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LEGITIMATING DEATH

Louis D. Bilionis*

INTRODUCTION: RECALLING FURMAN

On June 29, 1992, few people were aware that the day marked the twentieth anniversary of Furman v. Georgia.¹ Being an Eighth Amendment enthusiast, I thought it an appropriate occasion to reflect.

Time may alter Furman's legal legacy, but it will never rob the decision of its decisive immediate impact. After all, it is not often that a single sweep of the judicial pen spares hundreds of lives, as Furman did when it declared the prevailing system of capital punishment unconstitutional and cleared the nation's death rows. Nor should the passage of time lead us to underestimate the magnitude of the constitutional project the Court undertook in Furman. Prior to Furman, the 1971 decision in McGautha v. California² had dampened any hopes that the Supreme Court would unfurl the federal constitutional banner and lead the charge for reform, despite the abolitionist litigation campaign of the 1960s which exposed the illegitimate state of the death penalty. Yet McGautha, as it turned out, merely set the stage for one of constitutional law's sweeter ironies. Just fourteen months later, the Burger Court — hardly known for its belief in the validity of constitutional adjudication as an agent of social change — reversed course to embark upon the single most expansive constitutional criminal procedure program in the Court's history. Working from a virtually clean slate, the Furman Court unleashed the Eighth Amendment's Cruel and Unusual Punishments Clause, fashioning the beginnings of a rich normative vision that has initiated and sustained a nationwide reform of the system of capital punishment.³

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¹. 408 U.S. 238 (1972). As fate would have it, the day's significance in constitutional history was secured shortly after 10:00 a.m., when the Court handed down the anxiously awaited decision in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

². 402 U.S. 183 (1971) (holding that Due Process Clause does not prohibit giving jury unbridled discretion to sentence a murderer to death).


Stressing Furman's pathbreaking significance implies no slight of the Warren Court's selec-
And what reform activity Furman has wrought. Institutions of all stripes have taken a new interest in capital punishment and substantially changed its administration and practice. Change, I hasten to add, is by no means necessarily synonymous with cure. Many observers fear that the post-Furman reforms amount to a kind of cruel makeup job — dabs of legal formalism and streaks of moral rhetoric that paint a happy legitimate face on the still ugly visage. The Court did nothing to assuage fears concerning the inadequacy of these reforms in McCleskey v. Kemp when it dismissed statistical evidence of racial discrimination in capital punishment as legally insufficient, no matter how empirically sound, to impugn the practice's constitutionality. All the same, if the death penalty is to be a working feature of our criminal justice system — and for the foreseeable future, it surely

tive incorporation cases. But, unlike the Burger Court's Furman, the Warren Court's most renowned accomplishments in the criminal field built upon principles that had long been identified in the Court's jurisprudence, heightening (but not initiating) federal constitutional regulation of the field. Before Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (announcing per se right to appointed counsel), there was Betts v. Brady, 316 U.S. 455, 471-73 (1942) (granting right to appointed counsel on case-by-case basis), overruled by Gideon. 372 U.S. at 345. Before Miranda v. Arizona, 384 U.S. 436, 467-79 (1966) (establishing bright-line rules to guard against coerced confessions), there was Brown v. Mississippi, 297 U.S. 278, 285-87 (1936) (relying upon case-by-case scrutiny to guard against coerced confessions). Even before Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that fruits of unreasonable searches or seizures must be excluded at state trial), there was Rochin v. California, 342 U.S. 165, 172-73 (1952) (forbidding use of evidence at state trial that was seized in a manner that shocked the conscience), and Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (identifying "[t]he security of one's privacy against arbitrary intrusion by the police" as implicit in the concept of ordered liberty and thus enforceable against the states through the Due Process Clause, but leaving question of remedy for a violation of the right — and, therefore, the exclusionary rule — to the states), overruled in part by Mapp, 367 U.S. at 653. See generally Herbert L. Packer, The Courts, the Police, and the Rest of Us, 51 J. CRIM. L., CRIMINOLOGY & POLICE Sci. 238, 239-40 (1966) (discussing how Court's regulation of state criminal process typically grows incrementally).

4. Given the American lawyer's preoccupation with case law, focus usually turns to the large body of constitutional death penalty jurisprudence spawned by Furman and its two most immediate progeny, Gregg v. Georgia, 428 U.S. 153 (1976), and Woodson v. North Carolina, 428 U.S. 280 (1976). For a full appreciation of Furman's impact, however, one must venture far from the pages of the United States Reports. The regulation of capital punishment today actively involves a diverse array of public and private actors — among them, state lawmakers and judges, state and federal administrative agencies, the prosecutorial and criminal defense communities, the organized bar, public interest groups, and the Congress.

5. See, e.g., SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 9-10 (1989) (questioning the Court's "fiction" that procedural safeguards work to legitimate capital punishment); FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 87-91 (1986) (arguing that efforts to regularize capital punishment have failed and were doomed to fail); Vivian Berger, "Black Box Decisions" on Life or Death — If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham, 41 CASE W. RES. L. REV. 1067, 1069 (1991) ("[A]rbitrariness . . . will dog the administration of death."); Robert Weisberg, Deregulating Death, 1983 SUP. CT. REV. 305, 354 ("It is as if the constitutional strictures on the death penalty are merely a matter of legal aesthetics.").


will be — society must acknowledge a responsibility to tend to its fairness, its equity, and its morality. That was, after all, the point that condemned inmates pressed in McGautha and Furman, and by that measure alone Furman must be credited as a success.

