

Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism

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“From this day forward, I no longer shall tinker with the machinery of death.”—Justice Harry Blackmun¹

“[T]he fog of confusion that is our annually improvised Eighth Amendment, ‘death is different’ jurisprudence”—Justice Antonin Scalia²

In the “evolving standards” view of the Cruel and Unusual Punishments Clause of the Eighth Amendment,³ the limitations imposed by that provision are supposed to reflect a national consensus.⁴ When it comes to regulating the process by which murderers who are eligible for capital punishment are actually selected for it, the only consensus is that the Supreme Court has made a complete mess of it.

Those who believe that the Court should restrict capital punishment even more tightly, or ban it altogether, contend that the limitations imposed to date have failed to correct the problems the Court set out to correct.⁵ Those who believe that the Court has gone much too far into micromanagement of procedure, under a pretense of enforcing the Constitution, contend that the cure is worse than any actual disease.⁶

From the latter viewpoint, the fact that it is routine for unquestionably guilty murderers whose crimes are undeniably far worse than the median homicide to sit on death row decades after their sentencing⁷ represents a colossal failure of judicial activism. Shifting majorities have imposed rules, each of which seemed to be an improvement in policy to a majority or plurality of justices at the time, but none of which had any sound basis in the “text and tradition of the Constitution.”⁸ The combined weight of these “improvements” is what makes the system dysfunctional. Our system would be far better at delivering justice if the Court had merely set the

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¹ Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

² Morgan v. Illinois, 504 U.S. 719, 751 (1992) (Scalia, J., dissenting).

³ See Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

⁴ See, e.g., Roper v. Simmons, 543 U.S. 551, 564 (2005).

⁵ See Glossip v. Gross, 135 S. Ct. 2726, 2755–56 (2015) (Breyer, J., dissenting).

⁶ See *id.* at 2753 (Thomas, J., concurring).

⁷ See, e.g., Dan Morain, *Lawrence Bittaker, A Most Depraved Killer, Twists Justice System*, SACRAMENTO BEE (Aug. 20, 2016, 5:31 AM), <https://www.sacbee.com/opinion/opn-columns-blogs/dan-morain/article96800957.html>.

⁸ Callins v. Collins, 510 U.S. 1141, 1141 (1994) (Scalia, J., concurring).

macro rules for a valid system of capital punishment in *Gregg v. Georgia*⁹ and then left implementation of the systems within those broad boundaries to state courts and legislatures. It might even be better if the Court had gone ahead with a “limited coup d’état”¹⁰ and abolished capital punishment outright in *Furman v. Georgia*¹¹ or *Gregg* and been overruled by constitutional amendment, as happened in California and Massachusetts.¹²

I. DEFINING JUDICIAL ACTIVISM

First, it is necessary to define the term “judicial activism,” because that term has been given a number of different definitions. I define “judicial activism” as a decision that declares that a provision of the Constitution requires a particular rule, even though it was not understood to require that rule at the time it was adopted, in order to achieve a policy result that the judge deems desirable. Such a decision takes a policy choice that was assigned to the legislative power by the Constitution and reassigns it to the judicial power.

The clearest example of judicial activism in the criminal law is the exclusionary rule supposedly contained in the Fourth Amendment. The rule was unknown to the law at the time of the adoption of the Fourth Amendment and for a century thereafter.¹³ The rule’s most prominent defenders make their case on other grounds, not even attempting to defend it on the basis of original understanding.¹⁴

An example of a constitutional line of cases that does not come within this definition is the Confrontation Clause line of *Crawford v. Washington*.¹⁵ People committed to upholding the Constitution as it was adopted by the democratic process can disagree on how to apply the *Crawford* rule,¹⁶ but the basis of the rule is the original meaning of the Sixth Amendment.¹⁷

⁹ *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁰ See Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971).

¹¹ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹² See *People v. Anderson*, 493 P.2d 880 (Cal. 1972); CAL. CONST. art. I, § 27; District Attorney v. Watson, 411 N.E.2d 1274 (Mass. 1980); MASS. CONST. art. XXVI, pt. 1; see *infra* text accompanying note 102.

¹³ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 786 (1994).

¹⁴ See, e.g., 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.1 (5th ed. 2012); Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J. L. & PUB. POL’Y 119 (2003). One of the very few attempts to make an originalist case is Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZAGA L. REV. 1 (2010). For my refutation, see Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner, *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (No. 14-1373), <http://cjlff.org/program/briefs/StrieffE.pdf>.

¹⁵ *Crawford v. Washington*, 541 U.S. 36 (2004).

¹⁶ Compare *Davis v. Washington*, 547 U.S. 813, 822 (2006), with *id.* at 838 (Thomas, J., concurring in part and dissenting in part).

¹⁷ *Crawford*, 541 U.S. at 60.

This definition of judicial activism distinguishes legitimate from illegitimate judicial review based on the justification for judicial review laid out in *Marbury v. Madison*.¹⁸ Legitimate power comes from the people. The legislature's legitimate power is only that delegated to it by the people, subject to the boundaries the people put on it.¹⁹ An act that exceeds those limits is not law and can be disregarded by courts because, and only because, the superior law established by the people controls over the inferior law enacted by the legislature.²⁰ "The principles [established in the Constitution] are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be *permanent*."²¹ That is, the people have reserved the power to change the constitution to themselves through the amendment process. They have not delegated it to the legislative branch acting through ordinary legislation,²² and just as surely they have not delegated it to the courts.

A definition of judicial activism that includes legitimate as well as illegitimate judicial review would be simpler, but it would also be useless. Suzanna Sherry defines "judicial activism" as all judicial review of legislative and executive actions and then defends "judicial activism" as so defined.²³ Such an argument is a reverse straw man fallacy.²⁴ Instead of defending the judicial activism that its critics actually attack, Sherry sets up a straw man that no one is attacking and defends it.

Legitimate judicial review protects the people's right of democratic self-government from the legislature by enforcing constitutional limitations as they were understood at the time of adoption from subsequent legislation that exceeds those limits. Illegitimate judicial review violates the people's right of democratic self-government by changing the limits on the courts' own will to strike down legislation that is within the limits as they were intended. The latter is judicial activism.

II. PRELUDE TO FURMAN

The 1960s were a time of rapid social change in America, especially in the area of civil rights. This is the area where advocates of judicial activism cite its most important success. In 1954, in *Brown v. Board of Education*,²⁵ the Supreme Court declared "separate but equal" racially segregated schools to violate the Equal Protection Clause of the Fourteenth Amendment, and in a companion case from the

¹⁸ *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁹ *Id.* at 176.

²⁰ *Id.* at 178.

²¹ *Id.* at 176 (emphasis added).

²² *See id.* at 177.

²³ *See* Suzanna Sherry, *Why We Need More Judicial Activism* 4 (Vand. U. L. Sch., Working Paper No. 13-3, 2013), <http://ssrn.com/abstract=2213372>.

²⁴ *Cf.* RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS* 171 (3d ed. 1997) (straw man fallacy is misrepresenting the opponents' arguments and then attacking an argument they did not make).

²⁵ *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

District of Columbia they discovered an “equal protection component” in the Due Process Clause of the Fifth Amendment, applicable against the federal government.²⁶ There is no doubt that neither of these specific results were intended at the time of the respective amendment’s enactments.²⁷ It took another decade for Congress to finally break the filibuster and pass the sweeping Civil Rights Act of 1964. The Court had led the way, and the country eventually came around.

In the 1960s, opponents of the death penalty had reason to hope that the country would also move their way on that issue. Since 1936, Gallup has polled on the question “Are you in favor of the death penalty for a person convicted of murder?” That question is flawed as a measure of absolute support for capital punishment,²⁸ but it is useful for tracking relative changes over time simply because of its long history. The poll showed substantial majorities in favor until the mid-1950s but then a steady decline until a plurality was briefly opposed in 1966.²⁹

Why did public support decline so significantly? One likely reason is that in the growing consciousness of civil rights, many people were concerned about unequal application to black defendants. A second reason was that America had seen a long stretch of exceptionally low crime, an 18-year period that Barry Latzer called the “golden years.”³⁰ A graph of the spread between yes and no answers to Gallup’s standard death penalty question and a graph of violent crime rates are remarkably in sync in their ups and downs. See Figure 1.

²⁶ *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

²⁷ An originalist case could be made for the result as a remedial measure because in practice the separate schools were not equal, and the burden of suing district by district denied equality in practice. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 82 (1990). But that was not the rationale of *Brown*.

²⁸ See Kent Scheidegger, *Gallup: 2/3 Say DP Imposed About Right or Not Enough*, CRIME AND CONSEQUENCES (Oct. 25, 2016, 1:47 PM), <http://www.crimeandconsequences.com/crimblog/2016/10/gallup-23-say-dp-imposed-about.html>.

²⁹ *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/Death-Penalty.aspx> (last visited Mar. 12, 2019).

³⁰ BARRY LATZER, *THE RISE AND FALL OF VIOLENT CRIME IN AMERICA* 43–44 (2016).

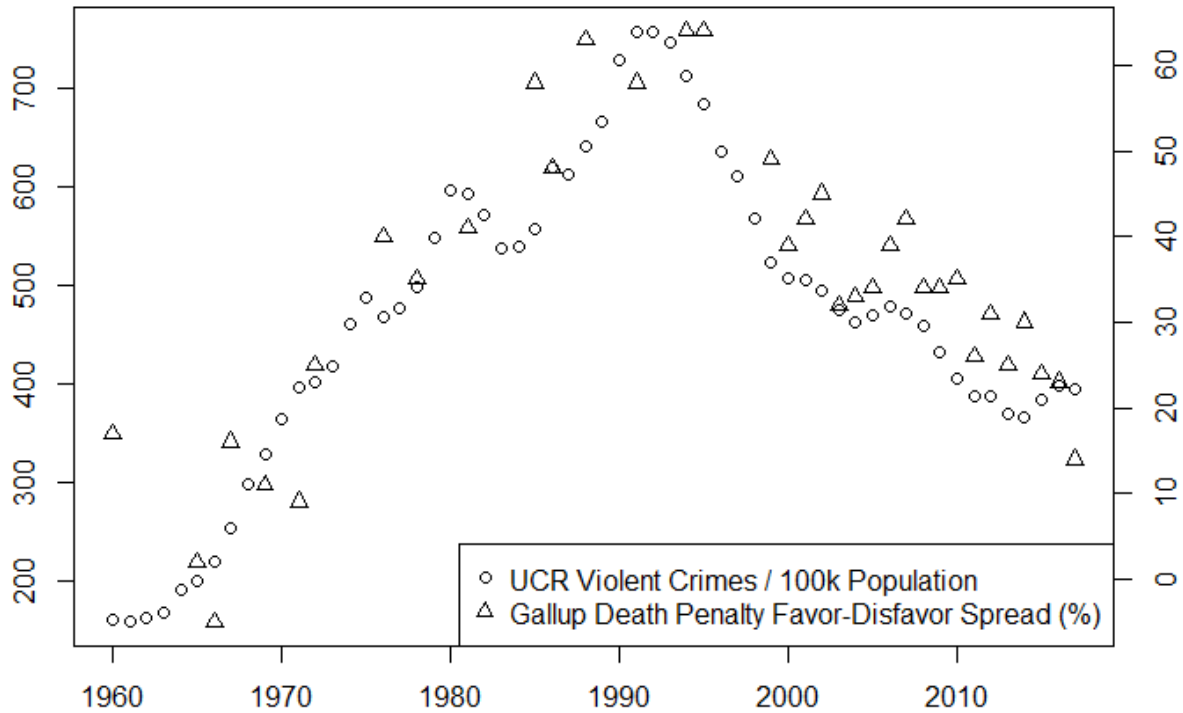


Figure 1. Violent Crime Rate v. Death Penalty Support

The Supreme Court did not take up a direct challenge to the constitutionality of the death penalty during the 1960s. However, it did deal the penalty a staggering blow in *Witherspoon v. Illinois*³¹ in 1968. The Court declared the very widespread practice of removing jurors opposed to the death penalty to be unconstitutional.³² The Court made the decision fully retroactive,³³ resulting in a large number of reversals. Some opponents believed that America had seen its last execution.³⁴ Support for the death penalty had reached a historic low, and a de facto moratorium was in place while states recovered from *Witherspoon* and waited to see what the Court would do next. The political will might not have been there to restore capital punishment.

