eighth Amendment challenges to Georgia's capital punishment statute in McCleskey?

B. Theoretical Framework

Over time, constitutional scholars have developed different explanations for what controls judicial decisionmaking. Put more simply, scholars disagree on what judges think about when they decide a case. My goal is to explain why the Court reached its decisions in both *Gregg* and *McCleskey*.² To do so, I will use a theory proposed by Brian Tamanaha that he calls “Balanced Realism.”

Balanced realism is an approach to understanding judicial decisionmaking that falls somewhere in the middle of a spectrum whose poles are made up of “Formalist” and “Realist” perspectives. Though Tamanaha makes a compelling argument that few judges and scholars in the last 150 years have seen judicial decisionmaking from either extreme of pure formalism or realism, the distinction between these two ideal types highlights an important disagreement among theorists about what inputs go into judicial decisions. Because of its centrality to debates over judicial decisionmaking, the distinction is useful for interpreting the results in *Gregg* and *McCleskey*.

Broadly speaking, formalist theories posit that judges make decisions by considering solely the legal arguments and merits of a case. This conception of judicial decisionmaking, which many believe to have dominated legal thinking between the 1870s and 1920s, is founded upon the proposition that law is “determinate.” According to this view, judges may reach the “right” decision on any legal question by applying the rules and principles of the law mechanically to the facts of the case at hand. As Brian Leiter explains in his article “American Legal Realism,” formalist theories hold that “judges decide cases on the basis of distinctively *legal* rules and reasons, which justify a unique result in most cases (perhaps every

² The task of explaining the Court’s decisions can be described as “abductive reasoning,” a form of logical reasoning which attempts to explain an observed phenomenon (in this instance the Court’s written decisions) by offering relevant evidence that *may* explain the outcome. In this form of reasoning, the evidence offered does not lead inescapably to the outcome, but it may provide the “best guess.”

case).³ Thus, a strictly formalist theory of judging posits that the only inputs into judicial decisionmaking are the laws, rules, principles, doctrines and precedents.

Contrary to the formalist conception of judicial decisionmaking, realist theories hold that judges base their decisions on more than just legal reasoning. In the realist perspective law is “indeterminate,” and legal rules and principles do not justify a unique “correct” result in every case. According to realists, who began writing in the 1920s at Yale and Columbia Law Schools, applying the legal rules and principles to the facts of a case may often lead to more than one possible outcome. When this happens a judge must choose between outcomes by drawing on other sources like her intuitive sense of justice, policy preferences, or perceptions of societal values. If this is an accurate description of judicial decisionmaking, we must look beyond legal reasoning to explain how judges choose one result over another. As Brian Leiter writes, “[a]ll the Realists agreed... that the best explanations for why judges decide as they do must look beyond the law itself.”⁴

Despite the strengths of both perspectives (which many have an easier time finding within the realist view) Brian Tamanaha acknowledges in his book “Beyond the Formalist-Realist Divide” that neither formalism nor realism by itself provides an accurate account of how judges make decisions.⁵ Instead he proposes a theory he calls balanced realism, which holds that judges make decisions based on both legal reasoning and extralegal influences. Referring to the realist perspective as “skepticism” and the formalist perspective as “trust” that the law and not other factors determines judicial decisionmaking, Tamanaha writes

Balanced realism has two integrally conjoined aspects - a skeptical [realist] aspect and a rule-bound

³ Leiter, Brian. “American Legal Realism.” University of Texas School of Law. Public Law and Legal Theory Research Paper No. 42. October, 2002.

⁴ Ibid.

⁵ Tamanaha argues that few scholars or judges have ever truly accepted a formalist viewpoint on the judging. Instead, most have accepted that a balanced approach which incorporates both realist and formalist aspects is a more accurate description of judicial decisionmaking.

[formalist] aspect. It refers to an awareness of the flaws, limitations, and openness of law, an awareness that judges sometimes make choices, that they can manipulate legal rules and precedents, and that they sometimes are influenced by their political and moral views and their personal biases (the skeptical aspect). Yet it conditions this skeptical awareness with the understanding that legal rules nonetheless work; that judges abide by and apply the law...⁶

In this paper I take a balanced realist approach to explaining the Court's decisions in *Gregg* and *McCleskey*. By doing so I assume that the decisions were based on both legal doctrine and extralegal factors. I incorporate both elements by isolating the analysis of the cases through formalist and realist lenses.

The Formalist Lens

I use a formalist lens because I assume that legal reasoning played a role in shaping the outcome of both cases.⁷ Despite this assumption, I acknowledge that the role legal reasoning played may be difficult to interpret. One possibility is that legal reasoning - the law, rules, principles, doctrine and precedent - nearly determined the outcome by convincing the justices that only one result (the one they voted for) was a legitimate application of the law to the facts of the case. Another possibility is that legal reasoning played a smaller role, leading justices to lean toward one result over the others but failing to convince them wholeheartedly that there was one "right" or "wrong" answer. A third possibility is that legal reasoning played very little role in the decision by narrowing the acceptable results but failing to impart the justices with a preference for one of the remaining options over any other.

In order to determine how legal reasoning affected the outcomes in *Gregg* and *McCleskey*, I examine the constitutional questions, the standards that the Court used to evaluate these questions, and its application of the standards to the facts of the case.

⁶ Tamanaha, Brian. *Beyond the Formalist-realist Divide: The Role of Politics in Judgin*. Princeton, NJ: Princeton University Press, 2010, at: 7.

⁷ It is important to note the Court had more than one possible result to choose from when deciding the cases.

The Realist Lens

Though the formalist lens is useful for explaining the Court's decisions in *Gregg* and *McCleskey*, I believe a realist lens also adds to the explanations. This is based on the assumption that the Court's decisions were not determined solely by legal reasoning, but by outside factors as well. Similar to the difficulty of determining the role of legal reasoning in the Court's decision, it is difficult to measure the impact of extralegal factors such as the justices' policy preferences, moral beliefs, perceptions of societal values or concern for the reputation of the Court.

To evaluate the extralegal factors that influenced the Court's decisions in *Gregg* and *McCleskey* I explain the main possible outcomes in each case and suggest potential reasons that the Court may have chosen its selected path in both instances.

II HYPOTHESES

Though the complex set of inputs in these cases precludes the possibility of finding a complete explanation, I suggest two possible influences on the Court's decision to uphold Georgia's capital punishment statute in both *Gregg* and *McCleskey*. Both are conceptual influences on the justices that may have played a role in these and previous death penalty cases. The two influences are a preoccupation with the "countermajoritarian difficulty," and a limited understanding of how social forces like discrimination based on race and social status may influence the outcome in capital punishment cases.

A. Preoccupation with the Countermajoritarian Difficulty

I suggest that in both *Gregg* and *McCleskey* the justices were influenced by the "countermajoritarian difficulty," a concept which holds that the Supreme Court undermines democratic values when it invalidates acts of the representative branches of government.

Though scholars, judges and lawyers have debated the proper powers and limitations of the Supreme Court since the beginning of the republic, skepticism about the Court's supremacy over representative branches of government gained renewed influence in the middle of the twentieth century. In part, the renewed interest may have been a response to what were perceived as the "activist" decisions of the Warren Court such as *Brown v. Board of Education (1954)* and *Miranda v. Arizona (1966)*. Alexander Bickel made a lasting impact on constitutional theory by bringing the countermajoritarian difficulty back to the center of constitutional debates in several key works. In 1962's "The Least Dangerous Branch," Bickel writes

The root difficulty is that judicial review is a counter-majoritarian force in our system... the reality [is] that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it... it is the reason the

charge can be made that judicial review is undemocratic.⁸

To be sure, not all scholars of constitutional theory accept the countermajoritarian difficulty as a significant problem for judicial review. Many theorists dispute the view that the Supreme Court undermines democratic values by enforcing its interpretations of the Constitution by arguing that it rests on simplistic premises about democracy. One of the most salient criticisms is that non-majoritarian values, such as protecting the rights of discrete and insular minorities, are fundamental to democracy. Ronald Dworkin, one of the most important legal philosophers of the twentieth century, argues that the basic principle of the Constitution is the requirement that government treat all individuals with equal respect and concern. He argues that in many cases, upholding this principle requires thwarting the will of majorities that deny the rights of minority group members. According to John Hart Ely, another influential theorist, the Constitution's primary *raison d'être* is to protect minority groups from political malfunctions that exclude them from the political process. These theorists and many others offer compelling (and sometimes conflicting) arguments against the view that the Court undermines democracy when it invalidates acts by the legislative or executive branches of government to enforce the requirements of the Constitution.

Despite these criticisms, the countermajoritarian difficulty has had a lasting impact on constitutional theory and judicial decisionmaking itself. It has influenced judges to hesitate before invalidating acts of the representative bodies of government in many types of cases, but especially in those whose outcomes hinge on value judgments, such as equal protection and due process liberty cases. Proponents of the countermajoritarian difficulty argue that in these value judgment cases, which address questions like whether the denial of the right for same sex couples to marry impedes an essential aspect of "liberty," the Court violates democratic values in an especially egregious manner when it invalidates acts of the representative bodies. According to these critics of "judicial activism," invalidating acts of the representative

⁸ Bickel, Alexander. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Indianapolis: Bobbs-Merrill, 1962, at: 16

bodies would amount to imposing the subjective values of nine unelected judges on the rest of society, undermining the basic principles of self-government. They argue that in these cases the Court has the greatest duty to defer to the judgments of the people and their representatives.

Of course, questions about whether and when the Supreme Court should invalidate laws or defer to representative branches of government have been part of constitutional debates since before *Marbury v. Madison* (1803) established the power of judicial review. Still, it is possible that the renewed attention to the countermajoritarian difficulty in the middle of the twentieth century may have placed a weight on the scale in many Supreme Court cases decided around that time by causing the justices to take deferential stances to other branches of government instead of invalidating their laws and acts.

I suggest that the countermajoritarian difficulty may have played a role in *Furman*, *Gregg*, and *McCleskey*. Beginning in *Furman*, the text of the Court's opinions contained numerous references to the need to respect the decisions of the states and for the Court to refrain from inserting its own policy preferences. This conception may help explain the Court's decisions through both the formalist and realist perspectives.

Looking at the formalist aspects of the decisions in *Gregg* and *McCleskey*, we see that the countermajoritarian difficulty shaped the Court's understanding the criteria that punishments need to meet to be prohibited by the Eighth Amendment and how it determined in these cases whether the challenged sentences met those criteria. Perhaps because the opinions of the Court indicate that by and large the justices saw the core of the Cruel and Unusual Punishments Clause as a moral principle against excessive or inhuman punishments, and because the countermajoritarian difficulty as a critique of judicial activism is particularly pronounced in cases requiring value judgments, the justices applied the Eighth Amendment by relying almost exclusively on the judgment of the representative bodies of government. The fact that this reliance on public opinion to determine whether capital punishment as practiced under the contested statute was consistent with the moral requirement of the Eighth Amendment may help explain the outcome because the legislative actions in the years following *Furman* indicated strong support for capital punishment

despite the potential risk of arbitrariness.

The countermajoritarian difficulty is also helpful for explaining the cases from a realist perspective. The justices' focus on the countermajoritarian difficulty helps explain why the Court chose to defer to the states despite the continuing chance of arbitrariness in *Gregg* and despite evidence of discrimination in *McCleskey*. Though the justices could have required Georgia to reduce the risk of arbitrariness even more before imposing capital sentences, any options besides upholding the statutes would have involved significant interference with state statutes.

B. Perception of Capital Cases as Devoid of Social Context

The second influence I propose has to do with the justices' conceptions of the social facts in death penalty cases. I suggest that most of the justices who decided *Gregg* and *McCleskey* may have seen capital cases as abstract functions of law instead of practices embedded in a social context. By viewing capital punishment cases as legal functions in which actors including jurors, prosecutors, and judges simply present, receive and interpret information about a crime in an unbiased manner before neutrally applying the law and imposing a legislatively prescribed notion of justice, the Court failed to imagine the ways in which discrimination based on race and socioeconomic status may affect capital cases. The justices seemed to be blind to the possibility that jurors and other actors hold their own perceptions of justice in capital cases that may be influenced by their views of the moral worth of the victim and perpetrator. Given the long history of the perception among the American public that African Americans are morally inferior and less valuable than whites, it is at least plausible that in some capital cases jurors, prosecutors and judges may see African American defendants as more morally culpable than their white counterparts and see crimes against African American victims as less morally abhorrent than those committed against their white counterparts. Despite this possibility, the justices used language that seemed to indicate very little concern for discrimination in capital cases.

As a result, this view may have made the Court disinclined to agree with the petitioners that juries consider the social status of the victim and the perpetrator of a capital crime in sentencing decisions, and that racial discrimination in capital punishment may be pervasive and systemic.

The justices' views of capital cases as devoid of social context may have been important from a formalist perspective by leading the Court to be more concerned in *Furman*, *Gregg*, and *McCleskey* with true randomness or capriciousness than with systematic discrimination that resulted in skewed sentencing patterns. This helps explain why the justices were satisfied in *Gregg* that the new capital punishment statutes

would limit the risk of arbitrariness enough to meet the standard of *Furman*. Had the Court been seriously concerned with the risk of discrimination in addition to arbitrariness in *Furman* and *Gregg* it may have been more likely to hold in the latter case that Georgia's new statute violated the Eighth Amendment. This is because several of the key provisions of the new statute, such as the requirement that the Georgia Supreme Court review all death sentences and ensure they are not excessive in comparison to similar cases, limited the risk of true randomness in sentencing but still left room for patterns of discrimination. Because juries still had discretion to reject the death penalty under Georgia's statute, they could still impose the death penalty in racially discriminatory ways by reserving it primarily for African American defendants. In *McCleskey*, the justices' view of capital cases as neutral applications of law also may have contributed to the Court's willingness to disregard the evidence of discrimination in the Baldus study.

In addition, the Court's view of capital punishment as devoid of social context may be useful for explaining the decisions from a realist perspective. Since many of the justices seemed to be unconvinced that jury decisions may be influenced by biases, they were unlikely to see discrimination in capital punishment as a substantial or serious problem for the criminal justice system. When deciding whether or not to uphold Georgia's laws in *Gregg* and *McCleskey*, it is likely that had the justices perceived a greater problem with discrimination in capital punishment, they may have been more inclined to invalidate Georgia's law in *Gregg* or *McCleskey*. They may have seen this risk of discrimination, as Justice Douglas did in *Furman*, as a detriment to the integrity of the American criminal justice system.