Reflecting on Furman in the light of recent developments, however, can make one wonder whether a requiem, and not a testimonial, is in order. Much that the Supreme Court says and does these days seems less than sympathetic to what many believe to be the gospel according to Furman and its 1976 sequels — that a death sentence’s legitimacy depends upon strict compliance with stringent procedural safeguards designed to ensure that the constitutionally vexing risks of arbitrariness, capriciousness, discrimination, unfairness, factual error, legal error, and moral error do not materialize. The Court’s campaign to bring the writ of habeas corpus within newly constrictive bounds — culminating in its refusal, in Herrera v. Collins, to provide a condemned inmate a federal hearing to present newly discovered evidence of his actual innocence — surely marks the sharpest and most amply chronicled break with post-Furman ideas about what it takes to le-


9. I use the word “campaign” advisedly, for there are important divisions of opinion among the Justices on the habeas question. Chief Justice Rehnquist and Justices Scalia and Thomas appear to have embraced an “administrative” vision of habeas that employs the writ not to remedy constitutional violations, but rather to keep state courts within the bounds of good faith. See Wright v. West, 112 S. Ct. 2482, 2486-91 (1992) (opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia, J.); see also James S. Liebman, More Than “Slightly Retro”: The Rehnquist Court’s Rout of Habeas Corpus Jurisdiction in Teague v. Lane, 18 N.Y.U. Rev. L. & Soc. Change 537, 543 & n.26 (1990-1991) (noting that Court’s recent decisions suggest that federal habeas review of state court decisions may be analogized to judicial review of administrative agencies). Justices O’Connor and Kennedy have expressed discomfort with that vision and seem unprepared to abandon the traditionally adjudicative role of the habeas court. See 112 S. Ct. at 2493-98 (O’Connor, J., concurring in judgment); 112 S. Ct. at 2498-2500 (Kennedy, J., concurring in judgment); Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1721-27 (1992) (O’Connor, J., dissenting, joined by Blackmun, Stevens, and Kennedy, JJ.); 112 S. Ct. at 1727-28 (Kennedy, J., dissenting).


gitimate a death sentence. Federal habeas traditionally has provided
death cases with the searching scrutiny for procedural rectitude that
they demand, and the anticipation of such thoroughly probing fed­
eral review has enabled the Court to profess faith in the efficacy of its
proceduralist tack toward the regulation of capital punishment. As
Justice Blackmun rightly noted, "[t]he more the Court constrains the
federal courts' power to reach the constitutional claims of those sen­
tenced to death, the more the Court undermines the very legitimacy of
capital punishment itself." 13

But there are other apparent departures from Furman-style notions of legitimacy. The Court's unprecedented display of impatience
with Robert Harris' challenge to California's gas chamber on the eve
of his execution comes to mind, 14 as does another recent first for the
Court — the explicit overturning of Eighth Amendment precedent
favorable to the capitaly accused in the victim-impact case of Payne v.
Tennessee. 15 A more generalized assault on Furman-era precedent,
Justice Scalia's attack on the cornerstones of Woodson v. North Caro-

CRIMINOLOGY 9 (1990); Robin West, The Supreme Court 1989 Term — Foreword: Taking Free­
dom Seriously, 104 HARV. L. REV. 43 (1990); Ann Woolhandler, Demodeling Habeas, 45 STAN.

12. James Liebman reports:

Counting only published decisions, the federal courts found constitutional error in 40%
of the 361 capital judgments of conviction and sentence that those courts finally reviewed in
habeas corpus proceedings between mid-1976 and mid-1991. The constitutional error rate is
46% (of 408 cases) when discoverable unpublished decisions also are counted.
Liebman, supra note 9, at 541 n.15.

13. Sawyer v. Whitley, 112 S. Ct. 2514, 2530 (1992) (Blackmun, J., concurring in judgment);
see Diane Wells, Federal Habeas Corpus and the Death Penalty: A Need for a Return to the
Principles of Furman, 80 J. CRIM. L. & CRIMINOLOGY 427 (1989) (arguing that cutbacks in
federal habeas are inconsistent with principles underlying Furman).

14. Vasquez v. Harris, 112 S. Ct. 1713, 1714 (1992) (ordering that "[n]o further stays of
Robert Alton Harris' execution shall be entered by the federal courts except upon order of this
Court."); Gomez v. United States Dist. Court, 112 S. Ct. 1652, 1653 (1992) (per curiam) ("There
is no good reason for this abusive delay, which has been compounded by last-minute attempts to
manipulate the judicial process."). The Harris litigation has provoked interesting critical com­
mentary. See Steven G. Calabresi & Gary Lawson, Equity and Hierarchy: Reflections on the
Harris Execution, 102 YALE L.J. 255 (1992); Evan Caminker & Erwin Chemerinsky, The Law­
less Execution of Robert Alton Harris, 102 YALE L.J. 225 (1992); Stephen Reinhardt, The
Supreme Court, the Death Penalty, and the Harris Case, 102 YALE L.J. 205 (1992); Symposium,

part, Booth v. Maryland, 482 U.S. 496 (1987), each of which forbade the use of victim-impact
evidence in capital sentencing). The Court was doggedly determined to undo Booth and Gathers
during its 1990 Term. The coup de grace surely would have come earlier, in Ohio v. Huertas, had
it not been for a checkered record that caused the Court to dismiss the writ of certiorari in that
after, the Court granted certiorari in Payne and requested the parties to address whether Booth
Vivian Berger, Payne and Suffering — A Personal Reflection and a Victim-Centered Critique, 20
FLA. ST. U. L. REV. 21, 37-44 (1992) (discussing the petitions for writs of certiorari in Huertas
and Payne).
and Lockett v. Ohio, is underway and, although unsuccessful thus far, has managed to generate some heat. This is not to mention the increasing number of cases in which the Court has turned aside a capitalively accused's claim for constitutional protection.