³¹ *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

³² *Id.* at 522.

³³ *Id.* at 523 n.22.

³⁴ See MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 123 (1973).

It was not to be. Support grew as crime increased. In the next two years, the Supreme Court ducked opportunities to address broad assaults on capital punishment.³⁵ In 1971, the Court finally gave an answer, and it dealt the anti-death-penalty movement a setback that seemed to be as large as its victory in *Witherspoon* had seemed four years earlier, though again appearances would turn out to be deceiving.

In *McGautha v. California*,³⁶ the Court granted certiorari limited to the question of whether giving juries in capital cases discretion in the penalty determination without standards to guide them violated the Due Process Clause of the Fourteenth Amendment. The same day, the Court granted certiorari in *Crampton v. Ohio*.³⁷ On the standardless discretion question, Crampton asserted the Equal Protection Clause as well as the Due Process Clause.³⁸ In a separate question, he challenged Ohio's procedure of determining guilt and punishment in a single verdict, unlike California's bifurcated procedure.³⁹

The Supreme Court rejected both arguments by a 6-3 vote. The majority opinion and the concurrence were written by Justice Harlan and Justice Black, respectively, two major figures in the Court's history with very different approaches and styles. Justice Harlan's opinion for the Court laid out the early history of capital punishment, where death was the mandatory sentence subject only to executive clemency.⁴⁰ This was followed by a discussion of the evolution of unregulated mercy on the part of the jury,⁴¹ and a policy discussion of proposals by the American Law Institute and the National Commission on Reform of Federal Criminal Law for guiding the jury with lists of factors for them to follow.⁴² In a discussion that seems prescient in light of later developments, Justice Harlan noted that such lists would be of limited value. They could not be exclusive due to the infinite variety of circumstances, and if not exclusive they would be little more than suggestions.⁴³ The opinion was framed as a challenge under the Due Process Clause, making no mention of Crampton's Equal Protection challenge. Yet it concluded with language that implied a preclusion of recasting the same argument under a different provision of the Constitution. "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the

³⁵ *Maxwell v. Bishop*, 398 U.S. 262, 263-64 (1970); *Boykin v. Alabama*, 395 U.S. 238, 249 n.3 (1969) (Harlan, J., dissenting).

³⁶ *McGautha v. California*, 398 U.S. 936, 936 (1970).

³⁷ *Crampton v. Ohio*, 398 U.S. 936, 936 (1970).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *McGautha v. California*, 402 U.S. 183, 197-99 (1971).

⁴¹ *Id.* at 199-202.

⁴² *Id.* at 202-03.

⁴³ *Id.* at 207.

untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to *anything* in the Constitution.”⁴⁴

If the Due Process claim was expressly rejected and if the Equal Protection claim was rejected *sub silentio*, what was left? A year earlier, former Justice Goldberg and his former clerk Alan Dershowitz had published a law review article claiming that the Eighth Amendment precluded the death penalty.⁴⁵ Justice Black in his concurring opinion sought to shut the door to that challenge, and Justice Brennan in his dissent sought to keep it open.

Justice Black’s concurrence was characteristically pithy. He said he agreed with the majority’s result and most of its reasoning, but he rejected any implication that the Supreme Court had the authority to disapprove any procedure it thought was unfair without some grounding in a specific constitutional guarantee.⁴⁶ He reached out to reject the notion that the arguments rejected that day could be brought back in through the Eighth Amendment. In his view, it was enough to preclude that argument that the death penalty was in use at the time of ratification.⁴⁷ He concluded with a rejection of judicial activism as clear as anyone has ever stated it. “Although some people have urged that this Court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never believed that lifetime judges in our system have any such legislative power.”⁴⁸ Justice Brennan noted twice that the Eighth Amendment challenge was not before the Court.⁴⁹

Most observers believed that any broad judicial challenge to the death penalty was dead for the foreseeable future.⁵⁰ There was clearly not a majority on the Court willing to rule that capital punishment was unconstitutional *per se*. The standardless discretion argument had been rejected under the provision where it most naturally fit. The strongest argument was that this system led to racially discriminatory application, but that argument sounds in equal protection, which had been raised and rejected, even if not discussed. Justice Black argued that the Court should take up the Eighth Amendment argument, feeling confident it would be rejected. Justice Brennan opposed this move, with the same view of the likely outcome.⁵¹ Justice Black prevailed, and the Court granted certiorari in four capital cases, calling for briefing on the Eighth Amendment question.⁵²

⁴⁴ *Id.* (emphasis added).

⁴⁵ Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970).

⁴⁶ *McGautha*, 402 U.S. at 225 (Black, J., concurring in the judgment).

⁴⁷ *Id.* at 226.

⁴⁸ *Id.*

⁴⁹ *Id.* at 306, 310 n.74 (Brennan, J., dissenting).

⁵⁰ EVAN MANDERY, *WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 111–12 (2013).

⁵¹ William J. Brennan, *The 1986 Oliver Wendell Holmes, Jr. Lecture: Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 321–22 (1986).

⁵² *See Furman v. Georgia*, 403 U.S. 952 (1971).

It seems inconceivable that the cases could come out differently than *McGautha*. Justices Black and Harlan resigned from the Court early in the following term, but their successors would be appointed by President Nixon,⁵³ and they would surely be more conservative and less receptive to activist arguments, not more. Additional evidence of discriminatory application could be and would be presented, but it is far-fetched to imagine that such an argument could be accepted under the inapposite “cruel and unusual” limitation the year after it was rejected under the spot-on “equal protection.” Surely the Supreme Court could not be so unprincipled as to pound a square peg of an argument into a round constitutional hole the year after knocking it out of the square hole where it actually fit, could it?

III. THE REAL EIGHTH AMENDMENT

The words “cruel and unusual” are not self-explanatory. Understanding the original understanding requires a dive into history. At the time of *Furman*, the only substantial exploration of the original understanding was an article by Anthony Granucci.⁵⁴ The article was cited eight times in *Furman*.⁵⁵ More recently, Professor John Stinneford has examined the original meaning more extensively in a series of three articles.⁵⁶ This later scholarship sheds additional light on the original understanding, particularly the meaning of “unusual.”

The phrase “nor cruel and unusual punishments inflicted” was copied verbatim from the English Bill of Rights of 1689 to the Virginia Declaration of Rights in 1776 to the Eighth Amendment in 1791.⁵⁷ While the wording was unchanged, the understood meaning of “cruel” may have shifted between England and America. Granucci contends that in the English Bill of Rights, “cruel” punishments referred to unjustly harsh ones, but torturous punishments remained authorized for the most heinous crimes, particularly treason.⁵⁸ In America, he argues, the Framers misinterpreted the English law and believed that “cruel” referred to torturous punishments.⁵⁹ Stinneford, however, contends that “cruel” meant “unduly harsh” in early America as well as England.⁶⁰ This dispute need not be addressed here because

⁵³ MANDERY, *supra* note 50, at 125.

⁵⁴ See Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CAL. L. REV. 839, 839 (1969).

⁵⁵ See *Furman*, 408 U.S. at 242 n.2, 274, 275 n.17, 316 n.5, 318 n.13, 319 n.14, 376 n.2, 419 n.3.

⁵⁶ John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U.L. REV. 1739 (2008) [hereinafter Stinneford, *Unusual*]; John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531 (2014) [hereinafter Stinneford, *Desuetude*]; John F. Stinneford, *The Original Meaning of “Cruel,”* 105 GEO. L. J. 441 (2017) [hereinafter Stinneford, *Cruel*].

⁵⁷ Granucci, *supra* note 54, at 840.

⁵⁸ *Id.* at 855–56, 860.

⁵⁹ *Id.* at 860–65.

⁶⁰ Stinneford, *Cruel*, *supra* note 56, at 473.

the Supreme Court's regulation of capital sentencing procedure would not be justified under either interpretation.

Perhaps more significant, though less appreciated, is the meaning of "unusual." Stinneford argues that "[a]t the time the Bill of Rights was adopted, the term 'unusual' had at least two possible meanings: 'out of the ordinary' and 'contrary to long usage,'" the latter being a legal term of art in the seventeenth and eighteenth centuries.⁶¹ After a long review of the history, he concludes that the framers of the Bill of Rights used the term in the latter sense.⁶²

The English Bill of Rights provision was directed at the judiciary, not the legislature. As an ordinary Act of Parliament and not a superior form of law, the protections of the English act could be diluted by later legislation. The pertinent "whereas" clause of the English Bill of Rights referred to "illegal" punishments, while the operative section referred to "unusual" punishments.⁶³ No one at the time seems to have thought there was any significant difference. The problem was judges imposing punishments "utterly and directly contrary to the known laws and statutes and freedoms of this realm."⁶⁴

American bills of rights, state and federal, were intentionally different from the English model in one important respect. Restraining the legislative branch was a principal purpose. The grievances in the Declaration of Independence were not aimed solely at King George but also included protests against Acts of Parliament for, among other things, violating the traditional rights to trial by jury and trial in the locality of the crime.⁶⁵ While the Federal Convention was sitting, the North Carolina Supreme Court declared an act of the Legislature unconstitutional for violating the right to jury trial in that state's constitutional bill of rights.⁶⁶ In the *Federalist*, Madison described how experience in the states in the years since the Revolution demonstrated that the legislature was the most dangerous branch.⁶⁷ Jefferson endorsed the idea of amending the new Constitution to add a bill of rights, in part because it would empower the judiciary to protect rights against legislative encroachment.⁶⁸

The Anti-Federalist attacks on the proposed Constitution for lacking a bill of rights noted the absence of a "cruel and unusual punishments" provision, and these attacks are revealing glimpses at the original understanding. Granucci considers the ratification debates "sufficient contemporary comment to establish the interpretation

⁶¹ Stinneford, *Unusual*, *supra* note 56, at 1767.

⁶² *Id.* at 1825.

⁶³ *Id.* at 1760; Granucci, *supra* note 54, at 855.

⁶⁴ Granucci, *supra* note 54, at 855.

⁶⁵ See THE DECLARATION OF INDEPENDENCE para. 15–24 (U.S. 1776).

⁶⁶ *Bayard v. Singleton*, 1 N.C. 5, 5 (1787).

⁶⁷ THE FEDERALIST NO. 49 (James Madison).

⁶⁸ Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in NATIONAL ARCHIVES, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-12-02-0015>.

which the framers placed on the words ‘cruel and unusual.’”⁶⁹ In Massachusetts, Abraham Holmes recited a long list of traditional freedoms that Congress was not restrained from abridging. Among these is that Congress was “nowhere restrained from inventing the most cruel and unheard-of punishments.”⁷⁰ Holmes’s use of “unheard-of” is revealing. He was not concerned with Congress prescribing punishments that were traditionally used or commonly used at the time, even though they might be considered cruel. He was concerned with new inventions in punishment or adoption of punishments used in other countries but not in England or America. He raised the specter of the Spanish Inquisition.⁷¹

In Virginia, the fiery orator Patrick Henry made a similar argument.

In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone.⁷²

The English Bill of Rights had been directed at innovation by judges. The Anti-Federalists were more concerned about innovation by Congress. Prohibiting traditional punishments did not appear on anyone’s agenda.⁷³

Only one snippet of legislative history shows any concern regarding prohibition of traditional punishments, and that was to warn against it. The debate on the Bill of Rights in the House of Representatives was surprisingly brief. Only two members spoke on what became the Eighth Amendment. Congressman Smith of South

⁶⁹ Granucci, *supra* note 54, at 841; see also Stinneford, *Unusual*, *supra* note 56, at 1800–08 (discussing ratification debates with particular emphasis on Virginia).