III CAPITAL PUNISHMENT IN THE UNITED STATES

A. Capital Punishment is a State and Local Issue

Capital Punishment ranks among the most highly debated practices in American society. Though the practice of execution directly affects only a tiny portion of the nation's population, it engenders a debate that involves our views of morality, human worth, and our very identity as a society. For over two hundred years, citizens have presented moral, political and legal arguments on both sides of the issue. Discussing the history of opposition to the death penalty in his concurring opinion in *Furman*, Justice Marshall explains that

In 1793, William Bradford, the Attorney General of Pennsylvania and later Attorney General of the United States, conducted "An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania." He concluded that it was doubtful whether capital punishment was at all necessary, and that until more information could be obtained, it should be immediately eliminated for all offenses except high treason and murder.⁹

As a matter of public policy today, the use of capital punishment is primarily controlled by legislators, judicial officers, law enforcement and other officials at the state and local levels.¹⁰ Though the federal government maintains the penalty of death as a prescribed sanction for a select set of crimes, the vast majority of death sentences have been imposed in state courts. In 2013 the total population of death row inmates in state prisons was 3,029, compared to just fifty-nine in federal custody.¹¹ Additionally, the federal government has carried out only three of the 1,378 executions that have taken place in the United States since 1976.¹² Though the raw numbers of inmates on death row and executions carried out do not take

⁹ Marshall, J. *Furman v. Georgia* (1972), at: 336.

¹⁰ By "Public Policy" I am referring to a practice used by a governmental body to solve a problem or resolve a conflict. An example of a public policy is the operation of snow plows by the city of Oberlin in an attempt to overcome the challenges to transportation posed by extreme weather conditions. In the area of criminal law, a public policy may be the prescription of a defined prison sentence as an attempt to deter certain crimes. Simply put, a policy is an act of government.

¹¹ Death Penalty Information Center. "Death Row Inmates by State," accessed April 29th, 2014. At: <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188#year>.

¹² Death Penalty Information Center. "Number of Executions by Region and State Since 1976," accessed April 29th, 2014. At: <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>.

account of factors like the percentage of death-eligible cases in which state and federal seek capital sentences, they still indicate that the majority of trials that result in death sentences take place in state courts. Typically, these state trials take place in local jurisdiction courts and are argued by county prosecutors and defenders. In part, state and local control of capital punishment today is a result of the fact that for much of American history control over crime and punishment has rested primarily in the hands of local political bodies instead of a centralized authority. Alexander Moudrov of the City University of New York explains in an article about the history of criminal punishment in America that as far back as the late 1600s, American colonists treated crime as a problem concerning local communities, best resolved with policies formulated on a local level. “The legal system in British America relied on English legal conventions. Considering the relative autonomy of the colonies, however, their legal codes varied from colony to colony and reflected the unique concerns and beliefs of each.”¹³ Some of the most deeply embedded traditions in American law reflect this arrangement, like the practice of using citizen juries as a way of maintaining the influence of community values and judgments on the legal system. The majority opinion in *Gregg v. Georgia* (1976) pointed this out, writing that in one of its previous cases “The Court has said that “one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system.”¹⁴

Additionally, the weakness of the federal government in the early years after the Constitution was ratified necessitated that crime and punishment, along with a great number of other social problems, be remedied by state governmental bodies. Formulating criminal law, maintaining police, prosecutors, defenders and judges to enforce it, operating prisons to house criminals, and staffing courts to hear appeals all required resources and knowledge of local communities that the federal government simply did not have.

¹³ Moudrov, Alexander. “History of Crime and Punishment in America: Colonial.” Queens College, City University of New York. Accessed April 30th, 2014, at: <http://ebooks.ohiolink.edu/xtf-ebc/view?docId=tei/sage/9781412988766/9781412988766.xml;chunk.id=n303;toc.depth=1;toc.id=n303;brand=default>.

¹⁴ Stewart, J. Powell, J. Stevens, J. *Gregg v. Georgia* (1976), at: 181.

Together, these forces ensured that as the American legal system developed, the definition of criminal acts and the application of sanctions, including the death penalty, fell mostly into the purview of the states and the local communities that make them up. According to the website of the Federal Judicial Center, the research and education agency of the federal judicial system, "...most criminal cases involve violations of state law and are tried in state court. We all know, for example, that robbery is a crime, but what law says it is a crime? By and large, state laws, not federal laws, make robbery a crime."¹⁵

In addition to the traditional practice of dealing with crime at the state level, capital punishment has its own idiosyncratic qualities that have caused it to fall under state rather than federal control. First, the divisiveness of the death penalty has prevented a national consensus from emerging, thereby preventing federal legislators from taking a definitive stance. Second, capital crimes, trials and sentences bear a greater significance to local communities who experience them than prosecutions for other crimes. This is because the crimes in capital cases affect local citizens with ties to the community and often raise public outrage. The Supreme Court itself has acknowledged that the special sensitivity of capital cases, a product of both of its severity as a punishment and its importance to communities, and has encouraged the use of citizen juries in capital sentencing. In *Gregg*, the majority notes

Jury sentencing has been considered desirable in capital cases in order "to maintain a link between contemporary community values and the penal system – a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society."¹⁶

Together, these factors explain why ninety-eight percent of death row inmates have been sentenced in state, rather than federal, courts and why ninety-nine percent of executions since 1976 have been carried out by

¹⁵ Federal Judicial Center. "What the Federal Courts Do: How is a Federal Court Different from a State Court?" Accessed April 30th, 2014, at: <http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu2b&page=/federal/courts.nsf/page/CCA93B3B87C844BC85256C7900460860?opendocument>.

¹⁶ Stewart, J. Powell, J. Stevens, J. *Gregg v. Georgia* (1976), at: 190.

state, rather than federal, authorities.¹⁷

¹⁷ As mentioned above, the total number of death row inmates in state prisons in 2013 was 3,088 and the total number of death row inmates in federal prisons was 59. Additionally, 1,375 executions have been carried out by state authorities since 1976 and only 3 have been carried out by the federal government. Death Penalty Information Center. "Death Row Inmates by State," accessed April 29th, 2014. At: <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188#year>.

B. Capital Punishment Varies from State to State

The result of state control over capital punishment, as well as the unending debates over the death penalty, is a patchwork of political decisions on the use of capital punishment that vary from state to state.

The states are divided on whether capital punishment should be used at all. Though a majority of states still prescribe the death penalty for a certain set of crimes, a sizable and growing minority of states have done away with the practice. Since 1900, fifteen states have abolished the death penalty, including six in the last ten years alone, taking the number of death penalty states down to thirty-two.¹⁸ Additionally, since 2011 governors of three states have announced they will use their powers of clemency to suspend executions during their tenure in office.¹⁹

Second, the substance and procedure of capital punishment statutes vary from state to state. The substance of capital punishment law, or the set of crimes for which the death penalty can be imposed, is generally consistent but contains some variation. Though the majority of states restrict capital punishment to murders committed under a defined set of circumstances, a small number of states authorize prosecutors to seek the death penalty for other crimes.²⁰ Examples are Missouri, which authorizes the death penalty for placing a bomb near a bus terminal, and New Mexico, which authorizes the death penalty for treason.²¹ In addition to the substance, the procedure of capital punishment law, or the rules governing trials and sentencing for capital crimes, varies from state to state. In Florida, for instance, a jury must consider “[w]hether sufficient mitigating circumstances exist... which outweigh the aggravating circumstances found

¹⁸ “States With and Without the Death Penalty,” Death Penalty Information Center. Accessed Feb 20th, 2014. At: <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>.

¹⁹ Ian Lovett, “Executions are Suspended by Governor in Washington,” New York Times. February 11th, 2014. Accessed Feb 19th, 2014. At: http://www.nytimes.com/2014/02/12/us/washington-governor-jay-inslee-suspends-death-penalty.html?_r=0.

²⁰ “Death Penalty for Offenses Other than Murder,” Death Penalty Information Center. Accessed Feb 20th, 2014. At: <http://www.deathpenaltyinfo.org/death-penalty-offenses-other-murder>.

²¹ Ibid.

to exist...” before recommending a sentence of death.²² In Texas, juries do not weigh mitigating and aggravating factors but answer three questions about whether the defendant intended to inflict death, is likely to commit further acts of violence, and acted unreasonably in response to provocation by the victim.²³ While identical cases tried under both procedures may reach the same result in most events, the differences in a jury’s considerations under the Florida and Texas statutes would certainly produce different sentences in some cases. The variation in the substance and procedure of laws that govern capital punishment affect the cases that qualify for death sentences, the appeals that are accepted or rejected and the individuals who eventually go to the execution chamber.

Third, the states vary in the frequency of implementation. The number of actions required of state agents along the road from crime scene to execution chamber, including investigation, arrest, prosecution, conviction, appellate review, clemency appeals to state executives and execution itself, results in an uneven application of the death penalty, with a few states carrying out the great majority of executions that take place in the United States. Though thirty-two states, the federal government and the military permit the death penalty, the top three states, Texas, Virginia, and Oklahoma, have carried out 735 executions since 1976, more than half of the 1,378 executions that have taken place.²⁴ Additionally, many states have carried out only a few executions, including fifteen states that have carried out fewer than ten executions, and eleven states that have carried out fewer than five in the same time period.²⁵

²² *Profitt v. Florida* (1976), at 248.

²³ *Jurek v. Texas* (1976), at 269.

²⁴ Executions by State. Death Penalty Information Center. Accessed April 30th, 2014. At: <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>.

²⁵ *Ibid*

C. Capital Punishment is a Constitutional Issue

Though policies to address crime are generally written and implemented by government agents at the state and local levels, they are also shaped by the protections, enumerated and unenumerated, found in the Federal Constitution. The judicial branch of government plays a role in shaping criminal law by adjudicating constitutional claims and restricting state action that violates constitutional rights. Over time, the Supreme Court has invalidated aspects of state criminal law in a number of major cases. By doing so, the Court has had some impact on both the substance and procedure of criminal law in the United States.²⁶

The most famous case on criminal procedure, or the acts by which states enforce their criminal law, is *Miranda v. Arizona* (1966). In this case the Court held that confessions taken after arrest could not be used in criminal trials unless the suspects had been adequately informed of their Fifth and Sixth Amendment rights. This ruling had a direct impact on the actions of law enforcement officers in the United States and established the phrase that would become a permanent part of American culture, “you have the right to remain silent, anything you say can and will be used against you in a court of law...”

Fewer cases have directly reshaped the substance of criminal law, which includes the definition of crimes, defenses and punishments. Among the most famous of these cases is *Robinson v. California* (1962), in which the Court ruled that California violated the Eighth Amendment by incarcerating Lawrence Robinson for the mere status of drug-addiction.

Though substance-based cases like *Robinson* have been less numerous and impactful than procedure-based cases like *Miranda*, one can argue that both types have contributed to theories of how constitutional protections, explicitly enumerated in parts of the bill of rights like the Fourth Amendment’s ban on unreasonable searches and seizures, but only implicitly found in other parts such as the Due Process Clause

²⁶ For an argument that the Supreme Court has impacted both procedural and substantive criminal law, see Louis Bilionis, “Process, the Constitution, and Substantive Criminal Law,” *Michigan Law Review*, Vol. 96, No. 5 (March 1998), 1269-1334. Accessed Feb 20th, 2014. At: <http://www.jstor.org/stable/pdfplus/1290179.pdf?acceptTC=true&acceptTC=true&jpdConfirm=true>

of the Fifth Amendment, restrict legislative choice in criminal law.

In his Michigan Law Review article “Process, the Constitution, and Substantive Criminal Law,” Louis Bilionis refers to such theories of restriction as “substantive constitutional criminal law,” or a “vibrant relationship between the Constitution and the criminal law.”²⁷ Bilionis argues that legal scholars have been mistaken to expect a substantive constitutional criminal law to arise only in cases establishing “rights-based restrictions on the criminal sanction that are grounded in some satisfactory substantive theory of crime, punishment and individual liberty.” Further, he argues that Henry Hart’s desire for the Supreme Court to articulate parts of such a theory, contained in his seminal work *The Aims of Criminal Law*, has been less unfulfilled than is commonly thought.²⁸ Bilionis makes his case by offering an account of procedural criminal law as a set of questions on the

...proper constitutional roles of judges and legislators and prosecutors and jurors in criminal law choices, on the relative strengths and weaknesses of the players involved, and on the function of political safeguards and institutional discretionary mechanisms, on the significance of federalism, and on the countermajoritarian difficulties attending judicial review under the capacious concept of due process.²⁹

According to this account, procedural questions have been at “the intersection of the Constitution and substantive criminal law for the last seventy-five years.”³⁰

Capital punishment is no exception. Beginning in the late 1800’s, the Supreme Court has reviewed challenges to state capital punishment laws under multiple constitutional provisions. Some of the cases were *Wilkerson v. Utah* (1879) which permitted the use of firing squads under the Eighth Amendment, *Powell v. Alabama* (1932) which determined that the Fourteenth Amendment guaranteed a right to counsel before a capital trial, and *Francis v. Resweber* (1947) which held that a second attempt at execution after a first failed

²⁷ For an argument that the Supreme Court has impacted both procedural and substantive criminal law, see Louis Bilionis, “Process, the Constitution, and Substantive Criminal Law,” Michigan Law Review, Vol. 96, No. 5 (March 1998), 1269-1334. Accessed Feb 20th, 2014. At:

<http://www.jstor.org/stable/pdfplus/1290179.pdf?acceptTC=true&acceptTC=true&jpdConfirm=true>

²⁸ Ibid, at: 1271

²⁹ Ibid

³⁰ Ibid, at: 1272

attempt did not constitute double jeopardy, as prohibited by the Fifth Amendment. In these and other cases, the Court generally deferred to state legislatures and rejected challenges under the Eighth, Fifth and Fourteenth Amendments. Despite its decisions to reject the majority of constitutional challenges to capital punishment, including the basic contention that the practice is prohibited in all cases by the Eighth Amendment's cruel and unusual punishments clause, the Court has recognized a unique constitutional significance to the death penalty and has placed some restrictions on capital punishment.