Nor will the work of scholars and commentators inspire confidence in the vitality of Eighth Amendment law under Furman. Critics have been giving the Court's death penalty jurisprudence a bad name for years, chastising it as the chaotic product of unreasoned, result-ori-

18. Justice Scalia detailed his challenge to Woodson and Lockett in Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in judgment) ("I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted."). See also Richmond v. Lewis, 113 S. Ct. 528, 538 (1992) (Scalia, J., dissenting) (following his dissent in Walton); Espinosa v. Florida, 112 S. Ct. 2926, 2929 (1992) (Scalia, J., dissenting); Sochor v. Florida, 112 S. Ct. 2114, 2130 (1992) (Scalia, J., concurring in part and dissenting in part).


19. E.g., Graham v. Collins, 113 S. Ct. 892 (1993) (rejecting claim that Texas sentencing scheme, as applied, precluded consideration of mitigating evidence in violation of the Eighth Amendment; Penry v. Lynaugh, 492 U.S. 302 (1989), narrowly interpreted); Lockhart v. Fretwell, 113 S. Ct. 892 (1993) (holding no ineffective assistance of counsel where attorney for death row inmate failed to raise claim which would have been meritorious under law prevailing at the time but which now lacks merit); Schad v. Arizona, 111 S. Ct. 2491 (1991) (rejecting claim that jury should be instructed on all possible lesser-included offenses to capital murder that are supported by the evidence); Mu'Min v. Virginia, 111 S. Ct. 1899 (1991) (rejecting claim that capital defendant should enjoy broader voir dire of prospective jurors in light of pretrial publicity); Lewis v. Jeffers, 497 U.S. 764 (1990) (affirming lenient standard for review of constitutional adequacy of aggravating circumstances); Walton v. Arizona, 497 U.S. 639 (1990) (affirming placement upon the defendant of the burden to establish mitigating circumstances sufficient to call for a life sentence); Whitmore v. Arkansas, 495 U.S. 149 (1990) (declining to hold that third party has standing to assert that Constitution forbids another capitalively sentenced individual from waiving appellate review); Clemons v. Mississippi, 494 U.S. 738 (1990) (affirming propriety of appellate reweighing of aggravating and mitigating circumstances as means of curing trial-level error relating to capital sentencing); Saffle v. Parks, 494 U.S. 484 (1990) (holding that Constitution as construed to date does not dictate that sentencer must be free to base its decision on the sympathy it feels for the defendant after hearing mitigating evidence); Boyde v. California, 494 U.S. 370 (1990) (upholding sentencing scheme that requires imposition of death sentence where mitigating circumstances are outweighed by aggravating circumstances); Blstone v. Pennsylvania, 494 U.S. 299 (1990) (upholding scheme that mandates imposition of death sentence where aggravating circumstance but no mitigating circumstance exists); Stanford v. Kentucky, 492 U.S. 361 (1989) (refusing to hold death penalty per se unconstitutional for the juvenile offender); Peny v. Lynaugh, 492 U.S. 302 (1989) (refusing to hold death penalty per se unconstitutional for the mentally retarded offender); Murray v. Giarratano, 492 U.S. 1 (1989) (refusing to hold that death row inmates enjoy constitutional right to counsel to pursue collateral relief).
Gent clashes between ideologically polarized Justices. Dozens of articles each year take the Court to task for the wide array of outrages and blunders ostensibly committed during the preceding Term. Innovative proposals to steer the law in new directions — anywhere other than where it seems to be headed — abound, with few, if any, kind words to be said for the path the Court has taken. To judge from the reviews, the Justices are at best making a serious mess of the Eighth Amendment and, at worst, submitting the jurisprudence that Furman begot to the proverbial death by a thousand cuts.

Can it be? Possibly so. But the evidence supports an alternative verdict as 20. See, e.g., Berger, supra note 5, at 1082 (suggesting the jurisprudence “has collapsed in substance, if not in form, not only because of its subsurface flaws but also because of the present Court’s commitment to regulating capital sentencing solely in superficial ways”); Robert A. Burt, Disorder in the Court: The Death Penalty and the Constitution, 85 Mich. L. Rev. 1741, 1781 (1987) (suggesting Court’s jurisprudence “reveals an implicitly anarchic element marked by repeated fractionation”); Weisberg, supra note 5, at 306 (suggesting that Court’s cases “reveal the art of legal doctrine-making in a state of nervous breakdown”).


well — provided you take the Court on at least some of its own terms, appreciate the challenges it faces, and appraise its efforts without undue passion or prejudice. This article attempts just that, and it arrives at the surprising conclusion that a meaningful Eighth Amendment death penalty jurisprudence lives on, that it is a quite intelligible jurisprudence, and that it is driven by a coherent methodology with firm roots in the traditions of constitutional adjudication.