⁷⁰ *Debates in the Convention of the Commonwealth of Massachusetts* (Jan. 9, 1788) in 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 111 (Jonathan Elliott ed., 2d ed. Philadelphia, 1891).

⁷¹ *Id.*

⁷² *Debates in the Convention of the Commonwealth of Virginia* (June 2, 1788) in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 447–48 (Jonathan Elliott ed., 2d ed. Philadelphia, 1891).

⁷³ See Stinneford, *Unusual*, *supra* note 56, at 1807 (argument was for adherence to “long usage” and against innovation).

Carolina objected that the wording was “too indefinite,”⁷⁴ a very valid concern if the words are only considered on their face without being limited by their original understanding. Congressman Livermore was somewhat more expansive.

No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not be restrained from making necessary laws by any declaration of that kind.⁷⁵

Most of the members evidently did not think much of this argument. No one bothered to respond. “The question was put on the clause, and it was agreed to by a considerable majority.”⁷⁶ It is not likely that the House agreed to let itself be restrained by judges from imposing traditional punishments. The obvious answer to Livingston’s argument is that the conjunctive “and unusual” requirement precludes judicial abolition of a traditional punishment which is still in common use.

The same Congress that proposed the Bill of Rights enacted a general criminal law for federal offenses and ordinary crimes in areas of exclusive federal jurisdiction. That law provided for whipping.⁷⁷ There does not appear to be any indication that anyone thought it would violate the Eighth Amendment upon ratification.

Justice Black believed that the fact that capital punishment was widely practiced at the time the Eighth Amendment was ratified was sufficient by itself to preclude a challenge to it under that provision.⁷⁸ If it were that simple, then whipping and perhaps even cutting off ears would be constitutional, and that is an argument against such simplistic reasoning. Originalism need not be that rigid or simplistic, however.

The Constitution gives Congress the power to create and support armies and navies,⁷⁹ but it says nothing about air forces. Armies and navies were the kinds of military forces known at the time, and interpreting those words to encompass the kinds of military forces known at this time is consistent with the people’s will in adopting the Constitution. We must always keep in mind that the purpose of fidelity to the original understanding is to preserve the people’s right of self-government by

⁷⁴ 1 ANNALS OF CONG. 782 (1789).

⁷⁵ *Id.* at 782–83.

⁷⁶ *Id.* at 783. Stinneford states that Livermore was out of the mainstream of thought of the founding era; *See* Stinneford, *Unusual*, *supra* note 56, at 1809.

⁷⁷ Crimes Act of Apr. 30, 1790, ch. 9, § 16, 1 Stat. 112, 116.

⁷⁸ *McGautha v. California*, 402 U.S. 183, 226 (1971) (Black, J., concurring).

⁷⁹ U.S. CONST. art. I, § 8, cl. 11–12.

maintaining the limits on legislative authority that the people put there and not inventing limits that the people never intended. As the world changes, the limits can be applied in a way that most closely fits the original understanding to the world as it presently exists.

Delegate Holmes captured the essence of what became the Eighth Amendment by referring to “cruel and unheard-of punishments.” Whipping was a common punishment in 1791, but it is “unheard-of” today. It is constitutionally “unusual” within the original understanding of the Eighth Amendment not because ivory-tower opinion deplors it, not because half the states have abolished it,⁸⁰ not because the Supreme Court in its independent judgment finds it has no legitimate penological purpose,⁸¹ but because it long ago vanished from our law and practice.⁸²

Chief Justice Earl Warren’s plurality opinion in *Trop v. Dulles*⁸³ is a favorite of opponents of the death penalty for its high-sounding but vacuous statement that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁸⁴ More pertinent but less often cited is Warren’s express rejection of the use of the Eighth Amendment for exactly the purpose that those who quote those words usually seek to support. “[T]he death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.”⁸⁵ The judiciary cannot legitimately deploy the Eighth Amendment to forbid a punishment that is supported by both history and current acceptance.

IV. FURMAN AND THE LEGISLATIVE RESPONSE

It would seem impossible that two members of the *McGautha* majority would turn 180 degrees just a year later on the pretense of construing a different provision of the Constitution, one much less suited to the discrimination problem than the Equal Protection Clause raised but ignored in *McGautha*. Yet that is exactly what happened.

In 1972, the Supreme Court had four Justices appointed by President Nixon and five who had been members of the Warren Court. That division proved to be more important than the political party of the appointing President that gets so much attention today. Of the five, Justice White tended to be the most favorable to the

⁸⁰ *But cf.* *Atkins v. Virginia*, 536 U.S. 304, 343 (2002) (Scalia, J., dissenting) (majority finding “consensus” from less than half of the states).

⁸¹ *But cf. id.* at 348–49 (Supreme Court declaring a punishment unconstitutional based on its independent judgment is an unconstitutional usurpation of power).

⁸² *See Stinneford, Desuetude*, *supra* note 56, at 589.

⁸³ *Trop v. Dulles*, 356 U.S. 86 (1957).

⁸⁴ *Id.* at 101.

⁸⁵ *Id.* at 99. Stinneford justifiably criticizes *Trop* and its “evolving standards” statement, among others, for erasing the word “unusual” out of the Eighth Amendment and setting the stage for much mischief to follow. Stinneford, *Unusual*, *supra* note 56, at 1749–51. It is curious that he does not mention the one passage in *Trop* that is fully consistent with his thesis.

prosecution generally, and, as his opinions would show in *Furman* and later cases, he was the most comfortable with capital punishment.

Justice White was the key, and given his commitment to civil rights,⁸⁶ the discrimination argument was the one most likely to win him over. Evan Mandery cites an unnamed source saying that Justice White turned ashen upon hearing the evidence of discrimination during oral argument.⁸⁷ He further claims that there was a secret agreement between Justice Stewart and Justice White. They would both write opinions that the present death penalty was unconstitutional but only because of infrequent use, not unconstitutional altogether.⁸⁸ Whether Mandery has a sufficient source for this claim is disputed,⁸⁹ but it is consistent with their opinions in *Furman* and *Gregg*.

The Stewart and White opinions deserve the closest attention because they are on the “narrowest grounds,” a method of analyzing Supreme Court cases with no majority that was announced by the lead opinion in *Gregg*⁹⁰ and shortly afterward endorsed in an opinion of the Court in *Marks v. United States*.⁹¹ They are a remarkable pair of opinions.

Justice Stewart began by denouncing the death penalty as “absolute renunciation of all that is embodied in our concept of humanity.”⁹² That is simply a personal opinion which can neither be supported nor refuted and with which a great many people disagree. He noted that mandatory death sentences were not before the Court,⁹³ probably expecting that no contemporary legislature would enact a mandatory death penalty except for very narrowly defined and rarely committed offenses.

Moving to the laws before the Court, his reasons are unrelated to anything that the Eighth Amendment was understood to prohibit at the time of its adoption. On the “unusual” prong, particularly, he notes that the punishment is infrequently imposed for murder.⁹⁴ But frequent mercy and infrequent application does not place a punishment outside the traditions and law of the country, which is what “unusual” means in the Eighth Amendment. The death penalty was still “widely applied” in

⁸⁶ See Frank Scaturro, *The Unjustly Forgotten Legacy of Byron White*, NATIONAL REVIEW (Mar. 30, 2017, 5:00 PM), <https://www.nationalreview.com/2017/03/byron-white-supreme-court-legacy-judicial-restraint-unjustly-forgotten/> (last visited Aug. 25, 2019).

⁸⁷ MANDERY, *supra* note 50, at 166.

⁸⁸ *Id.*

⁸⁹ David Oshinsky, *Stay of Execution*, N.Y. TIMES SUNDAY (Aug. 30, 2013), <https://www.nytimes.com/2013/09/01/books/review/a-wild-justice-by-evan-j-mandery.html> (last visited Aug. 25, 2019); Michael Meltsner, *Death Penalty and the Law*, N.Y. TIMES OPINION LETTER, (Nov. 12, 2015), <https://www.nytimes.com/2015/11/12/opinion/death-penalty-and-the-law.html> (last visited Aug. 25, 2019).

⁹⁰ *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976).

⁹¹ *Marks v. United States*, 430 U.S. 188, 192–93 (1977).

⁹² *Furman v. Georgia*, 408 U.S. 238, 306 (1972).

⁹³ *Id.* at 307.

⁹⁴ *Id.* at 309.

the sense that the *Trop* plurality used that term when there were hundreds of people on death row. It had not vanished like the pillory.

This is followed by a very revealing statement. “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”⁹⁵ An inanimate force of nature cannot be “cruel and unusual” in any way relevant to the meaning of that phrase in the Eighth Amendment. The imposition of punishments that are either within or outside the law and customs of a country is necessarily a human activity. Justice Stewart’s complaint of application that is either random or racially biased⁹⁶ resonates in equal protection.

Justice White cast the monumental deciding vote that temporarily abolished the death penalty in the United States. His opinion explaining his vote does not contain a single citation. He made a policy argument that the death penalty as it then existed, so rarely applied to the crimes for which it was authorized, did not serve a function in the criminal justice system. Why is it the Supreme Court and not the state legislatures that decides whether it serves a function? Why is the Court’s own evaluation of purpose the deciding factor rather than the history and current acceptance noted in *Trop*? “Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires.”⁹⁷ Indeed, but when the judiciary disagrees, it normally backs up its opinion with a discussion of the meaning of the constitutional provision. Such an explanation is all the more essential when the meaning is radically different from the historical understanding. This opinion is a good policy argument; it is devoid of proper constitutional law.

If racial discrimination was really behind the decision to throw out the unguided-discretion capital sentencing statutes, as it likely was,⁹⁸ the principled way to attack that problem would have been to say that the equal protection claim, although stated in Crampton’s question presented, was not really addressed in *McGautha*, and given new evidence the Court would need to reconsider it. If that course had been taken, the focus in subsequent cases might have stayed on whether state procedures were conducive to evenhandedness in application. Because *Furman* was allegedly based on a different provision of the Constitution, divorced from its original meaning, it was little but an empty jug for a succession of Justices to pour their policy preferences into.

The notion that *Furman* spelled the end for the death penalty in America⁹⁹ did not last long. To say that there was a wave of popular support would be an understatement. It was more like a tsunami.

The Gallup Poll’s standard question had only a 9-point margin for “favor” over “oppose” in March before the decision, but it jumped to a 25-point margin in

⁹⁵ *Id.*

⁹⁶ *Id.* at 309–10.

⁹⁷ *Id.* at 313.

⁹⁸ See *Graham v. Collins*, 506 U.S. 461, 479–84 (1993) (Thomas, J., concurring).

⁹⁹ See *MANDERY*, *supra* note 50, at 241–43.

November.¹⁰⁰ The California Supreme Court had struck down that state's death penalty under the state constitution four months before *Furman*,¹⁰¹ but the people of the state swiftly signed a petition to amend the state constitution and rebuke the state court, and the proposition won by a landslide.¹⁰²

By the time the issue returned to the Supreme Court, the legislatures of thirty-five states had enacted post-*Furman* death penalty statutes.¹⁰³ Congress enacted a post-*Furman* death penalty law for airplane hijacking,¹⁰⁴ which passed the Senate unanimously.¹⁰⁵ Any claim that capital punishment was inconsistent with the values of the American people had been refuted beyond question.

There was, however, one major problem. *Furman* had left legislatures with no clear roadmap on what kind of death penalty statute the Supreme Court would approve. There were five separate opinions, with individual rationales and no Justice expressly joining any others. Possibly, at least some of the Justices were so far out of touch with the sense of the nation that they genuinely believed that no major effort toward restoration would be forthcoming, so no roadmap would be needed. Finally, and perhaps most importantly, because *Furman* attached a new meaning to a constitutional provision with no historical basis for it, there was no history of earlier cases to fall back on.