Beginning in the 1970s, a series of high profile cases established constitutional restrictions on both the procedure and substance of capital punishment law. In the procedure-based cases *Woodson v. North Carolina* (1976), *Gregg v. Georgia* (1976), and *Lockett v. Ohio* (1978), the Court narrowed the range of constitutionally acceptable capital punishment laws by banning mandatory sentencing, requiring written guidelines and allowing juries to consider any mitigating evidence.

In addition to these procedure-based cases, the Court reviewed substantive capital punishment laws and established further restrictions. Substance-based cases such as *Coker v. Georgia* (1977), *Thompson v. Oklahoma* (1988), and *Ford v. Wainwright* (1986) have focused on proportionality and culpability. They have restricted the use of capital punishment for non-lethal crimes such as rape, and for defendants with limited culpability such as minors and the mentally insane.

Though each procedural or substantive case has addressed one narrow aspect of capital punishment law, they have all contributed to theories of how the protections of the Constitution, namely the Cruel and Unusual Punishments Clause, the Due Process Clause and the Equal Protection Clause, restrict state legislatures in the area of capital punishment law. Through these cases the Supreme Court began to develop the type of "vibrant relationship between the Constitution and the criminal law" that Bilonis defines as the backbone of a "substantive constitutional criminal law."

IV CASES

This paper focuses on Supreme Court decisions in three landmark cases, *Furman v. Georgia* (1972), *Gregg v. Georgia* (1976) and *McCleskey v. Kemp* (1987). Each of these cases rested on challenges under the Cruel and Unusual Punishments Clause of the Eighth Amendment. Though they contained multiple constitutional challenges, they all considered the contention that death sentences applied under contemporaneous state capital punishment statutes were at best arbitrary and at worst discriminatory. According to the petitioners, the risk of randomness or discrimination in capital sentencing was so great that death sentences imposed under such statutes should be considered “Cruel and Unusual Punishment” as prohibited by the Eighth Amendment.

A. *Furman v. Georgia* (1972)

Furman was one of the first cases in which the Supreme Court placed constitutional restrictions on state capital punishment law.³¹ Council for William Henry Furman, an African American resident of Georgia convicted of murder and sentenced to death, argued that his death sentence under Georgia’s state capital punishment statute violated the Cruel and Unusual Clause of the Eighth Amendment. Aside from the claim that capital punishment is cruel and unusual under any circumstance, his lawyers argued that Georgia’s statute created an unconstitutional risk of randomness and discrimination in capital sentencing.

Georgia’s capital punishment statute, like that of nearly every state at the time, allowed juries to

³¹ Earlier cases in which the Court imposed restrictions on state capital punishment laws are few but include two notable cases, *Powell v. Alabama* (1933) and *Witherspoon v. Illinois* (1968). In *Powell*, the Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments required states to provide access to legal counsel for indigent defendants in capital cases. This holding was succeeded by *Gideon v. Wainwright* (1963), which extended the requirement to defendants in all felony cases. In *Witherspoon*, the Court held that state capital punishment laws allowing prosecutors to reject all jurors who opposed the death penalty deprived defendants of their Fifth and Fourteenth Amendment Due Process rights by stacking the deck against them at trial.

impose or reject the death penalty for any defendant convicted of a capital crime. By giving juries such wide discretion, petitioners argued, the statutes nearly guaranteed that sentences would rest on inappropriate factors such as the social class of the defendant, the quality of the defense council, or the personal prejudices of the jurors. They contended that under such unguided sentencing schemes it would be nearly impossible to distinguish individuals among the small set of defendants in capital cases given the death penalty from persons in the much larger group of defendants in capital cases given life sentences.

The Supreme Court's decision in *Furman* was complex. Deciding the case in an unusual manner, the Justices produced nine separate opinions, each of which contained different lines of reasoning. Though the opinions of five Justices overlapped enough to reach the result of striking down Georgia's capital punishment statute, each did so by different means. This fractured ruling, also the longest Supreme Court case yet, made a substantial impact on capital punishment law.³²

In the two longest opinions of the case, Justices Brennan and Marshall held that capital punishment violates the Cruel and Unusual Punishments Clause of the Eighth Amendment in every circumstance. According to Brennan, the death penalty violates the core standard of the Eighth Amendment, that "[t]he State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."³³ To determine whether a punishment violates what he calls a principle of "human dignity" Brennan proposes a formula that he draws from historical analysis and previous Eighth Amendment cases including *Wilkinson v. Utah* (1879), *Weems v. United States* (1910), and *Trop v. Dulles* (1958). According to this formula, the Court should consider four qualities of a punishment to determine whether it constitutes "Cruel and Unusual Punishment" under the meaning of the Eighth Amendment. They include the punishment's severity, the arbitrariness of its application, its popular acceptance and its excessiveness or necessity. Under Brennan's

³² Together, the Court's lengthy concurring and dissenting opinions in *Furman* took up more than 200 pages, making it the longest U.S. Supreme Court opinion ever written. Oyez ITT Chicago-Kent College of Law, "Furman v. Georgia," Accessed April 28th, 2014, at: http://www.oyez.org/cases/1970-1979/1971/1971_69_5003/.

³³ Brennan, J. *Furman v. Georgia* (1972) at: 270.

analysis, capital punishment fails to meet any of the standards, rendering it “Cruel and Unusual.” Justice Marshall’s analysis is similar to Brennan’s and includes considerations of the same four components with a slightly greater emphasis on the issue of discrimination.

Perhaps because Marshall and Brennan’s conclusion that the Constitution prohibits all use of capital punishment would invalidate the laws of many states, they were careful to justify their decision by writing extensively on the history of capital punishment, the methods of constitutional interpretation they employed, and the role of the Supreme Court in society. Marshall anticipated the controversy that would follow the ruling. “The elasticity of the constitutional provision under consideration presents dangers of too little or too much self-restraint. Hence, we must proceed with caution to answer the question presented.”

Despite the depth of analysis in the opinions by Brennan and Marshall, their position failed to win acceptance from any other members of the Court. In much shorter opinions Justices Douglas, Stewart and Powell refused to address the contention that capital punishment is cruel and unusual under every circumstance, instead limiting their analyses to sentences imposed under Georgia’s statute. Though their opinions discuss different aspects of the argument, all three agreed with William Furman’s lawyers that the death penalty, as applied in Georgia, violated the Eighth Amendment.

Justice Douglas wrote that the lack of sentencing guidelines opened the door for private prejudices to play a role in deciding which defendants would receive life or death sentences. In his analysis of the Eighth Amendment, Justice Douglas found an anti-discrimination principle that prohibits such discriminatory application of a punishment. He writes

The words ‘cruel and unusual’ certainly include penalties that are barbaric. But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is “cruel and unusual” to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.³⁴

³⁴ Douglas, *Furman v. Georgia* (1972), At: 245

Justices Stewart and White reached the same conclusion as Douglas, but they perceived the constitutional evil of Georgia's statute to be the risk of randomness, capriciousness, or arbitrariness, instead of discrimination. Justice Stewart foregoes a deep analysis of the Eighth Amendment in his opinion but uses similar criteria to Brennan and Marshall to determine what punishment the Cruel and Unusual Punishments Clause prohibits. According to both Stewart and White, a punishment is "cruel" under the meaning of the Eighth Amendment if it is excessive, meaning that a less severe punishment could serve the same state interests. To Stewart, the fact that the vast majority of capital defendants received life sentences implies that the Georgia legislature thought a life sentence sufficient so serve its state interests in capital cases and that death penalties were excessive. "In the first place, it is clear that these sentences are "cruel" in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary."³⁵

Another measure Stewart uses to apply the Eighth Amendment is the frequency of imposition. He emphasizes the rarity with which the death penalty was imposed under such statutes and compares the misfortune of receiving a death sentence to being the killed by a random act of nature.

These death sentences are cruel and unusual in the way that being struck by lightning is cruel and unusual. For, of all the people convicted of murders and rapes in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed...³⁶

The rarity of death sentences under Georgia's statute leads Justice Stewart to find that the penalty fails both prongs of his Eighth Amendment test. He concludes "...the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."³⁷

Justice White takes a less literal approach to interpreting the Cruel and Unusual Punishments

³⁵ Stewart, J. *Furman v. Georgia* (1972), At: 309.

³⁶ Ibid.

³⁷ Ibid.

Clause but still focuses on the rarity of capital punishment in Georgia as a measure of its excessiveness. For White, death sentences imposed under Georgia's statute violate the Eighth Amendment because the infrequency with which they are imposed undercuts the state interest of deterrence. Without serving this interest, White concludes, the punishment must be considered excessive.

...the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.³⁸

The remaining four justices - Burger, Blackmun, Powell and Rehnquist - all voted to uphold Georgia's statute. They rejected both claims presented in the case, that capital punishment is "cruel and unusual" in all cases and that capital sentences applied under Georgia's statute were unconstitutionally arbitrary or discriminatory.

As a result of the Court's unusual split, *Furman* failed to establish a clear and coherent principle of law. Instead, the splintered decision sent mixed signals to the states about the constitutionality of capital punishment. The three concurring opinions of Douglas, Stewart and White that controlled the result in *Furman* had neglected to directly address whether capital punishment was unconstitutional in all circumstances, but had voided Georgia's statute because of its application. These three justices had tenuously held that infrequency and arbitrariness in sentencing were constitutional roadblocks to capital punishment, but they failed to outline how states could write their statutes to overcome those obstacles. Additionally, the four strong dissents had done their best to highlight the opposition to these rulings that existed within the chambers of the Court itself. Despite its failure to establish a clear principle of law, the ruling in *Furman* had a large practical impact. It imposed a moratorium on capital punishment throughout the states that prevented the imposition of any new death sentences and commuted the death sentences of

³⁸ White, *Furman v. Georgia* (1972), At: 312

over six hundred prisoners.³⁹

³⁹ Death Penalty Information Center, “Constitutionality of the Death Penalty.” Accessed April 30th, 2014, at: <http://www.deathpenaltyinfo.org/part-i-history-death-penalty#susp>.

B. *Gregg v. Georgia* (1976)

The moratorium would not last long, however, since thirty-five states and the federal government revised their capital punishment statutes within four years of the ruling in *Furman*.⁴⁰ States attempted to comply with *Furman* by including provisions in their new statutes that would narrow jury discretion and ensure more reliability in the imposition of death sentences. Georgia's new law, like that of twenty other states, required juries to find at least one statutorily defined "aggravating factor."⁴¹ Additionally, it required that the trial judge and the State Supreme Court conduct a mandatory review of each death sentence and ensure it is not imposed "under the influence of passion, prejudice, or any other arbitrary factor" and that it is not "excessive or disproportionate to the penalty imposed in similar cases."⁴²

Other states enacted slightly different provisions such as the requirement in Texas that upon completion of the sentencing phase in capital trials juries decide

(1) whether the evidence established beyond a reasonable doubt that the murder of the deceased was committed deliberately... and with the reasonable expectation that the death of the deceased or another would result, and (2) whether the evidence established beyond a reasonable doubt that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.⁴³

Still other states revised their capital sentencing statutes by prescribing mandatory death sentences for defendants convicted of capital crimes. North Carolina's capital punishment statute, enacted in 1974 just two years after *Furman*, prescribed the death penalty for all murders "perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery,

⁴⁰ Found in the opinion of Justice Stewart in *Gregg v. Georgia* (1976), At: 179

⁴¹ Death Penalty Information Center. "Crimes Punishable by the Death Penalty." Accessed April 30th, 2014, at: <http://www.deathpenaltyinfo.org/crimes-punishable-death-penalty#BJS>

⁴² Stewart, J. *Gregg v. Georgia* (1976), At: 212

⁴³ Information drawn from the joint opinion of Justices Stewart, Stevens and Powell in *Jurek v. Texas* (1976), a companion case to *Gregg v. Georgia* (1976), in which the Court upheld Texas' capital punishment statute. *Jurek v. Texas* (1976), At: 268

kidnapping, burglary or other felony.”⁴⁴

Together, the ambiguity of the decision in *Furman* and the responses of the states that revised their statutes set the stage for another Supreme Court ruling on capital punishment. That ruling came in 1976 in *Gregg v. Georgia* (1976) and four accompanying cases in which the Court reviewed the sentencing statutes of Georgia, Texas, Louisiana, Florida and North Carolina.⁴⁵ In these cases the Court attempted to settle the confusion about the constitutionality of the revised statutes by clarifying the principles of *Furman* and applying them to a cross section of the new sentencing schemes enacted across the country.

Before addressing arguments about arbitrariness and discrimination in the new statutes, the Court first addressed the question of whether capital punishment is unconstitutional in all cases. As they had in *Furman*, Justices Brennan and Marshall voted to hold that in every circumstance the death penalty violates the principle of “human dignity” inherent in the Eighth Amendment. Unlike in *Furman*, however, Brennan and Marshall’s opinions were dissents from the ruling of the Court instead of concurrences. The majority and concurring opinions in *Gregg*, signed by seven justices, ruled definitively that capital punishment does not violate the Cruel and Unusual Punishments Clause of the Eighth Amendment in every case. This ruling protected capital punishment from this line of attack and reduced the chance that it would succeed in the foreseeable future.

After rejecting this blanket challenge to capital punishment, the Court turned to the statutes at hand. The states that reenacted capital punishment statutes after the Court’s ruling in *Furman* had attempted to reduce the risk of arbitrariness that was fatal to Georgia’s pre-1972 statute by reducing the range of discretion in capital cases granted to sentencing authorities. In the accompanying cases to *Gregg* the Court

⁴⁴ Text of the statute drawn from the joint opinion of Justices Stewart, Stevens and Powell in *Woodson v. North Carolina* (1976), a companion case to *Gregg v. Georgia* (1976) and *Jurek v. Texas* (1976), in which the Court struck down North Carolina’s mandatory capital punishment statutes. *Woodson v. North Carolina* (1976), At: 286.