To reach that conclusion, it is helpful first to have some sense of what the Supreme Court has been doing in the death penalty area lately. Part I thus presents a topical review of the Court's recent work, identifying the themes that now dominate, pointing out the concerns those themes raise, and asking whether any sense can be made of the Court's ventures. Part II takes up that question, and concludes that a common, well-recognized constitutional methodology accounts for the Court's Eighth Amendment decisions. The Justices concede that the amendment contains significant normative content against which to assess the legitimacy of capital punishment, and they agree that the federal judiciary bears an important responsibility to see that the amendment's norms are enforced. But in discharging that obligation, the Court uses federal judicial power sparingly in order to accommodate considerations of governmental structure, institutional capacity, and institutional responsibility. These concerns, too, carry constitutional credentials; to give them their due weight, the Justices — in a word — balance.

Neither the methodology of balancing, nor the decisions it produces, will meet or should meet with universal approval. Indeed, I have my own qualms about the former, and the latter often trouble me a great deal. What is important — insofar as constitutional law is concerned, anyway — is that the Court's performance under the Eighth Amendment falls well within the parameters of an established tradition of adjudication. It may disappoint, it may elicit disagreement, but it deserves respect.

Those on the front lines of capital punishment administration have little reason to fear the model of Eighth Amendment jurisprudence offered in Part II, for it has powerful, positive implications for how America should deal with death penalty issues in the years to come. As Part III of the article demonstrates, an appreciation of the Court's balancing methodology under the Eighth Amendment liberates us to think creatively and to speak articulately about the roles that state constitutional law, judge-made interstitial law, and executive clemency should play in the nation's quest to legitimate the death penalty. These alternative sources of regulatory authority are no less obligated
to respect basic Eighth Amendment values than are the federal courts. They are not, however, encumbered by the same institutional and structural limitations that face the federal judiciary, and thus they may enforce Eighth Amendment values — and, as Part III will illustrate, in appropriate circumstances must enforce those values — even though the federal judiciary's own balance dictates self-restraint.

What emerges is an integrated vision of the regulation of capital punishment under Furman and the Eighth Amendment. Legitimating death, under this view, is a collective societal responsibility. Every governmental institution with the power to reach the question of capital punishment has a vital constitutional mission to perform, contributing — within its means, with due regard for its own limits — toward the realization of Eighth Amendment ideals.

I. THE THEMES OF TODAY'S CAPITAL PUNISHMENT JURISPRUDENCE

Those who have become convinced that the Supreme Court's Eighth Amendment jurisprudence is a "fog of confusion . . . annually improvised" 24 would do well to reconsider. If there are shortcomings to be found in the Court's recent work in death cases, inconsistency and incoherence are not among them. The Court remains a committee of nine humans with differing perspectives, so there are still disagreements and some resulting wrinkles in the doctrinal fabric. But what Paul Freund once said of an earlier Court's travels in controversial territory holds here too: "[T]he degree of concord in this area is much more important than the degree of discord . . . ." 25

Indeed, it is the concord that frightens capital punishment's opponents these days. Four strong themes, embraced by a consistent and substantial majority of the Justices, have dominated the Court's recent death penalty decisions, and the themes foretell a rise in the number of executions.

First, the Court has been sharply reducing the involvement of the federal judiciary in the day-to-day business of reviewing capital cases. The Court's technique has been simple and direct: limiting the occasions for the exercise of federal judicial power in capital cases by fortifying old, familiar barriers to habeas corpus review and erecting new ones.

For years, procedural defaults in the presentation of an inmate's

25. Paul A. Freund, On Understanding the Supreme Court 9 (1949) (referring to the Court's dealings in the field of civil liberties during the 1930s and 1940s).
federal constitutional claim to the state courts\textsuperscript{26} have operated to bar consideration of the claim in habeas.\textsuperscript{27} In a series of cases culminating with \textit{Coleman v. Thompson},\textsuperscript{28} the Court has made the standards for determining whether there has been a procedural default under state law — and, if so, whether it may be excused — rigorously preclusive. The technicalities which the habeas petitioner must successfully negotiate in order to have a federal court adjudicate the merits of his claims are not, however, limited to those of a state's making. Working in the shadows of Congress' habeas legislation, the Court has been making new and restrictive \textit{federal} procedural law. The petitioner must also comply with these technical rules if a federal court is to reach the substance of his constitutional claim. For example, an inmate's failure to raise a claim in his first application for habeas relief now amounts, under \textit{McCleskey v. Zant},\textsuperscript{29} to a procedural default that can and probably will bar the claim from habeas consideration altogether.\textsuperscript{30} In addition, though no statute of limitations governs habeas petitions, it now appears that a well-pled constitutional claim can be dismissed, for

\begin{footnotesize}
\textsuperscript{26} Of course, presentation of the claim to the state courts is normally a prerequisite to federal habeas review. \textit{See} \textit{Paul Bator et al., Hart & Wechsler's The Federal Courts and The Federal System} 1552-60 (3d ed. 1988) (discussing requirement that state remedies be exhausted).


\textsuperscript{29} 111 S. Ct. 1454 (1991).

\textsuperscript{30} \textit{See} 111 S. Ct. at 1461-75. In theory, the petitioner's federal procedural default might be absolved upon a showing of either "cause and prejudice" or a "fundamental miscarriage of justice" — a showing which also would overcome the preclusive effect of a procedural default committed in state court. But given the narrow interpretation the Court has placed on these terms, the default will be fatal in most cases involving a second habeas filing.