The Framers believed that a supreme court was necessary to settle questions of federal law conclusively.¹⁰⁶ In terms of its institutional *raison d'être*, *Furman* was the single worst failure in the history of the Court.¹⁰⁷ The Court told the legislatures of the nation that their laws for punishing the worst crimes that state governments generally punish were unconstitutional, but it provided no clear answers on why they were or how to fix them.

The legislatures with the largest jurisdictions, the most resources, and presumably the highest degree of sophistication—Congress, California, and New York—all concluded that only mandatory sentencing would pass muster.¹⁰⁸ A

¹⁰⁰ *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/Death-Penalty.aspx> (last visited Mar. 12, 2019).

¹⁰¹ *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972).

¹⁰² See *People v. Frierson*, 599 P.2d 587, 612–13 (Cal. 1979); *Statewide Ballot Measure Database*, NATIONAL CONFERENCE OF STATE LEGISLATURES, www.ncsl.org/research/elections-and-campaigns/ballot-measures-database.aspx (Nov. 17, 2018) (Prop. 17 approved by 67.5%).

¹⁰³ See *Gregg v. Georgia*, 428 U.S. 153, 179–80 n.23 (1976).

¹⁰⁴ See *id.* at 180 n.24.

¹⁰⁵ An Act to amend the Federal Aviation Act of 1958 to implement the Convention for the Suppression of Unlawful Seizure of Aircraft; to provide a more effective program to prevent aircraft piracy; and for other purposes, S. 39, 93rd Congress (1973–1974), <https://www.congress.gov/bill/93rd-congress/senate-bill/39/actions>.

¹⁰⁶ See THE FEDERALIST NO. 22 (Alexander Hamilton).

¹⁰⁷ That is not to say it was the worst decision overall. Others are worse for the damage they caused.

¹⁰⁸ 49 U.S.C. § 1472 (Supp. IV 1970); CAL. PENAL CODE § 190.1 (Supp. 1976); N.Y. PENAL LAW § 60.06 (1975).

committee created by the National Association of Attorneys General reached the same conclusion, and about half the states passing reinstatement laws followed suit.¹⁰⁹ Texas enacted a unique statute that created a new degree of capital murder and then had the jury determine the sentence by its answers to “special issues.”¹¹⁰ Florida followed the Model Penal Code most closely, with a list of aggravating and mitigating circumstances.¹¹¹

Georgia made the smallest change from its pre-*Furman* statutes. The death-eligible class is narrowed by the finding of an aggravating circumstance, but once that is found the jury has nearly as much discretion as before.¹¹² Reading the opinions in *Furman*, one would think that this was a foolish choice and that Georgia’s was the statute most likely to be struck down. In fact, it would be one of the very few statutes from the interim period that survived the Supreme Court’s flip-flops largely intact, at least as applied to murder.

V. GUIDED DISCRETION

Five capital murder cases were heard together in the Supreme Court in its October 1975 Term. The statutes reviewed included two mandatory ones from North Carolina¹¹³ and Louisiana¹¹⁴ and the Texas, Florida, and Georgia statutes noted above. The Court consisted of eight of the nine Justices who had heard *Furman* plus Justice Stevens, who had succeeded Justice Douglas.

Justice Powell’s notes of the post-argument conference are now available. Justice Stewart had been turned around since *Furman* by the massive legislative response.¹¹⁵ “In light of what 35 states have done since 1972, [I] can no longer argue that [capital punishment] is incompatible with ‘evolving standards of decency.’”¹¹⁶ Justice Marshall’s astonishing response, in essence, is that it is not what the American people think about the death penalty that matters, but what they *would* think if they were not a bunch of ignoramuses.¹¹⁷ Absent from this assessment is any acknowledgment that people as well informed as Justice Marshall can have different views as to the facts and their interpretation.

¹⁰⁹ See *Rockwell v. Superior Court*, 556 P.2d 1101, 1117 (Cal. 1976) (Clark, J., concurring).

¹¹⁰ *Jurek v. Texas*, 428 U.S. 262, 268–69 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.). Citations to the five 1976 death penalty cases are to the joint opinions of these three Justices unless otherwise indicated. When necessary to refer to a specific opinion for clarity, they are cited below as simply “lead opinion.”

¹¹¹ See *Proffitt v. Florida*, 428 U.S. 242, 247–48 (1976).

¹¹² See *Zant v. Stephens*, 462 U.S. 862, 872 (1983).

¹¹³ *Woodson v. North Carolina*, 428 U.S. 280, 285–86 (1976).

¹¹⁴ *Roberts v. Louisiana*, 428 U.S. 325, 328–29 (1976).

¹¹⁵ *Gregg v. Georgia*, Box 33, Supreme Court Case Files, Lewis F. Powell Jr. Papers, Washington & Lee University School of Law, at 144 [hereinafter Powell Papers].

¹¹⁶ *Id.*; *Gregg v. Georgia*, 428 U.S. 153, 180–81 (lead opinion).

¹¹⁷ *Id.* at 232 (Marshall, J., dissenting).

Justice Powell was initially on the fence about the mandatory Louisiana and North Carolina statutes, but he ultimately cast the deciding vote to strike them down. So, ironically, the laws that conformed to what *Furman* seemed to require were invalidated, and the one that seemed most vulnerable was upheld. This flip-flop was further confirmation that the Supreme Court was not engaged in the *Marbury* process of upholding the people's constitution against legislatures exceeding their delegated authority, but rather making it up as they went along.

In *Woodson v. North Carolina*, the lead opinion reviewed the long history leading to the universal rejection of mandatory capital sentencing for broadly defined crimes before *Furman*.¹¹⁸ But what about *Furman* itself, deemed by most observers to require mandatory sentencing? That understanding was used by the challengers in these five cases to attack the statutes as unconstitutional because they were not mandatory or not really mandatory. The lead opinion gives us one of the most shockingly disingenuous statements in any Supreme Court opinion in history:

Perhaps the one important factor about evolving social values regarding capital punishment upon which the Members of the *Furman* Court agreed was the accuracy of *McGautha's* assessment of our Nation's rejection of mandatory death sentences. See *Furman v. Georgia*, 408 U. S., at 245-246 (Douglas, J., concurring); *id.*, at 297-298 (Brennan, J., concurring); *id.*, at 339 (Marshall, J., concurring); *id.*, at 402-403 (Burger, C. J., with whom Blackmun, Powell, and Rehnquist, JJ., joined, dissenting); *id.*, at 413 (Blackmun, J., dissenting).¹¹⁹

Conspicuously absent from this alleged agreement are the opinions of Justices Stewart and White, which the same three Justices claimed the same day were the controlling opinions in *Furman* because they were based on the narrowest grounds.¹²⁰ The Supreme Court as an institution and Justice Stewart in particular owed the Nation a profuse apology for misleading it into believing mandatory sentencing was required and then, four years later, flipping and declaring it forbidden. Instead, we got a shameless ducking of responsibility.

The *Woodson* lead opinion was quite correct on one undesirable result of mandatory sentencing. If imposed for a category of crimes which includes many offenses that do not warrant the sentence in the eyes of most people, it will lead to arbitrary results through jury nullification.¹²¹ Whether a person gets the mandatory sentence or not may depend on the extent to which the jurors are willing to disobey

¹¹⁸ *Woodson v. North Carolina*, 428 U.S. 280, 289-94 (1976).

¹¹⁹ *Id.* at 297.

¹²⁰ *Gregg*, 428 U.S. at 169 n.15.

¹²¹ *Woodson*, 428 U.S. at 302-03. The lead opinion was also correct in reserving judgment on mandatory penalties for much narrower categories, such as murder by a prisoner serving a life sentence. *Id.* at 287 n.7. Unfortunately, the Court would get that wrong later, after its focus had drifted away from equal treatment. See *Sumner v. Shuman*, 483 U.S. 66, 78-79 (1987).

their instructions, a result depending more on the choice of jurors than the justice of the case. That is arguably a constitutional defect, though again it should come under equal protection, not cruel and unusual punishment.

Not content with a rationale that made common sense, if not constitutional sense, the lead opinion added a section with the kind of high-sounding but ungrounded rhetoric that has been the plague of Eighth Amendment jurisprudence from *Furman* to the present. The lead opinion traced the development of individualized sentencing, considering both details of the offense and the background of the offender, singing its praises.¹²² The opinion acknowledged that in noncapital cases such sentencing “reflects simply enlightened policy rather than a constitutional mandate” yet for capital cases made it a constitutional mandate anyway.

How “enlightened” individualized sentencing is and how far the individualization process should be carried is very much a matter of opinion, and the prevailing opinion has gone back and forth throughout history. The primary problem with individualized sentencing is that the sentence a defendant receives may depend as much on which judge he draws as on his individual blameworthiness. The passage of Blackstone that is believed to have been so influential in the Founders’ view of the phrase “cruel and unusual punishment”¹²³ took the view that strict correspondence of punishment and crime for major offenses was “one of the glories of our English law,” protecting people against arbitrary judges.¹²⁴ In noncapital sentencing, boundless discretion had lost its allure by 1984, and Congress sought to create a middle ground with a detailed system of binding sentencing guidelines that took various factors into account and limited the judge to a range determined by those factors.¹²⁵ As with *Furman*’s rejection of boundless discretion in the capital context, the Sentencing Reform Act of 1984 was based in part on concerns that too much discretion resulted in discriminatory application.¹²⁶ Today, the philosophical pendulum has swung back in the other direction,¹²⁷ but no one can say for sure that its swinging has stopped. Declaring that the Constitution mandates a particular point on this very debatable spectrum, thereby freezing the law and precluding adjustment in the light of future experience, should require compelling evidence in the text, history, or both of the Constitution. Yet, there is none.

So the North Carolina law making death the mandatory punishment for all first-degree murders was struck down. A companion case examined a Louisiana law that required death for a narrower category and effectively invited nullification through

¹²² *Woodson*, 428 U.S. at 303–04.

¹²³ *See Granucci*, *supra* note 54, at 862–65.

¹²⁴ *Id.* at 863.

¹²⁵ *See United States v. Booker*, 543 U.S. 220, 233–34 (2005).

¹²⁶ *See id.* at 329 (Breyer, J., dissenting).

¹²⁷ *See, e.g.*, First Step Act of 2018, Pub. L. No. 115–391.

lesser-included offense instructions whether justified by the evidence or not; it was also struck down.¹²⁸

The lead opinion's approval of the Florida system in *Proffitt v. Florida* makes fascinating reading in light of later developments. On the advice of the state attorney general and contrary to the expert consensus as to what *Furman* required,¹²⁹ the legislature adopted the "guided discretion" approach. "Evidence *may* be presented on any matter the judge deems relevant to sentencing and *must* include matters relating to certain legislatively specified aggravating and mitigating circumstances."¹³⁰ The statute clearly did not require that the defendants be allowed to introduce anything they want. The statute was ambiguous as to whether the judge or jury was allowed to consider mitigating circumstances outside the statutory list. The lead opinion added the bracketed word "[statutory]" to its quote of the statute on the factors to be weighed,¹³¹ but it noted that the statute expressly limited aggravating factors to the statutory list and contained no similar express limit on the mitigating factors.¹³² Yet, the lead opinion did not find it necessary to resolve the ambiguity.

The clear implication is that a specified list of mitigating circumstances is not a constitutional issue. Rejecting a claim that the mitigation circumstances were not precise enough, the lead opinion held, "[t]he requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of *specific* factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition."¹³³ In the Texas case, the three Justices summarized their own holdings on the Georgia and Florida laws:

In *Gregg v. Georgia*, we today hold constitutionally valid a capital-sentencing system that directs the jury to consider any mitigating factors, and in *Proffitt v. Florida* we likewise hold constitutional a system that directs the judge and advisory jury to consider certain enumerated mitigating circumstances.¹³⁴

The important difference that the lead opinion saw between the Florida and Georgia statutes was not the lack of wide-open mitigation, but the fact that the judge and not the jury was the actual sentencer, both finding the requisite aggravating factors and determining the actual sentence.¹³⁵ The lead opinion saw this as "a feature, not a

¹²⁸ *Roberts v. Louisiana*, 428 U.S. 325, 326 (1976).