⁴⁵ The Capital Punishment Cases include *Gregg v. Georgia* (1976), *Jurek v. Texas* (1976), *Roberts v. Louisiana* (1976), *Proffitt v. Florida* (1976) and *Woodson v. North Carolina* (1976). All were consolidated in oral arguments and the opinions were announced on the same day.

invalidated the statutes of North Carolina and Louisiana, both of which had attempted to reduce the risk of arbitrariness by eliminating discretion altogether through mandatory sentencing. The Court held in *Woodson v. North Carolina* (1976) and *Roberts v. Louisiana* (1976) that mandatory sentencing violated the Cruel and Unusual Punishments Clause because it was overly harsh and in many cases led to the problem of jury nullification, in which juries refuse to convict a defendant when they feel the death penalty is inappropriate. The Court's opinions in *Woodson* and *Roberts* held that decisions to apply the death penalty must be made on an individual basis. In *Woodson*, Justices Stewart, Powell and Stevens wrote in their plurality decision that "respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death"⁴⁶

Though the Court invalidated the mandatory sentencing schemes of North Carolina and Louisiana, it upheld the statutes of Georgia, Florida and Texas. In these cases the Court addressed arguments that the revised statutes still gave juries enough discretion to impose the death penalty inconsistently and randomly upon unfortunate and isolated defendants.

In *Gregg*, *Proffitt* and *Jurek*, the Court rejected this argument, ruling that the state statutes under review met the requirement of *Furman*. Justice Stewart, the author of one of the three controlling opinions in *Furman*, wrote for the majority in *Gregg* that

The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish.⁴⁷

He went on to explain that Georgia's new statute, which required juries to find at least one of ten listed aggravating factors before imposing a death sentence, adequately reduced the risk of arbitrariness.

⁴⁶ Stewart, Powell, Stevens, *Woodson v. North Carolina* (1976), At: 304

⁴⁷ Stewart, *Gregg v. Georgia* (1976), At: 206

In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines... the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.⁴⁸

Though the Court only examined a few statutes, the rulings in *Gregg* and its companion cases gave the states a green light to impose capital punishment so long as they provided adequate sentencing guidelines and gave juries discretion to reject the punishment of death.

⁴⁸ Ibid, At: 207

C. Developments between 1976 and 1987

The next major ruling that squarely confronted claims of arbitrariness and discrimination in capital sentencing was *McCleskey v. Kemp* (1987). However, in the eleven intervening years between *Gregg* and *McCleskey* the Court reviewed Eighth Amendment challenges to the newly approved capital punishment statutes in several cases. In *Coker v. Georgia* (1977), *Enmund v. Florida* (1982) and *Ford v. Wainwright* (1986), the Court held that the death penalty was unconstitutional when disproportionate to the moral culpability of the defendant, as measured by the severity of the crime or the mental state of the defendant.⁴⁹ In *Coker*, *Enmund* and *Wainwright*, the Court ruled that capital punishment was disproportionate for the crime of rape, for defendants who are minors without a sufficiently culpable mental state and for prisoners awaiting execution who are insane.⁵⁰

In *Lockett v. Ohio* (1978) and *Skipper v. South Carolina* (1986) the Court protected a minimum level of discretion in capital sentencing. Adding to the 1976 *Woodson* decision, which rejected mandatory sentencing and required that juries consider defendants as "uniquely individual human beings," the Court held in *Lockett* and *Skipper* that juries must have the discretion to consider any mitigating evidence in capital cases. Writing for the plurality opinion in *Lockett*, Chief Justice Burger held that "[T]he sentencer . . . [cannot] be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."⁵¹

Though it had protected discretion in *Woodson*, *Lockett* and *Skipper*, the Court also imposed limits on jury discretion in *Godfrey v. Georgia* (1980). *Godfrey* centered around one of Georgia's ten listed aggravating factors. The language of the statute permitted juries to impose the death penalty for murder that could be described as "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of

⁴⁹ Explanation of *Coker*, *Enmund* and *Wainwright* found in *McCleskey v. Kemp* (1987), At: 305.

⁵⁰ *Ibid.*

⁵¹ Burger, J. *Lockett v. Ohio* (1978), At: 604

mind, or an aggravated battery to the victim.”⁵² The lawyers for Robert Godfrey, a man convicted of murder and sentenced to death for killing his ex-wife and mother in law with a shotgun, argued that the language of this provision in the Georgia statute was impermissibly vague. Writing for the majority, Justice Stewart noted this difficulty, writing “There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as ‘outrageously or wantonly vile, horrible and inhuman.’”⁵³

Despite the openness of the provision, the Court held that the statute was still constitutional as long as the Georgia Supreme Court interpreted its terms narrowly while conducting its mandatory review of each death sentence. In *Godfrey* the Court vacated the petitioner’s sentence but found no indication that Georgia’s court would not uphold its duty to interpret the statute narrowly.

In all these cases, the Court refined its capital punishment jurisprudence by clarifying the circumstances under which capital punishment is proportionate, by protecting a minimum level of discretion in capital sentencing and by requiring that state courts limit jury discretion by narrowly interpreting vague or open language in sentencing statutes. Before evaluating the Eighth Amendment claims in *McCleskey* the Court summed up its developments

In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.⁵⁴

⁵² Stewart, *Godfrey v. Georgia* (1980), At: 422

⁵³ *Ibid*, At: 428

⁵⁴ Powell, *McCleskey v. Kemp* (1987), At: 305

D. *McCleskey v. Kemp* (1987)

In 1987 the Court took on a stronger challenge to capital punishment than ever before, examining statistical evidence of racial discrimination in capital sentencing in Georgia. The lawyers for Warren McCleskey, a Georgia man sentenced to death for murder in the course of an armed robbery, relied on a study conducted by professor David Baldus (the “Baldus Study”), which showed disparities in the imposition of death sentences based on the race of the victim and the perpetrator.

Because McCleskey’s arguments rested on evidence of racial discrimination in capital sentencing, the primary challenge of the case was that Georgia’s sentencing statute denied McCleskey the Equal Protection of the laws guaranteed by the Fourteenth Amendment. Though the Court accepted the validity of the Baldus Study and acknowledged the existence of racial disparities in capital sentencing at a systemic level, it rejected McCleskey’s argument, holding that a petitioner must prove invidious discrimination affected the result in his own case in order to prevail on a Fourteenth Amendment claim.

[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study.⁵⁵

The secondary challenge brought by McCleskey’s lawyers was that Georgia’s statute violated the Cruel and Unusual Punishments Clause of the Eighth Amendment. They argued that the evidence in the Baldus Study that race played a part in capital sentencing proved Georgia’s statute had failed to adequately narrow jury discretion, or to ensure the presence of a “meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”⁵⁶

The Court rejected this argument, writing that consideration at trial by a jury of one’s peers is one

⁵⁵ Powell, *McCleskey v. Kemp* (1987), At: 292

⁵⁶ White, *Furman v. Georgia* (1972), At: 313. Ironically enough, the Baldus Study indicates that there was a meaningful basis to distinguish the few cases in which the death penalty is imposed, but that the meaningful basis was the constitutionally impermissible distinction of race.

of the hallmarks of our criminal justice system, and that such consideration comes with a certain degree of discretion. Justice Powell wrote for the majority in *McCleskey* that “...the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification...”

Powell went on to conclude that the Baldus Study had failed to show that the discretion exercised by juries in capital cases had resulted in a level of arbitrariness exceeding the constitutional limit imposed in *Furman*.

At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. The discrepancy indicated by the Baldus study is “a far cry from the major systemic defects identified in *Furman*”⁵⁷

In the end, the Court ruled that because *McCleskey* had not provided evidence that race had influenced the sentence in his own case, because jury discretion is an indispensable part of our criminal justice system, and because the statistics were insufficient to prove that Georgia’s statute failed to meet the standards of *Furman*, *McCleskey*’s sentence and Georgia’s statute were not unconstitutional. Warren *McCleskey* was executed in Georgia’s electric chair on September 25th, 1991.

⁵⁷ Powell, *McCleskey v. Kemp* (1987), In part quoting *Pulley v. Harris* (1984), At: 312

V ARGUMENTS

A. *Gregg v. Georgia* (1976)

Question 1: *Why did the Court reject the Eighth Amendment challenge to Georgia's capital punishment statute in Gregg v. Georgia (1976)?*

Formalist Lens

Explaining the ruling in *Gregg* through a formalist lens requires focusing on how the Court reached the legal outcome. This can be accomplished by contemplating two components: (a) the constitutional standard that the Court uses and the primary legal question of the case, and (b) its application of the facts of the case to answer the primary legal questions.

(a) In *Gregg*, the constitutional standard by which the Court evaluated the Eighth Amendment challenge was drawn from *Furman*, which had been decided four years earlier. The Court had ruled in *Furman* that Georgia's pre-1973 law, which gave juries full discretion to reject or impose the death penalty in any capital case, produced death sentences that were random enough to be disproportionate and excessive compared to the sentences in similar cases. The justices who wrote the controlling opinions in *Furman* described the constitutional violation of Georgia's law alternately as "pregnant with discrimination," as akin to being "struck by lightning," and as the result of a system that fails to produce a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."⁵⁸

Because *Gregg* was the first major case to test the constitutionality of Georgia's revised statute, the primary legal question was whether the statute's provisions would adequately reduce the risk of arbitrariness, or whether the statute would still produce death sentences that were arbitrary, capricious or

⁵⁸ Douglas, J., Stewart, J., White, J. *Furman v. Georgia* (1972), At: 257, 310, 313.

discriminatory enough to violate the Eighth Amendment.

(b) When applying the facts of the case to answer the primary legal question, the Court focused on the new provisions of Georgia's statute intended to narrow jury discretion and prevent the type of random or capricious sentences that the Court found unconstitutional in *Furman*.

Like many of the post-*Furman* statutes, Georgia's new law divided capital trials into two phases: a guilt and a sentencing phase. Adding a separate sentencing phase was intended to give both the prosecution and defense an opportunity to present evidence on the appropriateness of the death penalty that might otherwise be impermissible in a unitary trial. This new category of evidence included facts about the defendant's criminal history, community ties or moral character that are relevant to whether the defendant "deserves" the penalty but irrelevant to a determination of guilt and potentially prejudicial on that decision.⁵⁹

Additionally, the new law in Georgia provided a list of ten "aggravating factors" or circumstances of the crime, and required that juries find the presence of at least one of the ten factors before imposing a penalty of death.⁶⁰ This list was another mechanism designed to narrow the discretion that juries had and to ensure that they only imposed death sentences on rational and consistent bases.

Lastly the statute contained provisions that mandated judicial oversight of jury decisions, both by the trial judge and the Georgia Supreme Court. These provisions were intended to provide another safeguard against arbitrary or random death sentences. As the Court discussed in *Gregg*, the new statute required trial judges presiding over capital cases to fill out a

6 1/2-page questionnaire, designed to elicit information about the defendant, the crime, and the circumstances of the trial. It requires the trial judge to characterize the trial in several ways designed to test for arbitrariness and disproportionality of sentence. Included in the report are

⁵⁹ An example of evidence relevant to the sentencing phase that might prejudice a jury in the guilt phase is information about the defendant's family relationships, community ties, or prior criminal history.

⁶⁰ See Appendix A for a list of Georgia's ten aggravating factors

responses to detailed questions concerning the quality of the defendant's representation, whether race played a role in the trial, and, whether, in the trial court's judgment, there was any doubt about the defendant's guilt or the appropriateness of the sentence.⁶¹

In *Gregg*, the Court evaluated arguments that despite these provisions intended to narrow jury discretion, the statute still created the risk of random or arbitrary death sentences. Lawyers for the petitioner Troy Leon Gregg pointed to one of the new aggravating factors, which was reviewed and upheld in the later case *Godfrey v. Georgia (1980)*, that allowed juries to impose the death penalty on a defendant who commits a crime that is “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.” Gregg’s lawyers claimed that this broad provision would fail to narrow jury discretion and limit the circumstances in which capital punishment would be imposed. Additionally, they argued that in their review functions trial judges and the Georgia Supreme Court would do little more than affirm the flawed sentencing decisions of biased juries. In short, petitioners argued that the facts of the case - or the sentences that would be produced by Georgia’s new law - failed to meet the constitutional standard set by *Furman*.

The Court rejected this view, finding instead that the new statute adequately reduced the risk of wholly random or arbitrary sentences, thus meeting the Eighth Amendment standard of *Furman*. Justice White, the author of one of the controlling opinions that struck down Georgia’s previous statute in *Furman*, summarized his view of the constitutional challenge

the petitioner argues that the death penalty will inexorably be imposed in as discriminatory, standardless, and rare a manner as it was imposed under the scheme declared invalid in *Furman*. The argument is considerably overstated. The Georgia Legislature has made an effort to identify those aggravating factors which it considers necessary and relevant to the question whether a defendant convicted of capital murder should be sentenced to death.⁶²

Because five other justices in *Gregg* shared the essence of this view, the Court reached the conclusion that Georgia’s new law did not violate the Cruel and Unusual Punishments Clause of the Eighth Amendment to

⁶¹ Stewart, J. *Gregg v. Georgia (1976)*, At: 167.

⁶² White, J. *Gregg v. Georgia (1976)*, At: 221.

the Constitution.

Preoccupation with Countermajoritarian Difficulty

One possible explanation for the Court's answer to the legal question in *Gregg* is that the justices were concerned with the countermajoritarian difficulty when deciding the case.

Evidence that the Court was sensitive to the countermajoritarian difficulty can be found in the opinions of *Gregg* and the cases that came before it. *Trop v. Dulles* (1954) was an important previous case in which the Court developed its Eighth Amendment doctrine. Though the case focused on a military statute that punished soldiers for deserting by stripping them of citizenship, the Court developed its understanding of the Eighth Amendment in three ways that impacted the later capital punishment cases.

First, the Court's discussion in *Trop* strengthened the notion that at its core, the Eighth Amendment's prohibition on "Cruel and Unusual Punishments" is a subjective moral standard against "unjust" punishments. Chief Justice Warren wrote

The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this court, [however]...the basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."⁶³

By using terms such as the "dignity of man" and the "limits of civilized standards," Chief Justice Warren made clear that Eighth Amendment cases require value judgments about a punishment's morality. He continued by explaining that the moral standard of the Eighth Amendment is not constant over time, but must be applied by the Court in accordance with contemporary societal standards. "The Court recognized... that the words of the Amendment are not precise, and that their scope is not static. The

⁶³ Warren, C.J. *Trop v. Dulles* (1954), at: 100.

Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁶⁴

Second, the opinions in *Trop* developed the Court’s understanding of the need for deference to representative branches of government when applying the subjective moral standard of the Eighth Amendment. Though Chief Justice Warren wrote the majority opinion that invalidated the military statute under review, he was aware of the Court’s need to avoid imposing its own values and to defer when possible to representative branches of government.

[W]e are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. . . . that issue confronts us [in this case], and the task of resolving it is inescapably ours. The task requires the exercise of judgment, not the reliance upon personal preferences.⁶⁵

This was important because the complaints against judicial review contained in the countermajoritarian difficulty are most pronounced when the Court invalidates the acts of representative branches of government that violate moral guarantees in the Constitution.

Lastly, though the majority opinion focused primarily on the punishment of “denaturalization,” it touched briefly upon the constitutionality of the death penalty.⁶⁶ Though the Court did not examine in depth whether capital punishment violates the core concept of human dignity contained in the Eighth Amendment, its discussion of this question consists mostly of applying the judgments of the representative branches of government. Chief Justice Warren wrote

“Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment – and they are forceful – the death penalty has been applied throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.”⁶⁷

⁶⁴ *Ibid*, at: 101.

⁶⁵ *Ibid*, at: 103

⁶⁶ The Court discussed the constitutionality of the death penalty because the argument came up that the punishment of “denaturalization” could not be unconstitutionally severe under the Eighth Amendment punishment if the death penalty was not unconstitutionally severe.

⁶⁷ Warren, C.J. *Trop v. Dulles* (1954), at: 99

By including public opinion and the actions of the representative branches of government in its consideration of whether capital punishment violates the Eighth Amendment in *Trop*, the Court set the stage for the countermajoritarian difficulty to have a significant role in *Gregg* and *McCleskey*.

After *Trop*, the next case that influenced the Court's death penalty jurisprudence was *Furman*. Though a plurality of five justices voted in *Furman* to strike down Georgia's capital punishment law, an "activist" decision that effectively invalidated the capital punishment statutes of every state, both the concurring and dissenting opinions contained extensive references to the need for judicial restraint.

The dissenters in *Furman*, Burger, Blackmun, Powell and Rehnquist, all wrote opinions with strong warnings to the Court against imposing its own values or policy preferences. Justice Rehnquist, who would remain on the Court in *Gregg* and sit as Chief Justice in *McCleskey*, wrote an opinion that focused exclusively on the proper exercise of judicial review and the role of the Court in the American constitutional order. His first paragraph in *Furman* noted that

[The] holding necessarily brings into sharp relief the fundamental question of the role of judicial review in a democratic society. How can government by the elected representatives of the people co-exist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid laws duly enacted by the popular branches of government?⁶⁸

He went on to write that the "task of judging... must surely be approached with the deepest humility and genuine deference to legislative judgment," and that "judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review."⁶⁹

Chief Justice Burger wrote an opinion that contained a similar focus on judicial restraint. It begins with an admonition against legislating from the bench. "If we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall [in invalidating capital punishment in every case], or, at the very least, restrict the use of capital punishment to a small category of the most heinous

⁶⁸ Rehnquist, J. *Furman v. Georgia* (1972), at: 466

⁶⁹ *Ibid*, at: 468, 470

crimes.”⁷⁰ Referring to the invalidation of state capital punishment laws, Justice Blackmun wrote

There – on the Legislative Branch of the State or Federal Government, and secondarily, on the Executive Branch – is where the authority and responsibility for this kind of action lies. The authority should not be taken over by the Judiciary in the guise of an Eighth Amendment issue.⁷¹

Justice Powell’s dissenting opinion contains a similar emphasis on the need for judicial restraint. He levels a sharp critique at the Court’s ruling in *Furman*, arguing that Court overstepped its constitutional role in this case. In Justice Powell’s view, the people and their representatives should be the ones to reject punishments that violate societal “standards of decency.” According this view the justices who concurred in the result erred in *Furman* because

The Court’s judgment not only wipes out laws presently in existence, but denies to Congress and to the legislatures of the 50 States the power to adopt new policies contrary to the policy selected by the Court...

[T]he decision [to invalidate Georgia’s law] encroaches upon an area squarely within the historic prerogative of the legislative branch—both state and federal—to protect the citizenry through the designation of penalties for prohibitable conduct...⁷²

Justice Powell continued by castigating the Court for failing to defer to the legislative branches of government. He chooses language that reflects the core complaint of the countermajoritarian difficulty, implying that the Court’s decision not only misinterprets the Eighth Amendment but undermines democratic values.

Throughout our history, Justices of this Court have emphasized the gravity of decisions invalidating legislative judgments, admonishing the nine men who sit on this bench of the duty of self-restraint, especially when called upon to apply the expansive due process and cruel and unusual punishment rubrics. I can recall no case in which, in the name of deciding constitutional questions, this Court has subordinated national and local democratic processes to such an extent.⁷³

Though the dissenters in *Furman* wrote the opinions with the most extensive focus on the concept of the countermajoritarian difficulty, the justices who voted to invalidate Georgia’s law also discussed the Court’s

⁷⁰ Burger, C.J., *Furman v. Georgia* (1972), at: 375

⁷¹ Blackmun, J. *Furman v. Georgia* (1972), at 410

⁷² Powell, J. *Furman v. Georgia* (1972), at: 418

⁷³ Powell, J. *Furman v. Georgia* (1972), at: 418

need to defer to legislative branches of government.

Even Justice Brennan, who voted in *Furman*, *Gregg* and *McCleskey* to invalidate Georgia's capital punishment statute, considered the judgments of the legislative branches of government in his analysis of capital punishment. Brennan wrote that he "would not hesitate to hold... that death is today a "cruel and unusual" punishment, were it not that death is a punishment of longstanding usage and acceptance in this country."⁷⁴

Justice Marshall, who sided with Brennan in all these cases, also included discussion of the role of the Court and the need for judicial restraint. Acknowledging that the decision in *Furman* hinged on value judgments about capital punishment, "human dignity" and "standards of decency," Marshall wrote "the elasticity of the constitutional provision under consideration presents dangers of too little or too much self-restraint. Hence, we must proceed with caution to answer the question presented."⁷⁵

These mentions of the countermajoritarian difficulty in *Furman* set the stage for *Gregg*, in which the justices revealed a significant preoccupation with deferring to the representative branches of government. The majority opinion coauthored by Justices Stewart, Powell and Stevens expressed a large amount of deference to the states that may have tipped the scales in favor of upholding Georgia's statute. They wrote "in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity."⁷⁶ This presumption may have led the Court to weigh the actions of the state legislatures very heavily and to assume that the new statutes would adequately reduce the risk of arbitrariness. Stewart, Powell and Stevens revealed their keen awareness of the actions of the states, and the significance that it had for their analysis of the death penalty.

The petitioners in the capital cases before the Court today renew the 'standards of decency' argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate... it is now evident

⁷⁴ Brennan, J. *Furman v. Georgia* (1972), at 291.

⁷⁵ Marshall, J. *Furman v. Georgia* (1972), at: 315.

⁷⁶ Stewart, J., Powell, J., Stevens, J., *Gregg v. Georgia* (1976), at: 175.

that a large portion of American society continues to regard capital punishment as an appropriate and necessary criminal sanction.

The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. . . all of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.⁷⁷

Because the actions of the states between the ruling in *Furman* and the challenge brought in *Gregg* sent a clear message that the public by and large still favored the death penalty, the Court was inclined to defer to state legislatures and uphold Georgia's statute. The actions of the states may have played the largest role in the Court's analysis of whether the death penalty violates the Eighth Amendment in all cases, but they also may have impacted the Court's answer to the primary legal question of whether the new statute would adequately reduce the risk of arbitrariness. Though popular support for a punishment may have no direct impact on whether the punishment will be applied fairly or arbitrarily, the actions of the states may have been interpreted by the Court as indications that the public believed capital punishment, even when imposed with some risk of arbitrariness, did not violate "human dignity" and was not contrary to societal "standards of decency." The legislative actions taken by the representatives of an overwhelming majority of the American people may have increased the amount of arbitrariness in the imposition of death sentences that the Court would need to perceive before invalidating the statutes producing those sentences.

Perception of Capital Cases as Devoid of Social Context

In *Furman* and *Gregg* the petitioners argued that under Georgia's capital punishment system, decisions by prosecutors and juries would be influenced by biases about the race and social status of the defendants and victims. The influence of these biases, they argued, would lead to a disproportionately high imposition of the death penalty on socially disfavored groups like the poor and racial minorities. Though most observers would conclude it is at least possible that actors in the capital punishment system would be influenced by

⁷⁷ Stewart, J., Powell, J., Stevens, J., *Gregg v. Georgia* (1976), at 179-181.

biases, given the long experience with racism and discrimination in the American criminal justice system and the discretion still left to juries under Georgia's statute, most of the justices failed to acknowledge this possibility. Instead, they viewed capital cases as neutral applications of law that happen independent of a greater social context. Though in general the Court is oblivious to neither social conflict between groups based on race and class nor the possibility of discrimination in the criminal justice system, a majority on the Court failed to see how the greater social context of conflict and discrimination could impact decision makers in capital cases such as prosecutors, judges and juries. This view of capital cases as devoid of social context may have influenced the Court's answer to the primary legal question in *Gregg* by placing the issue of arbitrariness, not discrimination, at the center of the Court's focus and by making the justices unaware of the ways in which discrimination may infect capital sentencing. As a result, the justices may have been more likely find that the provisions of Georgia's revised statute adequately reduced the risk of arbitrariness and met the standard of the Eighth Amendment than they would have been had they been aware of the ways in which biases may infect sentencing decisions.

Evidence that the Court saw capital punishment cases as neutral functions of law in which actors apply the statutory provisions without the influence of personal biases can be found in the opinions in both *Furman* and *Gregg*. In *Furman*, this view is evident in both the concurring and dissenting opinions. Justices Stewart and White, who played important roles in *Gregg*, expressed the strongest perceptions of that capital sentencing was infected by random decisionmaking.

Justice Stewart, who would coauthor the majority opinion in *Gregg*, indicated that Georgia's capital punishment statute violated the Eighth Amendment because it allowed juries to make sentencing decisions that were "freakish" and random. He even went so far as to compare death sentences imposed under this statute with natural disasters or random acts of nature.

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as

reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.⁷⁸

Justice White, who would write the concurring opinion in *Gregg*, revealed a similar concern with randomness in capital sentencing instead of patterns of discrimination. He concluded that because death sentences were imposed so infrequently, it would be impossible to find rational distinctions between defendants who receive life sentences and those who receive the death penalty. "...[T]here is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."⁷⁹

Though Justice Brennan acknowledged the possibility of discrimination in capital sentencing as part of the reason for striking down Georgia's statute, the language of his opinion indicates that he perceived an element of randomness or arbitrariness present in capital sentencing. "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."⁸⁰

Additionally Justice Powell, who would author the majority opinion fifteen years later in *McCleskey*, expressed the belief that racial discrimination, once a central problem in American society, had been diminished to almost negligible levels.

The possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of our society in decades past, which contributed substantially to the severity of punishment for interracial crimes, is now no longer prevalent in this country. Likewise, the day is past when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in our history. Because standards of criminal justice have "evolved" in a manner favorable to the accused, discriminatory imposition of capital punishment is far less likely today than in the past.⁸¹

⁷⁸ Stewart, J. *Furman v. Georgia* (1972), at: 309.

⁷⁹ White, J. *Furman v. Georgia* (1972), at: 313.

⁸⁰ Brennan, J. *Furman v. Georgia* (1976), at: 293.

⁸¹ Powell, J. *Furman v. Georgia* (1972), at: 450.

As a result of these views, the standard set by the concurring opinions in *Furman* had to do primarily with arbitrariness, not discrimination.⁸² In *Gregg*, Justice Stewart summarizes his view of *Furman's principle*, mentioning nothing about discrimination. He writes

Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.⁸³

This vision of capital cases as devoid of social context may have influenced the Court's decision in *Gregg* to uphold Georgia's revised statute by leading the justices to be concerned only with arbitrary sentences instead of both arbitrariness and patterns of discrimination. Had the justices also been concerned with the risk of discrimination, they may have been more likely to invalidate Georgia's revised statute in *Gregg*. In part, this is because the standard set in *Furman* would have required new statutes to prevent discrimination along with arbitrariness, a more difficult standard to meet than reducing arbitrariness by itself. Provisions like Georgia's list of ten aggravating factors and its requirement of review by the state supreme court were better at preventing juries from imposing death sentences randomly than preventing juries from imposing sentences based on subtle biases. As pointed out by the counsel for *Gregg*, juries' ability under the new statute to reject the death penalty in any case may still have allowed biases to impact sentencing decisions. This is because juries can reject the death penalty for defendants from socially favored groups like whites and the middle class and refuse to reject it for defendants from socially disfavored groups like blacks and the poor without offering any legal justification.

In addition to placing arbitrariness at the center of the Court's focus, the perception of capital cases as devoid of social context may have blinded the Court to the ways in which discrimination can infect sentencing in capital cases. This may have increased the Court's faith that the provisions of the new statute

⁸² By referring to "the standard" set by the Court in *Furman*, I am referring to a single principle drawn from the various concurring opinions. Because the Court did not speak as one body, nor as one group that made up the majority, "the standard" set in *Furman* can only be an approximation.

⁸³ Stewart, J. *Gregg v. Georgia* (1976), at: 189.

would prevent juries from imposing death sentences arbitrary or racially discriminatory manners. Had the Court been more sensitive to the ways in which discrimination could influence jury decisions, it may have been more likely to agree with Gregg's claims of discrimination in Georgia's sentencing scheme, and thus to find the statute violative of the Eighth Amendment.

Realist Lens

A second means of explaining the outcome of *Gregg* is by looking at the ruling through a realist perspective. This perspective assumes that when the Court decided *Gregg* it chose between multiple possible outcomes by considering factors outside of legal reasoning. To analyze the Court's decision, I will examine the possible outcomes the Court chose between and suggest ways that the contermajoritarian difficulty and the view of capital punishment as devoid of social context may have led it to the selected path.