As for "cause," the Court has made it quite clear that a petitioner's inadvertence in failing to present a claim properly merits no sympathy. \textit{Carrier}, 477 U.S. at 486-92; \textit{Engle}, 456 U.S. at 129-35. Shenanigans on the part of judicial, prosecutorial, or law enforcement officers that wholly impeded presentation of the claim at the appropriate time constitute "cause," \textit{see} \textit{Amadeo v. Zant}, 486 U.S. 214, 222 (1986), but, it seems, official deceit and chicanery that succeeded only in making development of the claim more difficult do not do so. \textit{See} \textit{McCleskey v. Zant}, 111 S. Ct. 1454, 1474-75 (1991). "Cause" exists when the initial failure to raise the claim is due to attorney malfeasance that deprived the inmate of a constitutional right to the effective assistance of counsel, \textit{Kimmelman v. Morrison}, 477 U.S. 365, 375-80 (1986), but this theory is of little consequence to the problem of second habeas petitions because the Court has held that death row inmates are not constitutionally entitled to counsel to help them properly raise their claims in their first habeas petitions. \textit{Murray v. Giarratano}, 492 U.S. 1, 7-10 (1989) (plurality opinion). Finally, "cause" also exists when raising the claim earlier would have required the petitioner to perceive and advance a novel legal theory, \textit{Reed v. Ross}, 468 U.S. 1, 12-16 (1984), but a claim meeting this definition is likely to falter under the Court's new retroactivity jurisprudence.

The "fundamental miscarriage of justice" exception likewise affords little comfort for the second-time habeas applicant. In \textit{Sawyer v. Whiteley}, 112 S. Ct. 2514 (1992), the Court sharply circumscribed the range of affronts that will establish the requisite fundamental miscarriage of justice. 112 S. Ct. at 2518-23.
\end{footnotesize}
equity's sake, on grounds of belatedness. 31

The foregoing procedural strictures, while substantial, seem trivial when compared to the major new hurdle now blocking adjudication of constitutional claims in habeas. Under the retroactivity doctrine unveiled in *Teague v. Lane* 32 and extended to capital cases in *Penry v. Lynaugh*, 33 even an impeccably preserved and convincing claim of constitutional error cannot be heard in habeas if it depends upon a "rule" that was not "dictated" by constitutional precedent which existed when the petitioner's case cleared the direct review process. 34 Although the full reach of the Court's new retroactivity law remains to be determined, 35 its capacity for drastically reducing the role of the federal courts in death cases needs no elaboration. 36 No longer does the Court think it an injustice — or, at least, an injustice cognizable in habeas — to execute an individual who has persistently and appropriately sought relief from detrimental constitutional error. 37

The second theme involves a concerted effort by the Court to clarify its capital punishment jurisprudence to facilitate state efforts toward compliance and to lessen the need for federal supervision. Here, too, the Court's technique has been simple and direct: to the extent possible, it expresses the central constitutional concerns relating to the death penalty in formalistic terms that set predictable, attainable, and easily policed standards of behavior. The 1989 Term, rich with impor-

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35. Indeed, the division of opinions that have surfaced in the Court's post-*Teague* cases causes one to doubt whether the current Court will prove any more successful than earlier Courts at developing a consistent approach to retroactivity and related issues on habeas. *Compare Wright v. West*, 112 S. Ct. 2482, 2489-91 (1992) (opinion of Thomas, J.) (plurality opinion) (urging broad view of *Teague*’s import) and 112 S. Ct. at 2500-03 (Souter, J., concurring in judgment) (employing broad definition of what constitutes a "new rule") *with* 112 S. Ct. at 2496-98 (O'Connor, J., concurring in judgment) (taking narrower view of *Teague*) and 112 S. Ct. at 2498-2500 (Kennedy, J., concurring in judgment) (analyzing *Teague* in narrow terms); *compare Stringer v. Black*, 112 S. Ct. 1130, 1135-40 (1992) (opinion of Kennedy, J.) (holding that neither Clemons v. Mississippi, 494 U.S. 738 (1990), nor Maynard v. Cartwright, 486 U.S. 356 (1988), created a new rule) *with* 112 S. Ct. at 1140-46 (Souter, J., dissenting) (concluding otherwise); *compare Penry v. Lynaugh*, 492 U.S. 302, 313-19 (1989) (opinion of O'Connor, J.) (holding that decision did not create new rule) *with* 492 U.S. at 352-53 (Scalia, J., concurring in part and dissenting in part) (concluding otherwise).

36. See Liebman, *supra* note 9, at 541.

37. Whereas *Teague* denies defendants the advantages of beneficial new rules that emerge after their direct appeals have concluded, the Court has no problem with holding the defendants to adverse postfinality developments in the law. *See* *Lockhart v. Fretwell*, 113 S. Ct. 838, 844 (1993).
tall capital cases, saw the Justices enthusiastically pursuing this objective on each of the Eighth Amendment’s two principal doctrinal fronts. The amendment envisions rational orderliness in the capital sentencing process, and thus requires that the state employ aggravating circumstances that effectively channel and guide the sentencer’s discretion. In *Walton v. Arizona* and *Lewis v. Jeffers*, the Court reduced this concern to a set of concrete rules that state judiciaries should be able to follow with relative ease. The Eighth Amendment also envisions that courts will only impose morally appropriate death sentences, and therefore requires that each capital sentencing decision be an individualized one made with due regard for all potential mitigating circumstances.