¹²⁹ *See Rockwell v. Superior Court*, 18 Cal. 3d 420, 447–48 (1976) (Clark, J., concurring).

¹³⁰ *Proffitt v. Florida*, 428 U.S. 242, 248 (emphasis added).

¹³¹ *Id.* at 250.

¹³² *Id.* at 250 n.8.

¹³³ *Id.* at 258 (emphasis added).

¹³⁴ *Jurek v. Texas*, 428 U.S. 262, 271–72 (1976).

¹³⁵ *Id.* at 251–52.

bug,” to use later computer terminology. Because consistency was the key, the judge’s greater experience was an improvement over jury sentencing.¹³⁶

The Texas statute was a closer call. Justice Stewart was initially uncertain about it,¹³⁷ but eventually he went along with Justices Powell and Stevens, who had voted to affirm from the start.¹³⁸ The Texas law was not designed as a guided discretion statute. It was not a law that any legislature would be likely to enact if left to its own devices. Like the other states, Texas had to guess what the Supreme Court would approve after *Furman* and was most concerned that too much discretion, rather than too little, was the danger. From *Furman* onward, the question “What will the Supreme Court approve?” has distorted legislative decision-making in capital sentencing, like a drug that produces birth defects.

After narrowing the eligible class to five situations in the guilt phase of the trial, the Texas law presented the jury with three questions. The first required a deliberate homicide, the second asked about the probability of future violence, and the third asked about provocation by the deceased.¹³⁹ The first does not involve mitigating circumstances, and the third rarely arises, so in most cases mitigation could only come in through the second. Based on *Woodson* and *Roberts*, the *Jurek* lead opinion said, “in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances.”¹⁴⁰

The lead opinion held that the Texas system met this requirement based on statements of the Texas Court of Criminal Appeals that the jury could consider a number of mitigating factors in answering the dangerousness question, and that the court itself would consider a variety of factors in judging the sufficiency of the evidence.¹⁴¹ These state court opinions did not say or imply that the jury need be instructed on anything other than the statutory questions. While a considerable amount of mitigating evidence could be shoehorned into the future dangerousness inquiry, it is obvious that not everything that might be considered mitigating could be made to fit. Yet the Texas law was upheld as complying with *Furman*.¹⁴²

Although the language in the last part of *Woodson*, standing alone, might be stretched to say that a catch-all mitigating factor was constitutionally required,

¹³⁶ *Id.* at 252. As to the finding of an aggravating circumstance making the case eligible for the death penalty, this holding was overruled in *Hurst v. Florida*, 136 S. Ct. 616 (2016). On the question of whether *Hurst* applies to the discretionary weighing as well, there is a split of authority which the U.S. Supreme Court has not yet resolved. Compare *Ex parte Bohannon*, 222 So. 3d 525, 532–33 (Ala. 2016) with *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) (on remand).

¹³⁷ Powell Papers, *supra* note 115, at 145.

¹³⁸ *Id.* at 147, 150.

¹³⁹ *Jurek*, 428 U.S. at 268–69.

¹⁴⁰ *Id.* at 271. But the legislature could specify the circumstances. See *id.* at 271–72; see *supra* note 134 and accompanying text.

¹⁴¹ *Id.* at 262.

¹⁴² *Id.* at 276.

Proffitt and *Jurek* preclude such an interpretation. As of 1976, the Constitution included no such requirement.

These five cases established a broad range within which states retained considerable freedom to shape their capital sentencing systems. Guided discretion was required, including a narrowing of the class of murderers that may be considered for capital punishment and a consideration of mitigating circumstances which might or might not be limited to a specified list. As a matter of sentencing policy, this is not bad. The Supreme Court might have stopped there. Having required the states to rewrite their statutes within this broad framework, the Court could have left further details and the application of those systems to particular cases to the state courts.

Gregg and its companion cases might have been a “successful” exercise in judicial activism if one defines success in practical results rather than constitutional legitimacy. Wrapping it up there would have left capital punishment in America post-1976 far better than it had been pre-1972. Discrimination on the basis of race of the defendant, the greatest concern underlying *Furman*, was in fact reduced to a low enough level that numerous post-*Gregg* studies could not detect any race-of-defendant bias.¹⁴³ But it was not to be. Shifting majorities of the Court could not resist tinkering with the machine.

VI. EVERYTHING INCLUDING THE KITCHEN SINK

The Supreme Court’s post-*Gregg* innovations in capital sentencing have fallen primarily into two categories: expansion of the requirement for considering mitigation and categorical exclusions from capital punishment. The categorical exclusions have caused less damage, by far, and some might even be plausibly constitutional on an equal protection theory. The first significant post-*Gregg* case was a categorical exclusion from capital punishment of crimes of rape but not murder of an adult victim,¹⁴⁴ which was the kind of case that had raised the greatest equal protection concerns in *Furman*.¹⁴⁵ The mitigation hyperinflation, on the other hand, was a disaster.

Two terms after *Gregg*, the Supreme Court considered its first post-*Furman* Ohio capital case, *Lockett v. Ohio*.¹⁴⁶ *Lockett* was a “*Furman*-hangover” case. The statute involved was enacted in the interim between *Furman* and *Gregg*. It was not drafted as a guided discretion statute because the consensus at the time was that the Supreme Court had forbidden discretion rather than required it. Before *Furman*, the Ohio House of Representatives had passed a criminal code revision including a death

¹⁴³ The studies are discussed in my previous article. See Kent Scheidegger, *Rebutting the Myths About Race and the Death Penalty*, 10 OHIO ST. J. CRIM. L. 147 (2012).

¹⁴⁴ *Coker v. Georgia*, 433 U.S. 584, 597 (1977). The question of capital punishment for rape of a child was not resolved for another 31 years. See *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008).

¹⁴⁵ See *Furman v. Georgia*, 408 U.S. 238, 251 (opinion of Douglas, J.).

¹⁴⁶ *Lockett v. Ohio*, 438 U.S. 586 (1978).

penalty provision along the lines of the Model Penal Code. It would have required consideration of a list of aggravating and mitigating circumstances, with a catch-all.¹⁴⁷ *Furman* came down while the Senate Judiciary Committee was considering the bill. Misled by that decision, “the Ohio Senate developed the current sentencing procedure which requires the imposition of the death penalty if one of seven specific aggravating circumstances and none of three specific mitigating circumstances is found to exist.”¹⁴⁸ The Court’s own irresponsible and extraconstitutional decision in *Furman*, not any deficiency in Ohio’s lawmaking process, was responsible for the discretionless statute that emerged.

As written, mitigating circumstances in Ohio’s law were not a mechanism for exercising discretion, but rather a second stage of narrowing of the eligible class. If one of the three mitigating factors was found, the defendant was excluded from the death penalty. If none of the three was found, the sentence was death, and the sentencer had no discretion to impose a lesser penalty. The three mitigating circumstances were narrow and relatively objective: (1) inducement by the victim; (2) duress, coercion, or strong provocation; or (3) mental deficiency or psychosis short of insanity.¹⁴⁹

After *Gregg*, the Ohio Supreme Court attempted to salvage the statute in *State v. Bayless*.¹⁵⁰ The state court compared the statute to the one upheld in *Proffitt* and noted that both provided for the consideration of mitigating circumstances, while acknowledging that the Florida list was considerably broader.¹⁵¹ Sensing that the narrowness of the list might be a problem, the state court promised “to allow the broadest consideration of mitigating circumstances consistent with their language.”¹⁵² That would prove to not be broad enough.

The Ohio statute was really more like the Texas statute in *Jurek* than the Florida statute in *Proffitt*. The Texas legislature allowed a jury to spare the defendant from the death penalty if the crime was not deliberate, the defendant would not be dangerous in the future, or the crime was provoked by the deceased. The Texas statute passed muster in *Jurek*, for the time being, because the Texas Court of Criminal Appeals decided to let a very broad array of mitigation to be considered under dangerousness. But Ohio’s more specific and objective mitigating circumstances were not subject to as broad an array of mitigation. The Ohio Legislature had done a better job of responding to what *Furman* required. For that reason, it was in trouble post-*Gregg*. In the Supreme Court’s death penalty jurisprudence of the 1970s and 1980s, no good deed went unpunished.

Under Ohio’s *Furman*-deformed statute, Sandra Lockett was sentenced to death for a crime and a role in it that very few people would have thought warranted

¹⁴⁷ *Id.* at 599–600 n.7.

¹⁴⁸ *Id.* at 600 n.7; *see also id.* at 611–12 (appendix to opinion with text of statute).

¹⁴⁹ *Id.* at 607 (quoting OHIO REV. CODE ANN. § 2929.04(B) (1975)).

¹⁵⁰ *State v. Bayless*, 48 Ohio St. 2d 73 (1976).

¹⁵¹ *Id.* at 86–87 n.2.

¹⁵² *Id.* at 86.

a death sentence. She had participated in planning a robbery of a pawnshop and waited in the car while it was being committed. The pawnbroker tried to grab the gun and was killed.¹⁵³ The accomplice liability and felony murder rules produced a murder conviction and, with no mitigating circumstance applicable, the judge had “no alternative, whether [he] like[d] the law or not’ but to impose the death penalty.”¹⁵⁴

This statute suffered from some of the same deficiencies as the mandatory statutes struck down in *Woodson* and *Roberts*. It was not a product of a legislature deciding on its own what circumstances should be considered mitigating but rather one misled by *Furman* to believe it had to remove discretionary weighing factors from the statute¹⁵⁵ and include only categorical exclusions. By preventing all consideration of factors that are almost universally considered strongly mitigating, minor accomplice status and lack of an intent to kill, the statute invited jury nullification and the consequent arbitrary application.¹⁵⁶ This would have been sufficient reason to require the Ohio legislature to do it over, with an apology for misleading it.

Instead, Chief Justice Warren Burger, of all people, created a new constitutional mandate, extended a decision he had dissented from, sowed confusion through contradiction of two other opinions only two years old without expressly overruling them, enabled a decades-long war of attrition against the death penalty, and did all this without a shred of justification in the real Eighth Amendment. His plurality opinion in *Lockett* was as astonishing as it was disastrous.

Joined by the *Gregg* troika, Chief Justice Burger announced “that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not 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.”¹⁵⁷ To justify this mandate, the plurality misrepresented what had been decided only two years earlier.

There was, indeed, language in *Woodson* saying that the “character and record of the individual offender” must be considered,¹⁵⁸ but that is a far cry from saying *everything* about his character and record must be considered. As for *Proffitt*, the plurality claimed, “[a]lthough the Florida statute approved in *Proffitt* contained a list of mitigating factors, six Members of this Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive.”¹⁵⁹ The six members referred to are in the lead opinion and Justice White’s concurrence.¹⁶⁰

¹⁵³ *Lockett*, 438 U.S. at 590.

¹⁵⁴ *Id.* at 593–94.

¹⁵⁵ *Id.* at 600 n.7.

¹⁵⁶ *See supra* text accompanying note 121.

¹⁵⁷ *Lockett*, 438 U.S. at 604 (plurality opinion) (footnotes omitted).

¹⁵⁸ *See id.* at 601 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

¹⁵⁹ *Id.* at 606.

¹⁶⁰ *See id.* at 606 n.15.