When reviewing Georgia's revised capital punishment statute for the risk of arbitrariness, the Court had many possible outcomes to choose from. Though possible outcomes include many small variations, I have identified four major courses the Court could have taken. It could have:

- (a) Upheld the statute and tolerated some unknown risk of arbitrariness
- (b) Invalidated the statute and allowed Georgia and other states to revise their statutes to impose further restrictions on arbitrariness
- (c) Invalidated the statute and required that all capital punishment statutes use mandatory sentencing
- (d) Invalidated the statute and held that no revisions could limit arbitrariness enough to make capital punishment constitutional

In *Gregg* the Court rejected options (b), (c) and (d), instead choosing option (a) to uphold Georgia's revised statute despite some risk of arbitrariness. To understand the Court's decision I examine why it may have rejected options (b), (c), and (d), and why it may have found option (a) the most desirable.

Preoccupation with the Countermajoritarian Difficulty

The Court's preoccupation with the countermajoritarian difficulty may help explain why in *Gregg* it chose option (a) to uphold Georgia's revised statute. Because the legislatures of no fewer than thirty-five different states had reenacted capital punishment statutes in the wake of *Furman*, the justices perceived strong support for the death penalty among the public. For the justices, the legislative actions on capital punishment at the state level may have sent an even stronger message than congressional action would have, since state representatives are more closely accountable to the people they represent, and since the policy area of crime has traditionally been handled at the state level. Altogether, this showing of support indicated to the justices that capital punishment was still well within the bounds of contemporary societal norms. Justice Stewart observed that

Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.⁸⁴

This perception of political support, coupled with the justices' desire to defer to representative branches of government and to avoid imposing their own values, may have weighed in favor of upholding Georgia's statute and against options that would require overriding the will of majorities in Georgia and other states.

If the Court had viewed every listed option (a)-(d) as equivalent from a constitutional perspective and had free reign to choose between them, the least attractive choice may have been (d) because it would be the most "countermajoritarian" in its effects. Of all the options, (d) would have involved the most direct

⁸⁴ *Ibid*, at: 178.

and permanent invalidation of political and moral decisions made through the democratic process. It would have invalidated the legislative decisions not only in Georgia, but also in the other states that had enacted new capital punishment laws since *Furman*. Though the Court could have eliminated the possibility of arbitrary death sentences altogether by choosing option (d) and holding that no possible revision could adequately reduce the risk of arbitrariness, a decision by the nine justices to take this course would have overturned the laws of the people enacted in at least thirty five different jurisdictions, by some of the most politically accountable representatives in American government. Instead of invalidating just the law of one individual jurisdiction, course (d) would require reversing and invalidating the whole wave of laws passed by the representatives of the people of many states. Justice Stewart wrote that “[t]he most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes...”⁸⁵

For the justices preoccupied with judicial restraint and deference to the value judgments of the people, option (d) may have seemed far too drastic. This may help explain why the Court was willing to reject option (d), and tolerate at least some possibility of arbitrary death sentences.

The next least attractive option may have been (c), invalidating Georgia's statute and requiring that capital punishment statutes use mandatory sentencing as means of eliminating the risk of arbitrariness. Aside from seeing mandatory death sentences as too harsh for the American constitutional system, the decision to require mandatory sentencing would also have involved extensive invalidations of state laws. In 1976, the majority of the thirty-five revised capital punishment statutes used non-mandatory sentencing, meaning that the Court would have had to invalidate the laws enacted in each of these states. It is likely that the Court's preoccupation with the countermajoritarian difficulty may have put a weight on the scale away from taking

⁸⁵ *Ibid.*, at:179.

this option.

The last option the Court faced besides upholding Georgia's law was (b) to invalidate the statute but hold that other non-mandatory capital punishment statutes would be constitutional as long as they further reduced the risk of arbitrariness. This option may have been unattractive to the Court because it would have overturned Georgia's legislative actions and created confusion about what types of laws would be constitutional. In *Gregg* and its accompanying cases, the Court did not consider whether the specific provisions of all thirty-five capital punishment statutes enacted between 1972 and 1976 would meet the standard of *Furman*, but only reviewed the statutes of Georgia and four other states. As a result, a decision to invalidate Georgia's statute on the grounds that the specific provisions in that statute failed to adequately reduce the risk of arbitrariness would force the Court to specify in great detail the provisions of a statute that might meet the constitutional standard in order to avoid confusion. Not only would this present logistical difficulties, but it would arguably involve the Court in a form of policy-making. The Court's preoccupation with the countermajoritarian difficulty, which counsels strongly against any Court involvement in policy-making, may have led the Court away from this option.

As a result, the Court may have favored option (a) or upholding Georgia's statute because it would not require invalidating any democratically enacted state laws.

Perception of Capital Cases as Devoid of Social Context

Another explanation for the Court's decision to uphold Georgia's statute from a realist perspective comes from its view of capital cases as devoid of social context. Because most of the justices seemed to perceive jury decisions in capital cases as neutral applications of the law free of biases based on race and class, they were disinclined to see discrimination in capital sentencing as a serious constitutional flaw. The easiest way to understand the impact of this perception is to imagine how the case may have been different if the justices

had seen discrimination based on race and social status as a common component in capital sentencing under Georgia's revised statute. Starting from the premise of the realist perspective, which holds that the Court makes decisions by weighing the costs and benefits of multiple equivalent legal outcomes, we can infer that if the justices had seen discrimination as a widespread phenomenon in capital sentencing they may have been more likely to agree with the petitioners that the discrimination in capital sentencing was a liability for the integrity of Georgia's capital punishment scheme as well as the American criminal justice system as a whole. When considering options (a)-(d), it is possible this alternate view would have led the Court to favor options (b)-(d) more than (a).

As mentioned above, evidence that the justices by and large saw capital cases as neutral functions of law in which juries apply statutes without imposing their own biases based on race or social status is found in both the concurring and dissenting opinions in *Furman*. It is likely that this perception continued in *Gregg*, since none of the justices accepted the argument put forth by the petitioner that racial or other discrimination affected the imposition of capital sentences.

Though none of the opinions in *Gregg* discussed the presence of discrimination in Georgia's capital punishment system, the concurring opinion written in *Furman* by Justice Douglas helps illuminate how the Court may have perceived the case differently had it seen discrimination as a problem. In his concurring opinion, Justice Douglas saw discrimination as a problem for the criminal justice system as a whole. Discussing the history of the Eighth Amendment in *Furman*, he implied that the framers enacted the Cruel and Unusual Punishments Clause in large part to correct the flaws in the English criminal justice system that were caused by discrimination. "Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based, not on equal justice, but on discrimination."⁸⁶ He continued by comparing discrimination in Georgia's capital sentencing scheme to the degraded system of justice under the "caste" system practiced in ancient India.

⁸⁶ Douglas, J. *Furman v. Georgia* (1972), at: 255.

In a Nation committed to equal protection of the laws there is no permissible "caste" aspect of law enforcement . . . In ancient Hindu law a Brahman was exempt from capital punishment, and under that law, "[g]enerally, in the law books, punishment increased in severity as social status diminished." We have, I fear, taken in practice the same position, partially as a result of making the death penalty discretionary and partially as a result of the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation.⁸⁷

Based on Justice Douglas' perception that discrimination in capital sentencing was a major flaw undermining the legitimacy of the American criminal justice system, we may infer that had the other justices agreed that discrimination was present in capital sentencing they may have also seen it as a flaw in the justice system as a whole. From a realist perspective, it is possible that this alternate perception would have led the Court to favor options (b)-(d), which involved invalidating the statute and either requiring revisions or banning the use of capital punishment altogether. Instead, however, the perception held by the justices that discrimination was not a serious problem in capital sentencing may have led them to decide between the options based on other considerations, such as how much deference to the legislative branches of government each option would entail. In turn, this view of capital punishment as neutral may have led the justices to favor option (a).

⁸⁷ Ibid, at: 255.

B. *McCleskey v. Kemp* (1987)

Question 2: *Why did the Court reject the Eighth Amendment challenge to Georgia's capital punishment statute in *McCleskey v. Kemp* (1987)?*

Formalist Lens

To find explanations for the outcome in *McCleskey* through a formalist lens I will use the same approach used to find explanations for *Gregg*. This involves contemplating two components: (a) the constitutional standard that the Court uses and the primary legal questions of the case, and (b) its application of the facts to answer the primary legal question.

(a) The constitutional standard used in *McCleskey* was similar to the standard in *Gregg* but bore some important differences. Unlike the challenge in *Gregg* that rested exclusively on the Cruel and Unusual Punishments Clause of the Eighth Amendment, the petitioner in *McCleskey* challenged his sentence under both the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Thus, the Court's decision to uphold Georgia's capital punishment statute in *McCleskey* involved rejecting the challenges brought under both standards. Because my primary goal is to find explanations for the Court's answer to the Eighth Amendment challenge however, I discuss only the parts of the Court's analysis of the Fourteenth Amendment claim that may have impacted the Eighth Amendment question.

The constitutional standards the Court used to evaluate Warren McCleskey's death sentence under the Eighth Amendment were drawn directly from *Furman* and *Gregg*. In the majority opinion, Justice Powell explains that

two principal decisions guide our resolution of McCleskey's Eighth Amendment claim. In [*Furman v. Georgia*, 408 U. S. 238 \(1972\)](#), the Court concluded that the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive.

He continued,

The [question] before the Court in *Gregg* was the constitutionality of the particular procedures embodied in the Georgia capital punishment statute. We explained the fundamental principle of *Furman*, that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."⁸⁸

Though Justice Powell's language indicates that the Court used the exact same constitutional standard for the Eighth Amendment claim in *McCleskey* as it had in *Gregg*, the primary legal questions in the two cases differed because of the contexts in which they were decided. When *Gregg* was decided in 1976, Georgia's recently enacted statute had not been applied in a significant number of cases. Thus, the primary legal question in *Gregg* was whether the provisions of the newly enacted statute were likely to produce sentences with the same constitutional flaws as the system used before *Furman*. By 1987, the year that *McCleskey* was decided, the application of Georgia's statute had already resulted in a significant number of death sentences. Additionally, several Supreme Court cases between 1976 and 1987 had imposed new protections and limitations on jury discretion in capital sentencing. *Woodson v. North Carolina* (1976) which prohibited mandatory sentencing, *Lockett v. Ohio* (1978) which protected juries' ability to hear any mitigating evidence, and *Godfrey v. Georgia* (1980) which required narrow interpretations by juries and courts of one of the more vague provisions of Georgia's statute, reduced the constitutionally acceptable range of jury discretion in capital cases. They limited the discretion that juries have to impose death sentences, and protected the discretion that juries have to reject them. Justice Powell summarizes these developments neatly in *McCleskey*

In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed... Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty.⁸⁹

As a result of the differing contexts of the cases, the primary legal questions *McCleskey* were different from the one in *Gregg*. The Court addressed two primary legal questions: (1) whether the record of death

⁸⁸ Powell, J. *McCleskey v. Kemp* (1987), at: 301-302.

⁸⁹ *Ibid*, at: 306.

sentences produced by Georgia's discretionary capital sentencing system indicated that sentencing was done in an arbitrary or capricious manner, and (2) whether Warren McCleskey's sentence was an example of the arbitrariness or capriciousness that the Court prohibited in *Furman*.

(b) To answer the two primary legal questions in the case, the Court relied on evidence from the Baldus study as well as the facts of the crime for which McCleskey was sentenced to death.

The Baldus study was a comprehensive statistical analysis on the effects of race in Georgia's capital sentencing system. The study's authors, Professors David Baldus, Charles Pulaski and George Woodworth, attempted to determine the impact that the race of the victim and perpetrator of a capital crime had on the likelihood of a jury imposing a death sentence in any given case. At the beginning of the majority opinion, Justice Powell describes the methodology and findings of the research

The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970's. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants.

He continued,

Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks.⁹⁰

When answering the first legal question of whether the record of death sentences imposed under Georgia's statute indicated that the discretionary system produced random or arbitrary sentences, the Court relied on the Baldus study as the primary piece of evidence. When discussing the findings of the research, the Court expressed a large amount of skepticism about the use of statistics to prove discrimination. Justice Powell explained, "To evaluate McCleskey's challenge, we must examine exactly what the Baldus study may

⁹⁰ Ibid, at: 286-287.

show... Statistics at most may show only a likelihood that a particular factor entered into some decisions.⁹¹ He continued, “McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.”⁹² In addition to evaluating McCleskey’s arguments based on the Baldus study, Justice Powell addressed and emphatically rejected the claim that the discretion afforded to juries by Georgia’s system led to arbitrary sentences in violation of *Furman* and *Gregg*.

Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process⁹³

Thus, the Court concluded that neither the Baldus study nor the discretion permitted to juries under Georgia’s statute proved that the law produced death sentences that were arbitrary or capricious enough to violate the standard for non-arbitrariness set in *Furman* and *Gregg*. When deciding whether McCleskey’s sentence itself was imposed arbitrarily, the Court relied on the facts of the crime he had committed. The first paragraph of the majority opinion contains the details of the crime.

During the course of the robbery, a police officer, answering a silent alarm, entered the store through the front door. As he was walking down the center aisle of the store, two shots were fired. Both struck the officer. One hit him in the face and killed him.⁹⁴

The Court ultimately rejected McCleskey’s claim, noting the similarity between his crime and others that had resulted in death sentences. Justice Powell wrote

McCleskey argues that the sentence in his case is disproportionate to the sentences in other murder cases. On the one hand, he cannot base a constitutional claim on an argument that his case differs from other cases in which defendants *did* receive the death penalty. On automatic appeal, the Georgia Supreme Court found that McCleskey’s death sentence was not disproportionate to other death sentences imposed in the State.⁹⁵

⁹¹ Ibid, at: 308.

⁹² Ibid, at: 309.

⁹³ Ibid, at: 313.

⁹⁴ Ibid, at: 283.

⁹⁵ Ibid, at: 306.

He continued by implying that the Baldus study was evidence of neither arbitrariness in Georgia's capital sentencing statute as a whole, nor arbitrariness in McCleskey's sentence in particular. "...absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner," which the Baldus study failed to provide, "McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty."⁹⁶

Countermajoritarian Difficulty

One possible explanation for the Court's decision to reject the Eighth Amendment challenges in *McCleskey* is the preoccupation that many of the justices had with the countermajoritarian difficulty. As noted in my earlier discussion of *Gregg*, the opinions in both *Furman* and *Gregg* contained language about the justices' desire to defer to the representative branches of government. In the first sentence of his dissenting opinion in *Furman*, which was devoted almost entirely to the need for judicial restraint, Justice Rehnquist wrote "The Court's judgments today strike down a penalty that our Nation's legislators have thought necessary since our country was founded."⁹⁷ Justice Powell, who would write the majority opinion in *McCleskey*, criticized the Court for overstepping its constitutional authority in *Furman*.