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38. The principle of rational orderliness emerged as a central norm of Eighth Amendment jurisprudence in *Furman* and received its further elaboration four years later in *Gregg v. Georgia*, 428 U.S. 153 (1976). “*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” 428 U.S. at 189 (plurality opinion). Given the death penalty’s severity, there must be a “meaningful basis for distinguishing the few cases in which it is imposed from the many in which it is not.” 428 U.S. at 188 (plurality opinion) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)). When pains are not taken to minimize the risks of arbitrariness or capriciousness, the death sentence becomes “cruel and unusual in the same way that being struck by lightning is cruel and unusual.” *Furman*, 408 U.S. at 309 (Stewart, J., concurring); *see Bilionis, supra* note 3, at 295-300 (discussing principle of rational orderliness).


41. Justice O’Connor thus could say for an eight-Justice Court in late 1992:

> The relevant Eighth Amendment law is well defined. First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. Second, in a “weighing” State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain. Third, a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error. Finally, in federal habeas corpus proceedings, the state court’s application of the narrowing construction should be reviewed under the “rational factfinder” standard of *Jackson v. Virginia*.

*Richmond v. Lewis*, 113 S. Ct. 528, 534 (1992) (citations omitted); *see also Arave v. Creech*, 113 S. Ct. 1534, 1540-42 (1993) (applying these standards); *Creech*, 113 S. Ct. at 1545 (Blackmun, J., dissenting) (agreeing with majority’s statement of the applicable standards).

42. The principle of moral appropriateness emerged as a central norm of Eighth Amendment jurisprudence in *Woodson v. North Carolina*, 428 U.S. 280 (1976). The Court struck down a mandatory death penalty for murder, reasoning that the fundamental respect for human dignity underlying the Eighth Amendment, as well as the evolved standards of societal decency that give additional content to the amendment, dictate that a death sentence should not be imposed when it is morally inappropriate for the particular offender or offense. *See Bilionis, supra* note 3, at 288-95 (discussing principle of moral appropriateness). Starting with *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court has fashioned a substantial body of legal doctrine to implement the norm. *See Bilionis, supra* note 3, at 300-26 (analyzing doctrine under *Woodson* and *Lockett*).
simplicity to this concern as well.\textsuperscript{46}

The formalistic lines drawn by the Court in these cases offer the states a clearer sense of the constitutional straight-and-narrow, making a smoother-running capital punishment system the probable consequence. The gain, however, comes at a cost. When constitutional rules of criminal procedure are chosen for their administrative convenience, some mortgaging of the underlying constitutional values that inure to the individual’s benefit usually occurs. Just as bright-line Fourth Amendment rules have been known to sacrifice individual privacy in the name of police and judicial expediency,\textsuperscript{47} crystalline Eighth Amendment rules sell short the ideals of rational orderliness and moral appropriateness in favor of the perceived needs of federal and state judicial administration. \textit{Walton} and \textit{Jeffers}, for example, simplify state court compliance with the Eighth Amendment by holding that an aggravating circumstance need only receive an abstractly adequate definition that the sentencer then proceeds to apply, within the bounds of reason, to the facts of the particular case. Our desire for consistency and rationality in capital sentencing might have been significantly furthered had the Court required that an aggravating circumstance also prove its regularizing mettle in the run of cases.\textsuperscript{48}

In a third trend that has characterized recent capital punishment jurisprudence, the Supreme Court has consistently tempered its desire for legal clarity whenever attaining it arguably requires the compromise of legitimate state interests or more protection than necessary to

\textsuperscript{46} \textit{Blystone} upheld a sentencing scheme that requires imposition of the death sentence when the sentencer finds an aggravating circumstance but no mitigating circumstance. The Court reasoned that the requirement of individualized sentencing is satisfied so long as there are no constitutional failures relating to the consideration of mitigating circumstances. \textit{Blystone}, 494 U.S. at 305-09. Relying on \textit{Blystone}, \textit{Boyde} upheld a sentencing scheme that mandates imposition of the death sentence when mitigating circumstances are outweighed by aggravating circumstances. \textit{Boyde}, 494 U.S. at 377. And \textit{Parks} emphasized the circumscribed scope of mitigating evidence under \textit{Lockett} v. \textit{Ohio}, 438 U.S. 586 (1978), by holding that sympathy is not, under current law, a constitutionally protected mitigating circumstance. \textit{Parks}, 494 U.S. at 492-95.


\textsuperscript{48} Several years ago, my colleague Rich Rosen demonstrated how illuminating such a cross-case inquiry can be. See Richard A. Rosen, \textit{The “Especially Heinous” Aggravating Circumstance in Capital Cases — The Standardless Standard}, 64 N.C. L. Rev. 941 (1986).
secure the accused's constitutional interest. In such circumstances, the Court's response once again has been simple and direct: it implements fact-bound, case-specific standards. So it was in Payne v. Tennessee, 49 which replaced Booth v. Maryland's 50 plain prohibition of victim-impact evidence with a less-protective, indeed fundamentally amorphous, ban on unduly prejudicial evidence of the same nature. 51 So it was, as well, in Schad v. Arizona. 52 There, the Court declined to read Beck v. Alabama 53 to require that a jury receive instruction on every factually supported lesser-included offense in a capital prosecution; it instead held that constitutional error occurs only when the absence of the lesser-included offense instruction affects the reliability of the jury's capital murder verdict. 54 The states, of course, hardly deplore the absence of hard-and-fast rules in these cases, for the tradeoff is a positive one from their perspective. The standards espoused are open-ended enough to leave considerable running room for the advancement of a state's chosen interests, yet fact dependent enough to minimize sharply the risk of federal reversal.