As detailed above,¹⁶¹ the troika never resolved definitively whether the Florida statute permitted consideration of nonstatutory mitigating circumstances or not. They noted the lack of an express exclusion at one point in *Proffitt* and referred to the statute as limited to statutory mitigators at another point. They described the Florida statute as limited to statutory mitigators in *Jurek*. Yet *Proffitt* proceeded to a decision without answering that question. The *Lockett* plurality, in essence, says that the *Gregg* cases collectively established a constitutional requirement of unlimited mitigation, and the Court signed off on Charles Proffitt's execution on the mere *assumption* that Florida's statute met that requirement. That is not plausible, and Justices White and Rehnquist challenged that misrepresentation.¹⁶²

Justice Blackmun favored a more limited rule. He did not agree with a sweeping requirement for all mitigating evidence, but he did agree that "a nontriggerman" must be allowed to introduce mitigating evidence of their role in the crime and *mens rea*.¹⁶³ Why did Chief Justice Burger not go along with this more measured approach? Most likely, he wished to avoid a long series of cases deciding which categories of mitigating evidence were or were not so essential as to make them constitutionally required.

After several pages of discussion that comes as close as the Court has ever gotten to an apology for its flip-flopping and inscrutability,¹⁶⁴ the plurality opinion says, "[t]he States now deserve the clearest guidance that the Court can provide; we have an obligation to reconcile previously differing views in order to provide that guidance."¹⁶⁵ This is said in an opinion that failed to command a majority and failed to reconcile the rule it announced with the inconsistent approval of the Florida and Texas system two years earlier. Few decisions in the history of the Supreme Court have failed in their intended purpose so completely.

The conflict between *Lockett* on one hand and *Proffitt* and *Jurek* on the other would cause confusion and reversals of judgments for many years afterward. Even worse, though, the "everything including the kitchen sink" constitutional rule for mitigation combined with the rules for litigating effective assistance of counsel would create an unlimited source of issues for creative lawyers to tie up individual capital cases in repetitive, expensive proceedings that could be dragged out for decades. No single decision of the Supreme Court has contributed as much to the dysfunction of the American system of capital punishment as *Lockett*. Ironically, if capital punishment is killed any time in the near future, it will not be because the

¹⁶¹ See *supra* text accompanying notes 129–39.

¹⁶² See *Lockett*, 438 U.S. at 623–24 (White, J., concurring and dissenting in part); *id.* at 629–30 (Rehnquist, J., concurring and dissenting in part). Justice White would have established a categorical exclusion for accomplices like *Lockett*, see *id.* at 626, which the Court largely did later in *Enmund v. Florida*, 458 U.S. 782 (1982).

¹⁶³ *Id.* at 615–16.

¹⁶⁴ See *id.* at 597–601 (plurality opinion).

¹⁶⁵ *Id.* at 602.

opponents convinced the American people of their moral view¹⁶⁶ but because the bungling of “conservative” Warren Burger facilitated throwing sand in the gears.

The subsequent, winding path of the *Lockett* line depends heavily on the individual views of the Justices and the changes in personnel of the Supreme Court. This should not be surprising for a doctrine that has no constitutional roots and springs from views regarding desirable policy.

VII. A DOG’S BREAKFAST

Ronald Reagan was elected President in 1980. Justice Stewart retired at the end of the October 1980 term, and President Reagan appointed Justice Sandra Day O’Connor, a state-court judge from Arizona, to succeed him. She was widely expected to be more “conservative” than Justice Stewart, and in some ways she was. She authored landmark opinions in criminal law federalism, limiting the second-guessing of state courts by the federal district and circuit courts. These included major habeas corpus precedents on retroactivity,¹⁶⁷ procedural default,¹⁶⁸ and the statute preventing relitigation in federal court of claims reasonably decided on the merits by the state courts.¹⁶⁹

However, Justice O’Connor was an early and enthusiastic proponent of an expansive interpretation of *Lockett v. Ohio*. She was not an originalist in the mode of President Reagan’s later nominees Antonin Scalia and Robert Bork. She never indicated any discomfort with the *Lockett* rule having been cut out of whole cloth.

In Justice O’Connor’s first term, the Court took up the case of *Eddings v. Oklahoma* to decide whether it was constitutional to impose the death penalty on a 16-year-old.¹⁷⁰ Instead, the Court decided that the case had to be remanded because, even though Oklahoma had an open-ended mitigation statute and the judge did give strong weight to Eddings’ youth, he stated he could not consider Eddings’ bad childhood and personality disorder, a claim never raised to the state courts.¹⁷¹

The death penalty litigation in the Supreme Court from *McGautha* to *Lockett* had been primarily about the constitutionality of state death penalty systems. In *Eddings*, the Court switched issues to decide a question on the application of the *Lockett* rule in a particular case from a state where the statute on its face unquestionably conformed to *Lockett*. This was an ominous step toward micromanagement, and it would not be the last. Chief Justice Burger was no doubt horrified that the decision he thought would wrap things up with “clear guidance” for the State had instead become a license to flyspeck state trial records for

¹⁶⁶ See Art Swift, *Most Americans Continue to Say Death Penalty Morally OK*, GALLUP (June 4, 2015), <https://news.gallup.com/poll/183503/americans-continue-say-death-penalty-morally.aspx>.

¹⁶⁷ *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion).

¹⁶⁸ *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (“This is a case about federalism.”).

¹⁶⁹ *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000).

¹⁷⁰ *Eddings v. Oklahoma*, 455 U.S. 104, 120 (1982) (Burger, C.J., dissenting).

¹⁷¹ See *id.* (Burger, C.J., dissenting); *id.* at 108–09 (majority opinion).

compliance with the Court's fabricated code of sentencing procedure. He read the same record and concluded that the state courts had not refused to consider Eddings' family background and personality disorder but instead had merely assigned them little to no weight, a decision well within their authority.¹⁷²

By 1987, the *Lockett / Eddings* rule was so firmly entrenched that in *Hitchcock v. Dugger*, the Supreme Court unanimously overturned a Florida death sentence for failure to consider non-statutory mitigating circumstances without even mentioning *Proffitt*.¹⁷³ The unanimous opinion was written by Justice Scalia, then the junior member of the Court, who had come from the D.C. Circuit with no capital case experience. The opinion matter-of-factly overturned the sentence of a man who molested his niece and murdered her to keep her quiet due to the trial judge and advisory jury's failure to consider weak mitigating evidence. Among other things, there was testimony that he "had been a fond and affectionate uncle to the children of one of his brothers,"¹⁷⁴ i.e., the nieces and nephews other than the one he molested and murdered. Justice Scalia would change his tune dramatically as the magnitude of the Court's prior activism and its consequences became clear to him.

In contrast to *Hitchcock* and Florida, the decision to apply *Lockett* to effectively revoke the Court's approval of the Texas system met fierce resistance two years later in *Penry v. Lynaugh*.¹⁷⁵ There were multiple issues. Justice O'Connor was the only one in the majority on all of them, and she wrote the opinion of the Court. Justice Scalia wrote the dissent for four Justices on the *Lockett v. Jurek* issue.

Penry holds that the Texas system of asking only three specific questions is unconstitutional as applied if, under the circumstances of the case, those questions do not provide a vehicle for expressing a "reasoned moral response" to the proffered mitigating evidence.¹⁷⁶ It was obvious at the time of *Jurek* that the ability to shoehorn mitigation into the questions was not unlimited, but the Court upheld the statute anyway. The dissent described at length the clear inconsistency between the majority's holding and *Jurek*.¹⁷⁷

More important, for present purposes, is the dissent's final paragraph, echoing Justice White's charge from *Lockett* that compelling expansive mitigation had completely abandoned the anti-arbitrariness basis of *Furman*. "The Court has come full circle, not only permitting but requiring what *Furman* once condemned."¹⁷⁸ It makes no sense from the standpoint of reducing arbitrariness to say that the state must control the jury's discretion to impose the death penalty but must give free rein to decline to impose it. If some murderers are arbitrarily granted a merciful sentence of less than they deserve and others are not, then the ones who are not are arbitrarily

¹⁷² See *id.* at 123–26.

¹⁷³ *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

¹⁷⁴ *Id.* at 397.

¹⁷⁵ *Penry v. Lynaugh*, 492 U.S. 302 (1989).

¹⁷⁶ See *id.* at 328.

¹⁷⁷ See *id.* at 352–56.

¹⁷⁸ *Id.* at 359–60.

sentenced to death. “The decision whether to impose the death penalty is a unitary one; unguided discretion not to impose is unguided discretion to impose as well.”¹⁷⁹ Restricting one side of the coin and not the other only makes sense if the goal is simply to minimize the number of death sentences imposed. Nothing in the Constitution authorizes the Supreme Court to override statutes for that purpose.

The supposed requirements of the Constitution changed between *Furman* and *Penry* because the focus of concern of a majority of the people charged with interpreting the Constitution changed. It was not because any aspect of the death penalty was any more “unusual” in a constitutional sense in 1989 than it was in 1972. In 1972, a slim majority was primarily concerned with unequal application. In 1989, a slim majority was primarily concerned with avoiding any person being sentenced to death when that was not the “appropriate” sentence,¹⁸⁰ even if that meant that many who deserved death escaped it arbitrarily and unequal application resulted. This change is partly the result of personnel changes on the Court and partly the result of Justices changing their minds. Justice Blackmun joined the majority in *Penry*, though it was contrary to all of his opinions from *Furman* to *Lockett*.

Texas amended its capital sentencing statute to conform to *Penry* in 1991.¹⁸¹ That was the end of the *Furman* hangover. No state had a statute more restrictive on mitigation than the legislature thought desirable because the legislators feared that too much discretion on the mitigating side risked having the statute struck down. However, the Supreme Court’s decisions on whether the sentencer had been provided enough latitude in particular cases remained confused.

In 1993, the Court decided *Graham v. Collins*,¹⁸² and Justice White wrote the opinion for the five-Justice majority consisting of the four *Penry* dissenters and Justice Thomas, who had succeeded Justice Marshall. Since *Penry* did not say it was overruling *Jurek*, it could not possibly mean that the defendant is constitutionally entitled to an additional instruction beyond the special issues merely because he has some mitigating evidence that has implications beyond those issues.¹⁸³ The Court reiterated that view later the same term in *Johnson v. Texas*,¹⁸⁴ a direct review case where the Court could address the issue without the limitations that apply in habeas corpus. Justice Kennedy wrote the opinion for the same five-Justice majority. In 2007, after further personnel changes and Justice “drift,” *Graham* and *Johnson* were out, and the expansive *Penry* view was back in.

It was almost 30 years after *Lockett* when the Court decided *Abdul-Kabir v. Quarterman*, and Chief Justice Roberts described the cases as “a dog’s breakfast of divided, conflicting, and ever-changing analyses.”¹⁸⁵ It was not just commentators

¹⁷⁹ *Id.* at 360.

¹⁸⁰ *See id.* at 319.

¹⁸¹ *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 238–39 n.2 (2007).

¹⁸² *Graham v. Collins*, 506 U.S. 461 (1993).

¹⁸³ *Id.* at 473–77.

¹⁸⁴ *Johnson v. Texas*, 509 U.S. 350 (1993).

¹⁸⁵ *Abdul-Kabir*, 550 U.S. at 267 (Roberts, C.J., dissenting).

who thought so. The Justices of the Supreme Court itself, “as they shifted from being in the majority, plurality, concurrence, or dissent from case to case, repeatedly lamenting the failure of their colleagues to follow a consistent path.”¹⁸⁶ Because the *Lockett* rule has no foundation in the real Constitution and there is enough contradiction in the precedents that support can be found for either side in any case, both sides can claim that they are following precedent and the other is violating it, and they can both be right and both be wrong.

VIII. THE WAGES OF RESULT-ORIENTATION

The Supreme Court’s inability to agree with itself from one year to the next on what the Eighth Amendment requires and what it forbids has had dire consequences. In 2000, there was much wailing and gnashing of teeth over a study that found there was “serious error” in 68% of capital cases between 1973 and 1995,¹⁸⁷ from which it was concluded that the process of trying capital cases was “broken” and unreliable. However, that study defined “serious error” as any case where the conviction or sentence was reversed,¹⁸⁸ making no attempt to identify how many cases were correctly tried under the law in effect at the time and reversed because the Supreme Court changed its mind. For example, the *Hitchcock* case discussed earlier,¹⁸⁹ went to trial when the ink was barely dry on the *Proffitt* decision upholding Florida’s law. The case was tried in accordance with that law and that decision, and the judgment was reversed eleven years later based on *Lockett*’s misrepresentation of *Proffitt*. This counts as “serious error” in the trial court in the Liebman study, but the real error was in the Supreme Court.