Throughout our history, Justices of this Court have emphasized the gravity of decisions invalidating legislative judgments, admonishing the nine men who sit on this bench of the duty of self-restraint, especially when called upon to apply the expansive due process and cruel and unusual punishment rubrics. I can recall no case in which, in the name of deciding constitutional questions, this Court has subordinated national and local democratic processes to such an extent.⁹⁸

This focus in the Court's previous capital punishment cases on the need for judicial restraint may have influenced the decision in *McCleskey* by leading the justices again to prefer deference to the legislative actions of the states over invalidating the state statute. Though the primary legal questions (whether the record

⁹⁶ *Ibid*, at: 306.

⁹⁷ Rehnquist, J. *Furman v. Georgia* (1972), at: 465.

⁹⁸ Powell, J. *Furman v. Georgia* (1972), at: 418.

indicated that the discretionary system had produced arbitrary sentences, and whether McCleskey's sentence itself was arbitrary) had little direct connection to the state of public opinion on the morality of capital punishment, the Court's affinity for judicial restraint may have affected its interpretation of the legislative support for capital punishment. The Court may have viewed this political support as an indication that in 1987 capital punishment was still in line with contemporary societal values despite some risk of error in its application. As a result, the Court may have been willing to tolerate a greater level of risk that the statute would produce arbitrary sentences than it would have if similar statutes to Georgia's had not been widely in use at the time. In the last paragraph of the majority opinion, Justice Powell writes

Second, McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility — or indeed even the right — of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." ... Capital punishment is now the law in more than two thirds of our States.⁹⁹

Additionally, he indicates that even the non-moral questions addressed by the Court in *McCleskey*, such as the implications of the findings in the Baldus study, were better resolved by representative bodies of government at a local level and on a case by cases basis.

Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts," [*Gregg v. Georgia, supra, at 186*](#).¹⁰⁰

In sum, the focus on the countermajoritarian difficulty may help explain why the Court rejected the Eighth Amendment challenges brought in *McCleskey*.

Conception of Capital Cases as Devoid of Social Context

Another possible explanation for the Court's ruling in *McCleskey* involves the conceptions that several of the justices may have held about capital cases. The Court's opinions in *Furman*, *Gregg*, and *McCleskey* had

⁹⁹ *Ibid*, at: 319.

¹⁰⁰ *Ibid*, at: 319.

contained language indicating that most of the justices viewed capital cases as abstract functions of law in which actors including juries, prosecutors, and judges apply the law without the influence of biases based on race or social status. The prevalence of this view in all three cases may have influenced the Court's conclusions about the legal questions in *McCleskey* by leading the justices to focus on the risk of random imposition of the death penalty instead of a systematic pattern of discrimination disfavoring one group. In turn, this may have increased their willingness to view jury discretion in capital sentencing as a protection for defendants instead of an entry point for discrimination, and to reject the findings of the Baldus study that indicated the presence of a pattern of discrimination.

Evidence that the Court was focused on arbitrariness instead of discrimination in capital sentencing can be found in the opinions in *Furman*, *Gregg* and *McCleskey*. In *Furman*, the controlling opinions contained extensive references to randomness but little focus on discrimination. Of the three justices who voted to invalidate Georgia's statute in *Furman* because of its application, only Justice Douglas, who would leave the Court prior to the decision four years later in *Gregg*, indicated the belief that the risk of discrimination was the primary constitutional flaw in Georgia's capital punishment system. Though Justice Douglas' opinion concurred with Justices Stewart and White in the result that Georgia's statute was unconstitutional, his perceptions of the sentences imposed under Georgia's statute as well as the requirements of the Eighth Amendment were different from the ones used by the other justices. While the rest of the Court's opinions seem to indicate that the other justices perceived randomness in sentencing as the primary flaw, Justice Douglas's language revealed an alternative view. "...these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination..." Additionally, Justice Douglas indicated a conception of the Cruel and Unusual Punishments Clause not embraced by any other justice, writing

...discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments...Any law which is nondiscriminatory on

its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment.¹⁰¹

Neither of the other two controlling opinions took this view of sentences imposed under Georgia's statute, or of the constitutional standard behind the Eighth Amendment. Justices Stewart and White, who would author the majority and concurring opinions in *Gregg*, wrote extensively in *Furman* on the risk of arbitrariness or capriciousness. They described the imposition of death sentences under Georgia's statute as rare and random, not as discriminatory or biased. Recall the words of Justices Stewart and White, quoted earlier, who argued that "...the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed," and that "...[T]here is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."¹⁰² This argument, that there is no rational distinguishing feature of the few unfortunate defendants who receive death sentences, contradicts the view that discrimination based on race or social status affects capital sentencing because the concept of discrimination implies the selection of some individuals precisely because of an identifiable characteristic.

Justice Brennan, who voted in *Furman* to proscribe capital punishment under all circumstances, also used language indicating his perception that arbitrariness was a problem with Georgia's statute by stating "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."¹⁰³

Four years after *Furman*, the Court essentially used the same criteria of arbitrariness and capriciousness to evaluate Georgia's revised statute. In *Gregg*, the view of jury sentencing as random instead

¹⁰¹ Douglas, J. *Furman v. Georgia* (1972), at: 257.

¹⁰² Stewart, J. *Furman v. Georgia* (1972), at: 310; White, J. *Furman v. Georgia* (1972), at: 313.

¹⁰³ Brennan, J. *Furman v. Georgia* (1976), at: 293.

of biased was propounded by Justice Stewart, who mentioned nothing about discrimination in his analysis of the constitutional standard set in *Furman*.

Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.¹⁰⁴

He continued by arguing that the provisions of Georgia's new statute intended to guide jury discretion would meet the standard of *Furman* by reducing arbitrariness. In multiple mentions of the constitutional requirements established in *Furman*, both implicit and explicit, Justice Stewart references arbitrariness but not discrimination. Discussing the new sentencing standards of Georgia's statute, Justice Stewart makes an implicit reference to arbitrariness as the primary constitutional problem with the previous statute.

While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.¹⁰⁵

He continues with a more explicit reference to the previous case.

In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.¹⁰⁶

In *McCleskey*, the Court again revealed a concern for arbitrariness but not for discrimination. In the majority opinion Justice Powell explains that

Two principal decisions guide our resolution of *McCleskey*'s Eighth Amendment claim. In [Furman v. Georgia, 408 U. S. 238 \(1972\)](#), the Court concluded that the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive...

[In *Gregg*] we explained the fundamental principle of *Furman*, that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."¹⁰⁷

¹⁰⁴ Stewart, J. *Gregg v. Georgia* (1976), at: 189.

¹⁰⁵ Ibid, at: 195.

¹⁰⁶ Ibid, at: 195.

¹⁰⁷ Powell, J. *McCleskey v. Kemp* (1987), at: 302.

Together, the language of the opinions in *Furman*, *Gregg* and *McCleskey* indicate that the Court was not seriously concerned with discrimination in capital sentencing in any of these cases. As noted above, the Court's view of capital punishment's fatal legal flaw as the risk of arbitrariness and not discrimination may have made the justices see jury discretion as benign and to dismiss the evidence of a pattern of discrimination found in the Baldus study.

The majority opinion in *McCleskey* contains extensive discussion of the role of jury discretion in capital sentencing. Instead of expressing skepticism about the ability of juries to sentence defendants without the influence of personal prejudices, Justice Powell writes about juries as benevolent forces in criminal trials. He expresses a level of respect for their role that borders on reverence, noting

Our efforts [to eradicate racial prejudice] have been guided by our recognition that 'the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice,' *Ex parte Milligan*, 4 Wall. 2, 123 (1866). Thus, it is the jury that is a criminal defendant's fundamental "protection of life and liberty against race or color prejudice." *Strauder v. West Virginia*, 100 U. S. 303, 309 (1880).¹⁰⁸

Justice Powell also reject the view that juries may impose sentences according to their own biases based on race or social status. He writes

The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that "buil[d] discretion, equity, and flexibility into a legal system."¹⁰⁹

Powell's view of juries as benevolent forces in criminal trials, and his view of arbitrariness as the constitutional flaw of Georgia's pre-*Furman* statute, may have been factors behind his decision to reject the conclusion of the Baldus study that a pattern of discriminatory sentencing had emerged under Georgia's system. He writes, "At most, the Baldus study indicates a discrepancy that appears to correlate with race.

¹⁰⁸ Ibid, at: 309.

¹⁰⁹ Ibid, at: 311.

Apparent disparities in sentencing are an inevitable part of our criminal justice system.”¹¹⁰ He continues in the same paragraph, conclusively rejecting McCleskey’s claim based on the Baldus study

Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.¹¹¹

Realist Lens

To find explanations for the Court’s decision in *McCleskey* through a realist lens I use a similar method as that used to find explanations for *Gregg*. Analysis through a realist lens begins with the assumption that the Court chose between multiple acceptable legal outcomes when it decided the case, and that it chose between its options by considering factors outside of the legal arguments, such as its legitimacy, the stability of the political system, or the significance of a social problem. To analyze the Court’s decision in *McCleskey*, I will examine the possible outcomes the Court chose between and suggest ways that the contermajoritarian difficulty and the view of capital punishment as devoid of social context may have led it to the selected path.

When reviewing Georgia’s capital punishment statute in *McCleskey* for violations of the Cruel and Unusual Punishments Clause of the Eighth Amendment, the Court had many possible outcomes to choose from.

Though the set of potential outcomes includes many possible variations, I have identified three major courses the Court could have taken. It could have:

- (a) Upheld Georgia’s statute and rejected the Eighth Amendment arguments
- (b) Invalidated Georgia’s statute and permitted the state to add more protections

¹¹⁰ Ibid, at: 312.

¹¹¹ Ibid, at: 313.

(c) Invalidated Georgia's statute and precluded the state from revising it

In *McCleskey* the Court rejected options (b) and (c), instead choosing option (a) to uphold Georgia's revised statute and reject the Eighth Amendment challenges. To understand the Court's decision I examine why it may have rejected options (b) and (c), and why it may have seen option (a) as the most desirable.

Preoccupation with the Countermajoritarian Difficulty

One possible explanation for the Court's decision to choose option (a) was the concern held by many of the justices for the countermajoritarian difficulty. As noted above, the opinions in *Furman*, *Gregg* and *McCleskey* had expressed concern with the role of the Court and the need to defer to the representative branches of government. Assuming that the Court chooses between equally valid legal outcomes by looking at factors outside the legal arguments, as the realist lens posits, this concern for the countermajoritarian difficulty may have led the justices deciding *McCleskey* to prefer options that would require the least amount of interference with the representative branches of government. This preference alone may have been a strong factor in support of upholding Georgia's statute, but its influence was almost certainly boosted by the Court's perception of a "slippery slope" that might occur as the result of a decision to invalidate Georgia's statute. In the majority's view, invalidating Georgia's statute because of statistical disparities in sentencing based on race would have opened the door to challenges to many other aspects of the criminal justice system. Opening this door, they worried, would almost certainly lead to more invalidations of democratically enacted statutes.

Justice Powell, who wrote the majority opinion in *McCleskey*, had penned an opinion in *Furman* dissenting from the Court's decision to invalidate Georgia's statute and issuing a strong warning to the Court against neglecting its duty to defer to the legislative branches of government.

“Throughout our history, Justices of this Court have emphasized the gravity of decisions invalidating legislative judgments, admonishing the nine men who sit on this bench of the duty of self-restraint, especially when called upon to apply the expansive due process and cruel and unusual punishment rubrics.”¹¹²

Writing fifteen years later for the majority of the Court in *McCleskey*, Justice Powell expressed a similar sentiment. He mentioned the popularity of capital punishment laws across the nation. “Capital punishment is now the law in more than two-thirds of our States.”¹¹³ He also began the last paragraph of the majority opinion with a discussion of the need for deference to state legislatures.

Second, *McCleskey*’s arguments are best presented to the legislative bodies. It is not the responsibility — or indeed even the right — of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are “constituted to respond to the will and consequently the moral values of the people.”¹¹⁴

This desire to defer to the representative branches of government may have caused the justices to see option (c) as the least attractive path, followed by (b) and then (a). Choosing option (c), which would have involved permanently foreclosing the ability to employ capital punishment in Georgia, would have been the most “countermajoritarian” in nature. We may reasonably infer that the Court may have seen this option as the least compatible with the requirement that it defer to representative branches of government whenever possible because of its indefinite interference with the political solutions for crime available to the residents of Georgia. Additionally, this option would have created confusion about the constitutionality of capital punishment statutes across the nation. Selecting option (c) might have made other capital punishment statutes vulnerable to challenges based on studies similar to the one conducted in Georgia.

Option (b), invalidating Georgia’s statute and permitting revisions to rid arbitrariness and discrimination from the imposition of death sentences, may have been more palatable than (c) but still would have involved a countermajoritarian restriction of the statutory options available to the people of Georgia. Similar to option (c), it also would have obscured the constitutionality of state capital punishment

¹¹² Powell, J. *Furman v. Georgia* (1972), at: 418.

¹¹³ Powell, J. *McCleskey v. Kemp* (1987), at: 319.

¹¹⁴ *Ibid.*

statutes across the nation, potentially affecting the policy decisions of far more legislative bodies than just those of Georgia's state government.

Judging solely based on the amount of judicial interference that the differing options would require, we can reasonably infer that option (a) was the most desirable path in *McCleskey* to a Court bent on avoiding an “activist” decision that interfered with the political process.

Additionally, the justices' preoccupation with the countermajoritarian difficulty may have compelled the majority to reject McCleskey's claim because it saw a risk that accepting the challenge would invite other challenges and lead to a slippery slope. Justice Powell's opinion contains a candid expression of the impact that this perception may have had on his choice to reject McCleskey's challenge. The majority opinion indicated a concern that a decision to invalidate Georgia's statute based on findings that Georgia's discretionary statute led to racial disparities would open the door to further challenges to jury discretion, one of the staples of the American criminal justice system. “Two additional concerns inform our decision in this case. First, McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system.”¹¹⁵

Justice Powell continued by noting that a decision to invalidate Georgia's statute might lead to challenges to many other functions of the criminal justice system that have disparate impacts on differing racial groups. This might include sentencing for lesser crimes, or even routine police tactics. In turn, this might undermine the criminal justice system as a whole and require the Court to interfere with a plethora of democratically enacted criminal statutes.

Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.¹¹⁶

¹¹⁵ Ibid, at: 315.

¹¹⁶ Ibid, at: 315.

The opinion concludes by holding that racial disparities are an unfortunate but inevitable part of the capital punishment system and the criminal justice system as a whole. “The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.”¹¹⁷ The desire to defer to the states, as well as the potentially far-reaching judicial invalidations of state law that would follow from accepting the logic of McCleskey’s claim, may help explain why the Court rejected options (b) and (c) in favor of option (a).

Conception of Capital Cases as Devoid of Social Context

In addition to the concern for the countermajoritarian difficulty, the justices’ view of capital cases as neutral applications of law may also help explain why the Court rejected McCleskey’s challenge from a realist perspective. Should the justices have agreed with the claim made by John Boger, who represented Warren McCleskey in oral arguments before the Court, that “A black defendant convicted in the State of Georgia of the murder of a white person goes to his sentencing hearing with as serious a handicap against him on racial grounds alone as if the prosecutor had hard evidence that he had been tried and convicted previously of another murder,” they may have seen Georgia’s system as substantially, or even fatally, flawed.¹¹⁸ In turn, we can infer that this view would have led the justices to prefer options (b) or (c) which both involved striking down Georgia’s statute. The fact that none of the justices expressly accepted this view however, may help explain why the Court chose option (a).

As mentioned in the explanations offered above, we can find evidence that the justices did not see discrimination as a major problem for Georgia’s capital punishment system in the opinions in *Furman* and *Gregg*. Additionally, the opinions in *McCleskey* provide even more evidence that the Court never accepted

¹¹⁷ Ibid, at: 319.

¹¹⁸ Boger, John. Arguing before the Supreme Court in *McCleskey v. Kemp* (1987), argued October 15th, 1986. Accessed April 14th, 2014, at: http://www.oyez.org/cases/1980-1989/1986/1986_84_6811

this view of capital sentencing. Just as the justices in *Furman* and *Gregg* had discussed the risk of arbitrariness instead of the risk of discrimination in capital sentencing, the majority opinion in *McCleskey* makes no mention of discrimination as a serious problem for Georgia's system. Justice Powell explains that

Two principal decisions guide our resolution of McCleskey's Eighth Amendment claim. In *Furman v. Georgia*, 408 U. S. 238 (1972), the Court concluded that the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive...

[In *Gregg*] we explained the fundamental principle of *Furman*, that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."¹¹⁹

He continues by explicitly rejecting the claim brought by McCleskey that the Baldus study provides hard evidence that Georgia's capital punishment system is seriously flawed.

At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. The discrepancy indicated by the Baldus study is "a far cry from the major systemic defects identified in *Furman*,"¹²⁰

This view of Georgia's system as devoid of "major systemic defects" may help explain why the justices chose option (a) of upholding Georgia's statute and rejecting the evidence in the Baldus study. Should the justices have seen discrimination as a serious threat under Georgia's capital punishment statute, they may have been more inclined to choose options (b) or (c) that would have required efforts to ameliorate or eliminate the risk of discrimination. Because they did not see these flaws, the decision may have been impacted more by other considerations such as the desire to defer to the representative branches of government.

¹¹⁹ Powell, J. *McCleskey v. Kemp* (1987), at: 302.

¹²⁰ *Ibid*, at: 312.

VI CONCLUSION

In sum, I hope to have offered some explanations for the Court's decisions in *Gregg* and *McCleskey*. I hope to have explained why the Court rejected arguments that the administration of the death penalty was so arbitrary or discriminatory in Georgia that death sentences imposed there could be considered "cruel and unusual" in violation of the Eighth Amendment. I believe a close analysis of the written opinions reveals that a preoccupation with the countermajoritarian difficulty as well as a perception of capital cases as devoid of social context were concepts present in the minds of the justices, and that these concepts may have been factors that led the Court to uphold Georgia's statute in both cases.

My project has been limited in scope. I have sought to understand two Supreme Court decisions in a narrow area of constitutional law. Having offered some potential explanations for the Court's rulings in these cases, the next step is to determine what, if anything, this project may tell us about topics beyond the two cases discussed. Though research done in the social sciences may tend to need slightly less rigorous justification than that done in the humanities, those of us who choose to spend extended periods of time reading and writing about the Supreme Court are obligated to answer an inevitable (and typically sugar-coated) dinner party question: So what?

Though the "So what?" question that tends to follow explanations of Supreme Court decisions contains a multitude of potential sub-questions (Is our democracy regularly usurped by the elitist members of the Court? Can the Constitution remain a binding force on our society?), the limited scope of my projects restricts me to offering only the most cursory response to one potential sub-question about the topic: What can this research tell us about the future of challenges to capital punishment based on scientific evidence of arbitrariness and discrimination? With a very brief discussion of this question, I hope to squeeze just a drop of generalizable knowledge about law and society in the United States from this research.

Challenges to capital punishment based on evidence of arbitrariness and discrimination

The main inference I draw is that unless the justices become less concerned with the countermajoritarian difficulty and more aware of the prejudices that can impact capital cases, future Eighth Amendment challenges to capital punishment that are founded on statistical studies may be doomed to fail. In part, this may be because the preoccupation with the countermajoritarian difficulty seems to have led the Court in *McCleskey* to be concerned that overturning Georgia's statute based on the statistical evidence in the Baldus study would lead to a slippery slope of challenges to other parts of the capital punishment system. Should the justices remain as concerned with the countermajoritarian difficulty in the future, it is unlikely that they will stop perceiving this risk as a necessary consequence of accepting this type of challenge. Additionally, the justices' perception of capital cases as devoid of social context may help explain why the majority of justices pointedly refused to make inferences of discrimination in any individual case from statistical evidence of racial disparities in the overall system. Unless the justices begin to see the ways in which discrimination could potentially impact capital sentencing, they are unlikely to reverse the strong position taken by the Court in *McCleskey* and accept statistical evidence as proof of discrimination in individual cases.

As mentioned in the analysis of the realist component in *McCleskey*, the concern that the Court expressed about a slippery slope of challenges that might follow a decision to accept the type of evidence in the Baldus study may be a result of the justices' preoccupation with the countermajoritarian difficulty. Perhaps because such new challenges would require the Court to overturn many laws enacted by the representatives of the people, the majority opinion presented the risk of opening the door to further challenges in dramatic terms. Justice Powell used strong language to describe the danger, and presented it as an inevitable consequence of accepting *McCleskey*'s claim instead of just one of several possible outcomes.

Similarly, since *McCleskey*'s claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the

criminal justice system, such as defense attorneys or judges... As these examples illustrate, there is no limiting principle to the type of challenge brought by *McCleskey*.¹²¹

Despite the majority's embrace of the view that *McCleskey* was a Pandora's box that would undermine the entire criminal justice system, this was not the only perspective that could have been taken. It is not far-fetched to conceive of ways the Court could have distinguished between the use of statistical evidence in capital cases and in other types of criminal cases that would have avoided opening the door to unlimited challenges to other aspects of the criminal justice system. Justice Brennan discussed this possibility in his dissenting opinion, writing

The Court's projection of apocalyptic consequences for criminal sentencing is thus greatly exaggerated. The Court can indulge in such speculation only by ignoring its own jurisprudence demanding the highest scrutiny on issues of death and race... Despite its acceptance of the validity of Warren *McCleskey*'s evidence, the Court is willing to let his death sentence stand because it fears that we cannot successfully define a different standard for lesser punishments. This fear is baseless.¹²²

Jordan Steiker, in a book chapter about social science research and Supreme Court capital punishment jurisprudence, also acknowledges that the Court could have accepted *McCleskey*'s claim without inviting a bevy of following challenges. "Perhaps the Court could have held that the requirement of heightened reliability in the capital cases justified regulating outcomes in the capital context without mandating inferences in the non-capital process."¹²³ Instead of taking this view however, Steiker explains that the majority opinion seemed determined to prevent even the remotest possibility of inviting future challenges to many other democratically enacted laws, and that it may have been successful at doing so by closing the possibility of accepting this type of evidence in *McCleskey* or other future cases.

...the Court seemed determined generally to close the door to empirically based claims of racially discriminatory sentencing in the criminal justice system... To the extent the Court refuses to

¹²¹ Powell, J. *McCleskey v. Kemp* (1987), at: 317.

¹²² Brennan, J. *McCleskey v. Kemp* (1987), at: 342.

¹²³ Steiker, Jordan. "The Role of Constitutional Facts and Social Science Research in Capital Litigation: Is "Proof" of Arbitrariness or Inaccuracy Relevant to the Constitutional Regulation of the American Death Penalty." In "The Future of America's Death Penalty." Carolina Academic Press: Durham, NC. 2009, at: 34.

embrace outcome-based regulation, it obviously diminishes the significance of empirical research to its capital punishment jurisprudence.¹²⁴

Should future justices remain concerned with the countermajoritarian difficulty, a majority of the Court may continue see the possibility of inviting challenges to other parts of the criminal justice system as an extremely undesirable outcome, and may avoid accepting future challenges to capital punishment based on empirical research like the Baldus study.

Additionally, Court's perception of capital cases as devoid of social context may help explain why the justices refused to make inferences about any individual cases from the findings of racial disparities in the Baldus study. From a realist perspective, the justices' blindness to discrimination in capital sentencing may have made them less inclined to make inferences about discrimination in individual cases from the statistical evidence than they would have been had they seen discrimination as a prevalent factor in capital cases. Future justices may be unlikely to reverse the *McCleskey* opinion's strong refusal to make these inferences unless they begin to see capital cases in a robust social context and begin to imagine the ways in which prejudices and biases can infect capital sentencing.

Justice Powell's opinion for the majority in *McCleskey* gave only skeptical consideration to the petitioner's claim that the findings in the Baldus study provide evidence that discrimination impacted his case.

[McCleskey] offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study. McCleskey argues that the Baldus study compels an inference that his sentence rests on purposeful discrimination.¹²⁵

After considering the differences between McCleskey's challenge and other types of challenges based on statistical studies that the Court has accepted, such as in venire-selection and Title VII employment discrimination cases, Justice Powell pointedly refused to draw any conclusions from the statistical evidence

¹²⁴ Ibid.

¹²⁵ Powell, J. *McCleskey v. Kemp* (1987), at: 293.

in the Baldus study that would overturn McCleskey's sentence and potentially Georgia's statute as well. "Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose."¹²⁶ This assertive statement seems to greatly diminish the chances that the Court will be able to accept future challenges to capital punishment based on empirical evidence of racial disparities without taking a drastic turn away from *McCleskey*.

Jordan Steiker explains that the Court's decision to reject McCleskey's challenge set a strong precedent that will impede future challenges of the same sort. According to Steiker, statistical evidence may be able to shape public opinion, "But contemporary doctrine makes it exceedingly difficult for litigants to seek doctrinal shifts based on the empirical studies themselves, apart from their atmospheric value in shaping perceptions and public opinion about the fairness, accuracy, and utility of the underlying capital system."¹²⁷ Because the majority's strong refusal to make inferences based on the statistical study may be the result of its blindness to the possibility of racial discrimination in capital sentencing, and because the majority set strong legal precedent by explicitly rejecting the Baldus study, I suspect that unless the Court becomes much more aware of the social contexts in which capital cases may take place and unless it begins to see discrimination as a real threat in capital cases, it may be unlikely to accept these types of challenges in future cases.

Thus, when asked about the future of challenges to capital punishment based on empirical evidence of arbitrariness or discrimination, I would answer that it seems unlikely the justices will accept these challenges unless two important influences on their thinking change: their concern for the countermajoritarian difficulty, and their conception of capital cases as devoid of social context.

Before wrapping up, however, it may be useful to consider some of the developments that have taken place since *McCleskey*. One major development is the existence of new empirical evidence of flaws in

¹²⁶ Ibid, at: 297.

¹²⁷ Steiker, Jordan, at: 25.

capital sentencing schemes gathered by the Capital Jury Project (CJP) that began in 1991.¹²⁸ Jordan Steiker explains that CJP data have been gathered from over one thousand jurors who participated in capital cases and have been marshaled in state and federal courts to challenge different aspects of sentencing under the type of state capital punishment statutes validated in *Gregg* and affirmed in *McCleskey*. “By collecting data from numerous jurisdictions, the CJP is able to identify not only idiosyncratic defects in particular state statutes, but endemic flaws in jury decision-making, such as the propensity of jurors to decide punishment during the guilt-innocence phase of the trial (Bowers 1995)...”¹²⁹ Though studies finding flaws in capital sentencing that draw from the CJP data are usually accepted as scientifically valid by reviewing courts, state and federal judges have rejected the vast majority of challenges to capital punishment statutes based on these studies.

In part, this may be a result of the forces behind the decision in *McCleskey* and another case that dealt with statistical evidence of inaccuracy of expert testimony in capital sentencing, *Barefoot v. Estelle* (1983). Jordan Steiker attributes courts’ rejection of evidence from CJP data to the Supreme Court’s decisions in these two cases, writing “*Barefoot* and *McCleskey* thus explain why challenges to state capital sentencing schemes based on empirical evidence gathered by the Capital Jury Project have had little traction thus far in state or federal courts.”¹³⁰

The Supreme Court’s strong rejection of statistical evidence of discrimination in *McCleskey*, as well as other courts’ rejection of challenges based on CJP data in the years that have followed does not foreclose the possibility that future cases might undermine the capital sentencing system by presenting scientific evidence of arbitrariness or discrimination, but it seems to reduce the chances that such claims will succeed in the future. Because the opinions written in *Furman*, *Gregg* and *McCleskey* seem to indicate that concerns for the countermajoritarian difficulty and the vision of capital cases as devoid of social context were factors that

¹²⁹ *Ibid*, at: 35

¹³⁰ *Ibid*, at: 34

led the justices to uphold Georgia's statute in *McCleskey*, the Supreme Court may continue to uphold capital punishment statutes against charges of arbitrariness and discrimination unless these two components of its thinking change.