As a fourth and final theme, the Court has been actively outlining ways for state appellate courts to avoid remanding for full-fledged resentencing proceedings those cases in which constitutional error has been committed. With conspicuous dictum in Satterwhite v. Texas 55 and Clemons v. Mississippi, 56 the Justices instructed state courts that at least some constitutional defects in the sentencing process are open to harmless error analysis under the Chapman v. California 57 standard. And with even more conspicuous dictum in Clemons, a then-slim, but now larger, majority announced its view that a state appellate court can salvage a constitutionally flawed death sentence by independently reweighing the aggravating and mitigating circumstances and determining anew that death is the appropriate punishment — in

51. Payne, 111 S. Ct. at 2608.
54. Schad, 111 S. Ct. at 2505.
short, by conducting a constitutionally adequate resentencing on appeal. The message to state appellate courts could hardly be clearer: if your subordinates on the trial bench cannot do death right, no matter — just do it yourself. Perhaps a death sentence remains “different,” but not so different that it must rest upon a constitutionally sound judgment rendered by a sentencer who personally hears the testimony, personally eyes the witnesses, and personally encounters the individual defendant.

The fact that the Justices thus far have been rather scrupulous about what constitutes a satisfactory harmless error analysis or appellate reweighing provides some consolation, as does the hope that the Court will continue to recognize important and necessary restrictions on both doctrines. In the final analysis, though, the effect these doctrines have upon the fundamental justice of capital punishment depends on what transpires once the Court resolves the finer points and, as it surely will, turns its docket over to fresher concerns. Will the state courts then administer the teachings of the Court with care and devotion to their spirit? Or will they cut the Constitution’s corners by diluting the standards in their application, something that Judge Frank Easterbrook has acknowledged they now do in the harmless error field? When transgressions occur, will the lower federal courts sit empowered in habeas to rectify them? Or will some new contraction of habeas corpus insulate state court infidelities from meaningful federal scrutiny?

Questions like these illustrate why today’s capital punishment jurisprudence provokes such acute anxiety in those who see in Furman a

58. See Sochor v. Florida, 112 S. Ct. 2114, 2122-23 (1991) (holding that state court opinion was inadequate to demonstrate that a constitutionally adequate harmless error analysis had been undertaken); Parker v. Dugger, 111 S. Ct. 731, 736-39 (1991) (holding that harmless error analysis is inadequate when based on a perception of the facts that is not fairly supported by the record); Clemons v. Mississippi, 494 U.S. 738, 753-54 (1990) (indicating that harmless error conclusion would be hard to accept on facts presented); see also Satterwhite v. Texas, 486 U.S. 249, 258 (1988) (holding that error could not be deemed harmless); Hitchcock v. Dugger, 481 U.S. 393, 399 (1987) (holding that error could not be deemed harmless); Skipper v. South Carolina, 476 U.S. 1, 7-9 (1986) (disagreeing with lower court’s finding of harmless error).


60. I have outlined some of those restrictions elsewhere. See Bilionis, supra note 3, at 316-25.


63. It is possible that Brecht, 113 S. Ct. 1710, might have such an insulating effect. The Court held in Brecht that a habeas petitioner who establishes constitutional error of the trial variety is not entitled to relief unless the error had a substantial and injurious effect or influence on the judgment.
strict mandate for legitimating the death penalty. That view of *Furman* holds that legitimacy is attained only when the risks of arbitrariness, capriciousness, moral unreliability, and unfairness in capital sentencing have been eliminated, or at least minimized substantially and to the full extent permitted by society's best efforts.\(^{64}\) The essential ingredient of this legitimation strategy is a strong and unyielding federal judicial commitment to perform two central tasks: (1) to set forth stringent procedural safeguards which further the basic Eighth Amendment norms of rational orderliness, moral appropriateness, and procedural fairness;\(^{65}\) and (2) to insist that the states implement and faithfully adhere to those safeguards whenever they impose the death penalty. Put simply, the four dominant themes of today's capital jurisprudence signal, individually and in tandem, a distinct erosion of that federal judicial commitment.

The Supreme Court still mandates procedural safeguards that aim to advance Eighth Amendment values, but the only rules the Court seems willing to impress with constitutional credentials are those that have been made safe for state consumption — buffered standards that pursue the Eighth Amendment's goals tentatively and conditionally, after due assurance that they pose no serious threat to state efforts to

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\(^{64}\) As followers of the Court's capital punishment jurisprudence will be quick to point out, there has never been any formal agreement among the Justices on what *Furman* and the bellwether 1976 decisions interpreting *Furman* really meant. The broad view of *Furman* just sketched in the text represents but one interpretation, the one typically advanced by opponents of capital punishment and the one taken by Justices Brennan and Marshall and, with minor deviations, Justices Blackmun and Stevens. See, e.g., Walton v. Arizona, 497 U.S. 639, 676 n.1 (1990) (Brennan, J., dissenting, joined by Stevens, J.) ("Our cases ... 'insist' that capital punishment be imposed, fairly, and with reasonable consistency, or not at all.") (quoting Eddings v. Oklahoma, 455 U.S. 104, 112 (1982)).