My own, more limited study of cases where relief was granted on federal habeas corpus found that there were no cases in the sample where the state courts had been clearly wrong at the time of their decisions or where the verdict was clearly wrong as a matter of basic justice. The high rates of reversal were due to the Supreme Court changing or modifying the rules later or the state and lower federal courts disagreeing on application of Supreme Court precedents within the range in which reasonable judges can differ.¹⁹⁰

The *Lockett* rule is not the only one that caused a large number of judgments to be reversed because the Supreme Court changed its mind and banned a practice it had previously endorsed. The first two categorical exclusions from the death penalty were ones where the constitutionality of the penalty was at least in doubt from the

¹⁸⁶ *Id.*

¹⁸⁷ JAMES LIEBMAN, JEFFREY FAGAN & VALERIE WEST, *BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995* (2000).

¹⁸⁸ *See id.* at 25.

¹⁸⁹ *See supra* text accompanying notes 173–174.

¹⁹⁰ *See*, Kent S. Scheidegger, *Rethinking Habeas Corpus*, reprinted in *HABEAS CORPUS ISSUES: HEARINGS BEFORE THE HOUSE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMMITTEE ON THE JUDICIARY*, 102D CONG., 212, 249–56 (1991).

start. These were rape cases where the victim survives¹⁹¹ and minor accomplices without intent to kill caught up in the felony murder rule.¹⁹² However, for murderers who were 16 or 17 years old at the time of the murder, the Court considered the question and expressly held that their youth could be considered as a mitigating circumstance and not a categorical exclusion, and then turned around and retroactively required exclusion.¹⁹³ The Court later did the same with mental retardation,¹⁹⁴ now called “intellectual disability.”

The Court also contradicted itself on the extent to which jury participation is required. In *Proffitt v. Florida*, the lead opinion praised Florida’s system of having the jury’s verdict be merely advisory as to both the aggravating circumstance making the final discretionary decision.¹⁹⁵ The Court considered and rejected a Sixth Amendment challenge in *Spaziano v. Florida*¹⁹⁶ and again in *Walton v. Arizona*.¹⁹⁷ Later, the Court overruled *Walton* in *Ring v. Arizona*,¹⁹⁸ and it overruled *Spaziano* in *Hurst v. Florida*.¹⁹⁹

Reversals have costs in time, money, justice, and possibly innocent lives. A reversed case goes back to the trial court where there is either a new trial or a bargain with a sentence of something less than the defendant would likely get if he went to trial.²⁰⁰ A new judgment starts the appeal and habeas corpus process over again, with all the delay and expense that entails. There can also be little doubt that to the

¹⁹¹ See *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (unconstitutional); *Gregg v. Georgia*, 428 U.S. 153, 187 n.35 (1976) (open question).

¹⁹² See *Enmund v. Florida*, 458 U.S. 782 (1982) (unconstitutional); *Lockett v. Ohio*, 438 U.S. 586, 609 (1978) (plurality opinion) (open question).

¹⁹³ *Stanford v. Kentucky*, 492 U.S. 361, 375 (1989) (mitigating factor); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (categorical exclusion).

¹⁹⁴ *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989) (mitigating factor); *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

¹⁹⁵ *Proffitt v. Florida*, 428 U.S. 242, 251–52 (1976).

¹⁹⁶ *Spaziano v. Florida*, 468 U.S. 447, 458–60 (1984).

¹⁹⁷ *Walton v. Arizona*, 497 U.S. 639, 647–48 (1990).

¹⁹⁸ *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

¹⁹⁹ *Hurst v. Florida*, 136 S.Ct. 616, 623 (2016).

²⁰⁰ Unless the sentence is less than the likely one, there is little incentive for a defendant to agree. That is why guilty pleas with life sentences are far less common in jurisdictions with no death penalty. See ANTHONY YEZER, *ECONOMICS OF CRIME AND ENFORCEMENT* 299–300 (2014).

extent the death penalty can deter future murders,²⁰¹ that deterrent effect is diminished by the long delays and frequent reversals.²⁰²

Reversals due to changes in the law could be a transient effect that would eventually go away if the Supreme Court would stop tinkering, though I would not venture to predict that it will.²⁰³ But the damage of *Lockett* is not limited to these kinds of reversals. By opening the penalty phase to everything that can be fit into the broad category of “the record and character of the offender,” *Lockett* has swollen both the trial and review process to unnatural proportions.

In the early cases, the jury already knew most of what it needed to know from the guilt phase, before the penalty trial began. In *Gregg v. Georgia*, for example, neither party introduced *any* additional evidence in the penalty phase, even though the state had a wide-open mitigation statute. Instead, the penalty phase consisted only of lengthy argument.²⁰⁴ Today, the defense demands, in addition to state-paid counsel, “mitigation specialists” to investigate the defendant’s entire life and mental health evaluations regardless of whether there is any reason to think the defendant has a mental illness.²⁰⁵ The claim is made that appeals in capital cases need to take longer because of the size of the records,²⁰⁶ but the difference in record length between capital and life-without-parole cases consists primarily of mitigation evidence that is irrelevant to guilt and often lacks any connection with the crime.

The permanent cost-and-delay effect of *Lockett* does not end with trial and direct appeal, though. These effects are manageable. The fact that *Lockett* opens up essentially unlimited scope in mitigating evidence means that the collateral review lawyers have essentially unlimited scope to attack the competence of the trial

²⁰¹ The deterrence debate is outside the scope of this article. Suffice it to say that there are numerous studies by researchers with sterling credentials showing a deterrent effect, and the authors of those studies have defended their methods and answered their critics. Dale O. Cloninger & Roberto Marchesini, *Reflections on a Critique*, 16 APPLIED ECON. LETTERS 1709 (2009); Hashem Dezhbakhsh & Paul H. Rubin, *From the “Econometrics of Capital Punishment” to the “Capital Punishment” of Econometrics: On the Use and Abuse of Sensitivity Analysis*, 43 APPLIED ECON. 3655 (2011); Paul R. Zimmerman, *Statistical Variability and the Deterrent Effect of the Death Penalty*, 11 AM. L. & ECON. REV. 370 (2009). Certainly there is no proof that the death penalty does not have a deterrent effect. The National Research Council assembled a committee comprised of multiple opponents, and no supporters, of the death penalty and its deterrent effects. See Transcript of Motions Hearing at 41–44, *United States v. Fell*, No. 5:01-cr-12 (D. Vt. July 20, 2016) (testimony of Paul Zimmerman). That committee concluded that the studies as a whole provided no useful evidence either way. NAT’L RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY 3 (Daniel S. Nagin & John V. Pepper eds., 2012), <http://nap.edu/13363>.

²⁰² See Lewis F. Powell, Jr., *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035, 1035, 1041–42 (1989).

²⁰³ I have been wrong on that before. See Kent Scheidegger, *Capital Punishment in 1987: The Puzzle Nears Completion*, 15 W. ST. U. L. REV. 95, 126 (1987).

²⁰⁴ *Gregg v. Georgia*, 428 U.S. 153, 160 (lead opinion).

²⁰⁵ See, e.g., *Moore v. Parker*, 425 F.3d 250, 262 (6th Cir. 2005) (Martin, J., dissenting).

²⁰⁶ See, e.g., TASK FORCE ON DEATH PENALTY HABEAS CORPUS, AM. BAR ASS’N, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 270 (1990).

lawyers. For example, in *Rompilla v. Beard*,²⁰⁷ the Supreme Court held that committed defense lawyers who worked diligently on the defendant's behalf²⁰⁸ were ineffective for not discovering background information with no demonstrable connection to the crime. They inquired of the people in the best position to know, the defendant himself and his family. Both indicated there was nothing unusual in his childhood.²⁰⁹ The lawyers thus had good reason not to expend further resources after receiving solid information that this line of inquiry was a dead end and to focus their efforts elsewhere. Even so, they were held ineffective because, if they had looked in a file that they should have examined for an entirely different purpose, they would have accidentally stumbled upon evidence that contradicted their client's own statements to them.²¹⁰

The *Rompilla* decision is wrong in many ways, as thoroughly explained in the dissent, but the entire problem is avoidable. Lawyers are accused of ineffective assistance for their failure to "scour the globe"²¹¹ only because the Supreme Court has forced the states to allow in mitigation every speck of evidence that globe-scouring might turn up.

In evidence law generally, courts have the discretion to exclude evidence on the ground that its "probative value is substantially outweighed" by the cost.²¹² In capital sentencing, state legislatures should have the authority to decide what categories of mitigating evidence have enough weight to be considered and which can be excluded as having too little value to bear their weight. Evidence with no demonstrable connection with the crime would be first on that list. Indeed, at one time the Fifth Circuit adopted a nexus test for evidence with enough weight to be considered on a *Penry* claim, until the Supreme Court declared in *Tennard v. Dretke* that the nexus requirement had no basis in its *Lockett / Penry* line of cases.²¹³ But as the *Tennard* dissent pointed out, the *Lockett / Penry* rule "has no basis in the Constitution."²¹⁴

The final continuing injury caused by *Lockett* is the one that Justice White denounced on the day of the decision.²¹⁵ This injury is the most difficult to detect, but that does not mean that does not matter. The *Lockett* rule weakens the reforms enacted after *Furman* to make capital sentencing more structured and more evenhanded. A guided discretion system would be more likely to produce evenhanded results if the designation of mitigating factors were made on a uniform,

²⁰⁷ *Rompilla v. Beard*, 545 U.S. 374 (2005).

²⁰⁸ *Id.* at 396, 398–99 (Kennedy, J., dissenting).

²⁰⁹ *Id.* at 381; *id.* at 398–99 (Kennedy, J., dissenting).

²¹⁰ *Id.* at 383–84; *id.* at 405 (Kennedy, J., dissenting).

²¹¹ *Id.* at 383. The majority denied it was authorizing an attack on that basis, but it was.

²¹² *See* FED. R. EVID. 403.

²¹³ *Tennard v. Dretke*, 542 U.S. 274, 284 (2004).

²¹⁴ *See id.* at 293 (Scalia, J., dissenting).

²¹⁵ *Lockett v. Ohio*, 438 U.S. 586, 623 (White, J., concurring in part and dissenting in part).

statewide basis, rather than letting each juror decide that question individually.²¹⁶ In an “anything goes” system, the skills of the lawyers presenting and opposing the case in mitigation and the idiosyncrasies and gullibility of the jurors chosen for a particular case can have significant impact on a process that is supposed to be about the culpability of the defendant. Perfect evenhandedness is not achievable, of course, and cannot be constitutionally required. But reducing it is a worthy goal, and the *Lockett* rule interferes with achieving it.

The *Lockett* rule served a useful function in purging our statutes of the *Furman* hangover. That is, legislatures had enacted statutes that were more restrictive on mitigation than they would have chosen under their own judgment on good policy because they quite reasonably believed that *Furman* would not allow broad mitigation. Since *Lockett*, death penalty statutes have been enacted or amended under the opposite mandate with opposite results. Legislatures provide for unlimited mitigation even when they would prefer to restrict it. No doubt many would like to restrict mitigation with no connection to the crime, as the Fifth Circuit did before being reversed²¹⁷ and as the Arizona Supreme Court did at one time.²¹⁸ Such policymaking is within the legislative power, and nothing in the Constitution removes it from the legislature.

IX. THE FAULT, DEAR SCOTUS . . .²¹⁹

In 1994, Justice Blackmun penned his well-known dissent from the denial of certiorari in the capital case of *Callins v. Collins*,²²⁰ containing the famous or notorious (depending on one’s viewpoint) statement at the beginning of this article. The central thesis of the dissent was that the principle and purpose of *Furman v. Georgia* could not be reconciled with the subsequent decisions in *Woodson*, *Lockett*, and *Eddings*,²²¹ all of which were incorrectly decided according to Justice Blackmun at the time.²²² The solution to that dilemma is obvious. If one line of cases that was wrongly decided in the first place conflicts with another line, just overrule it. Justice Scalia forcefully pointed that out.²²³

²¹⁶ See *McKoy v. North Carolina*, 494 U.S. 433, 442–43 (1990).

²¹⁷ See *supra* text accompanying notes 213–214.

²¹⁸ See *State v. Ross*, 886 P.2d 1354, 1364 (Ariz. 1994).

²¹⁹ “Men at some time are masters of their fates / The fault, dear Brutus, is not in our stars, / But in ourselves.” WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 1, sc. 2.

²²⁰ *Callins v. Collins*, 510 U.S. 1141 (1994).

²²¹ *Id.* at 1144, 1147–48 (Blackmun, J., dissenting).

²²² See *Woodson v. North Carolina*, 428 U.S. 280, 307–08 (1976) (Blackmun, J., dissenting); see also *Eddings v. Oklahoma*, 455 U.S. 104, 120 (1982) (Burger, C.J., dissenting) (joined by Justice Blackmun et al.); *Lockett v. Ohio*, 438 U.S. 586, 613 (1978) (Blackmun, J., concurring in the judgment (“a reason more limited”).

²²³ *Callins*, 510 U.S. at 1142 (Scalia, J., concurring).

To that argument, Justice Blackmun could only respond with generalities. It is one thing to say that individualized sentencing is required in order to be fair;²²⁴ it is another to say that it is constitutionally required.²²⁵ But even assuming that *Woodson* was correct in requiring individualized sentencing, it is a giant leap farther to say that consideration of absolutely everything in the defendant's background is constitutionally required. Justice Blackmun said that limiting the sentencer to a specific list of circumstances "is offensive to our sense of fundamental fairness and respect for the uniqueness of the individual."²²⁶ Whose sense is "our sense"? Not the American people's. The legislative response to *Furman* demonstrated conclusively that if the people had to choose between limiting discretion or abolishing the death penalty, they would choose limiting discretion. If "our sense" refers to the sense of people who happen to be sitting on the Supreme Court at any particular point in history, declaring that they can override the will of the people based on nothing more, Justice Blackmun's thesis is contrary to the far more important value of democratic self-government.

Going beyond arbitrariness in general to the specific problem of racial bias, Justice Blackmun relied solely on the Baldus study.²²⁷ After describing Baldus's findings and discussing the *McCleskey* opinion, Justice Blackmun made the jaw-dropping statement that "as far as I know, there has been no serious effort to impeach the Baldus study."²²⁸ Incredibly, a Justice of the United States Supreme Court who participated in a landmark case *did not read the district court opinion in the case*. There is no other explanation for Justice Blackmun's ignorance on this point. Not only did the State of Georgia make a "serious effort to impeach the Baldus study," the State *prevailed* at trial with a court finding that the study does not show what it purports to show. "The best models which Baldus was able to devise which account to any significant degree for the major non-racial variables, including strength of the evidence, produce no statistically significant evidence that race plays a part in either [the prosecutor's or the jury's] decisions in the State of Georgia."²²⁹ The entire point was built on a foundation of sand.²³⁰ No other Justice joined Justice Blackmun's dissent.²³¹

The next broad-based, single-justice attack on the death penalty was based on the length of time it takes from judgment to execution. Prosecutors and advocates for victims of crime have long decried the excessive time it takes to adjudicate

²²⁴ See *id.* at 1144 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

²²⁵ Cf. *McGautha v. California*, 402 U.S. 183, 226 (1971) (Black, J., concurring) (no deprivation of rights "explicitly or impliedly guaranteed by the . . . provisions of the Bill of Rights").

²²⁶ *Callins*, 510 U.S. at 1150 (Blackmun, J., dissenting).

²²⁷ *Id.* at 1153–54.

²²⁸ *Id.* at 1154.

²²⁹ *McCleskey v. Zant*, 580 F. Supp. 338, 368 (N.D. Ga. 1984) (emphasis omitted).

²³⁰ Later studies are discussed in my previous article, Kent Scheidegger, *Rebutting the Myths About Race and the Death Penalty*, 10 OHIO ST. J. CRIM. L. 147 (2012).

²³¹ See *Callins*, 510 U.S. at 1143.

capital cases through the multiple layers of review.²³² In *Lackey v. Texas*,²³³ Justice Stevens took the surprising position that a capital judgment might be subject to reversal simply because of the length of time it took to review. Four years later, Justice Breyer took up what is now known as “the *Lackey* claim” in *Knight v. Florida*.²³⁴ In lamenting the length of time the cases had taken, Justice Breyer completely failed to account for the Supreme Court’s own culpability in causing the delay.

The obvious answer to a *Lackey* claim, Justice Thomas noted, is that the defendant cannot “avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.”²³⁵ Justice Breyer’s response that is the State, not the defendant, is responsible for the portion of the delay “which resulted in large part from the States’ failure to apply constitutionally sufficient procedures at the time of initial sentencing.”²³⁶ However, the procedures used at Knight’s initial sentence were “constitutionally sufficient” at the time. Knight was tried in 1975 in accordance with the statute and procedures that the Supreme Court upheld as constitutional the next year in *Proffitt*. Only after the Supreme Court amended the Constitution in *Lockett* and then made clear in *Hitchcock v. Dugger* that this did indeed override what they said in *Proffitt*²³⁷ was Knight’s initial sentence overturned.²³⁸

The delay that Justice Breyer would blame on the State is actually the fault of the Supreme Court itself. Justice Thomas noted, correctly, “in most cases raising this novel claim, the delay in carrying out the prisoner’s execution stems from this Court’s Byzantine death penalty jurisprudence.”²³⁹ First on the list of Justice Thomas’s examples of Byzantine jurisprudence is the *Lockett / Penry* mess, as masterfully dissected in his 1993 concurrence in *Graham v. Collins*.²⁴⁰

At the time of *Knight*, Congress had already acted to reduce delay with the landmark Antiterrorism and Effective Death Penalty Act of 1996.²⁴¹ If properly implemented, this act would have drastically reduced litigation time in the federal

²³² See KENT S. SCHEIDEGGER, CRIMINAL JUSTICE LEGAL FOUND., OVERDUE PROCESS: A STUDY OF FEDERAL HABEAS CORPUS IN CAPITAL CASES AND A PROPOSAL FOR REFORM 1–2 (1995), <http://cjlif.org/publications/OverdueProcess.pdf>.

²³³ *Lackey v. Texas*, 514 U.S. 1045 (1995) (opinion respecting denial of certiorari).

²³⁴ *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting).

²³⁵ *Id.* at 990 (Thomas, J., concurring).

²³⁶ *Id.* at 998.

²³⁷ See *supra* text accompanying notes 173–174.

²³⁸ See *Knight v. Dugger*, 863 F.2d 705, 708 (11th Cir. 1988); *Hitchcock v. Dugger*, 481 U.S. 393, 395 (1987). The district court had denied habeas corpus relief before the Supreme Court decided *Hitchcock*. See *id.*

²³⁹ *Knight v. Florida*, 528 U.S. 990, 991 (1999) (citations omitted).

²⁴⁰ *Graham v. Collins*, 506 U.S. 461, 478–500 (1993) (Thomas, J., concurring).

²⁴¹ Pub. L. No. 104-132, 110 Stat. 1214 (1996); see *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (purpose to reduce delay).

courts on habeas corpus. Rather than relitigating *de novo* questions of law and mixed questions of law and fact already fully decided by the state courts, federal courts cannot grant relief if the state court decision is neither “contrary to” nor an “unreasonable application of, clearly established federal law, as determined by the Supreme Court.”²⁴² Faithfully applied, this would make most federal habeas corpus cases quick, as determining that a prior court’s decision is reasonable is far simpler than relitigating the case, and genuinely unreasonable decisions are rare. Most issues should be decided at the threshold from an examination of the state court record and decision. That is not how it is applied, however. A large part of the problem is “massive resistance” on the part of the lower federal courts who don’t want to give up their power.²⁴³ Another large part of the problem, though, is the amorphous nature of ineffective assistance of counsel claims in the penalty phase when combined with the *Lockett* rule.

The bottom line is that much, and perhaps most, of what is genuinely wrong with the death penalty in America today is the fault of the federal courts and particularly the Supreme Court. The final question is what can and should the Supreme Court do about it.

X. A MODEST PROPOSAL.

Not every precedent that was wrongly decided should be overruled. Chief Justice Rehnquist wrote the opinion²⁴⁴ declining to overrule *Miranda v. Arizona*, though there is little doubt that he believed the case to have been wrongly decided as an initial matter.²⁴⁵ Among the considerations in deciding to overrule a precedent are whether it has become unworkable, “the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.”²⁴⁶ A final factor is whether Congress can change the rule, making the Court more reluctant to overrule statutory interpretation precedents.²⁴⁷

The *Lockett* rule seems simple enough on its face, and it is readily applied at trial. The trial judge need only allow the defense to introduce anything and everything that can be fitted into the spacious categories of the defendant’s character and record and then instruct the jury to consider it all but make their own judgment as to how much, if any, weight to give it. The unworkability of the rule comes at

²⁴² 28 U.S.C. § 2254(d)(1) (2018).

²⁴³ Kent Scheidegger, *Time and Again*, CRIME AND CONSEQUENCES (Oct. 6, 2014 8:37 AM), <http://www.crimeandconsequences.com/crimblog/2014/10/time-and-again.html>.

²⁴⁴ See *Dickerson v. United States*, 530 U.S. 428, 438 (2000).

²⁴⁵ See Eugene R. Milhizer, *Miranda’s Near Death Experience: Reflections on the Occasion of the Miranda’s Fiftieth Anniversary*, 66 CATH. U. L. REV. 577, 593–94 (2017).

²⁴⁶ *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009).

²⁴⁷ Cf. *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (“considerations of stare decisis weigh heavily in the area of statutory construction where Congress is free to change this Court’s interpretation of its legislation”).

the review stage, where the amorphous nature of the *Lockett* rule creates unlimited scope to attack trial counsel's performance. The infinite supply of hindsight critiques makes it easier to overturn well-deserved death sentences for those who are of a mind to overturn them.²⁴⁸ Where the judgment is upheld, large amounts of money and time are spent litigating evidence of dubious probative value.

The reliance interest is zero. It is highly unlikely that anyone decides to commit murder in reliance on the *Lockett* rule saving his neck, and if he did such reliance is not one society should recognize or accommodate.

At 40, the *Lockett* rule is old but not antique.²⁴⁹ As to strength of reasoning, few Supreme Court precedents have weaker reasoning.

I propose that *Lockett* be replaced by a more workable rule. Allowing the jury to consider all the facts of crime is manageable. The evidence is before them anyway from the guilt phase of the trial, and they would likely consider it whether instructed to or not. For evidence unconnected to the crime, the Florida statute in *Proffitt*, copied from the Model Penal Code, listed only two: lack of a significant criminal record and youth.²⁵⁰ Both of these are objective and easily determined.

For everything else, restore to the people the ability to decide through the democratic process which mitigating circumstances have enough probative value to be worth the burden of litigating them and then litigating whether defense counsel presented them well enough. The real Constitution does not transfer this decision from the people to the judiciary, and it is high time to give back to the people the authority that is rightfully theirs.

²⁴⁸ Cf. *Avery v. Georgia*, 345 U.S. 559, 562 (1953).

²⁴⁹ Cf. *Montejo*, 556 U.S. at 793 ("only two decades old").

²⁵⁰ *Proffitt v. Florida*, 428 U.S. 242, 249 n.4 (1976).