That view is detailed and explored in Part II.A of this article. In Part II.B, similar attention is paid to what I contend to be the chief and now dominant competing view of constitutional capital punishment jurisprudence under *Furman*.

\(^{65}\) In addition to the principles of rational orderliness and moral appropriateness, the principle of heightened procedural fairness also has figured prominently in modern capital punishment jurisprudence at the constitutional level. Invoking at turns the Due Process Clause and the Eighth Amendment, the Court has often stated its conviction that special procedural opportunities and protections should extend to the capitaly accused in order to ensure a fairness of process and a reliability of result that are commensurate with the severity and irrevocability of the death penalty. See, e.g., Turner v. Murray, 476 U.S. 28, 35-36 (1986) (opinion of White, J.) (requiring voir dire of jury regarding racial prejudices in capital prosecution for interracial murder); Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986) (noting that due process dictates that defense in capital case must be allowed to review and deny or explain any factor which the sentencer is permitted to take into account in the sentencing determination); 476 U.S. at 10-11 (Powell, J., concurring in judgment) (advancing reasoning of the majority); Green v. Georgia, 442 U.S. 95, 97 (1979) (requiring admission of important mitigating evidence notwithstanding its hearsay nature); Gardner v. Florida, 430 U.S. 349, 357-62 (1977) (requiring disclosure to defense of presentencing report in capital case); see also Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980) (arguing that the risk of moral error in capital sentencing that underlies the requirement of heightened procedural protections also establishes the penalty's unconstitutionality).
build and run an efficient death penalty system. What is more, *Teague v. Lane*’s 66 injunction against the making of new constitutional law in habeas corpus renders it unlikely that any additional procedural requirements will enter the picture unless and until the Supreme Court, in the exercise of its direct appellate jurisdiction in state criminal cases, says they may.

The contingent and restrained nature of the federal judicial commitment extends to the enforcement side of the ledger as well. With habeas corpus substantially contracted, an execution no longer must wait until a thorough and searching federal review determines that the rules deemed fundamental to the game have been obeyed. Nor will a conceded failure to play by the rules necessarily elicit a federal command to do it anew and get it right. Notwithstanding the fragile, highly nuanced, and essentially unknowable nature of a sentencer’s decision to impose the death sentence, 67 constitutional errors committed in the process leading to that decision may be dismissed as harmlessly inconsequential or held to have been “cured” — skeptics might say merely masked — by a state appellate court’s independent reweighing of the facts and its declaration that death remains the appropriate punishment.

Are we to conclude that the Court’s gestures in death cases amount to so much smoke and so many mirrors, barely obscuring the fact that the long-predicted “deregulation” of capital punishment 68 has finally arrived? There are rumblings to that effect from lawyers who litigate death cases, and they have a point. In the 1970s, when capital defendants enjoyed a virtually uninterrupted run of victories in the Court, it was easy to believe that the Court’s commitment to submit the death penalty to the rule of law was heartfelt. 69 Faith came harder in the 1980s, as defendants began to see some of their dearest claims lose. 70 Interspersed among those setbacks, however, were a

number of comforting contributions to the regulatory cause,\textsuperscript{71} and, most importantly, \textit{Furman}'s keepers still sat four strong on the Court, guaranteeing that the fulfillment of its promise was never more than a vote away. The 1990s, to put it mildly, offer no such reassurances. Justices Brennan and Marshall have exited, leaving only Harry Blackmun and John Paul Stevens to advance \textit{Furman}'s legitimacy ideals in a pure voice. The remainder of the Court has taken charge of the Eighth Amendment and, as we have seen, its decisions consistently strike themes antithetical to those ideals. A sleeker death penalty jurisprudence, built more for speed and efficiency than for normative safety, is coming on line. Predictably, executions are on the rise.\textsuperscript{72}

Thus told, the tale of the Eighth Amendment's demise sounds compelling. But, like most stories, this one has another side to it. For starters, consider the highly significant fact that, with one-and-a-half exceptions, no member of the Court today openly contests the constitutional stature of the norms that have driven Eighth Amendment death penalty jurisprudence for the past twenty years. Justice Scalia's patience with the concept of mitigation and the values it serves has certainly expired,\textsuperscript{73} and Justice Thomas has revealed some inclination to join Scalia in that view,\textsuperscript{74} but the rest of the Court currently adheres to all three of the normative propositions central to modern Eighth Amendment law — that capital sentencing decisions should aspire toward moral appropriateness, should be reached in a rational and orderly fashion, and should be rendered with a heightened procedural fairness befitting the gravity of the consequences to the individual. Even Chief Justice Rehnquist, once a steadfast opponent of any effort to read meaning into the Eighth Amendment for death cases,\textsuperscript{75} no

\textsuperscript{72}See \textit{DEATH Row, U.S.A.}, Winter 1992, at 5 (bulletin published by NAACP Legal Def. and Educ. Fund, Inc.) (documenting 27 executions during 1992, the largest number in any one calendar year since \textit{Furman}).
longer actively resists recognition of the amendment’s normative relevance to the practice of capital punishment.\(^{76}\)

Admittedly, appearances can be deceiving. The *United States Code* does not yet prohibit lip service in judicial opinions; in the end, only conscience, self-awareness, and self-respect stand in the way of the Justice who might be tempted to publicly extol principles he or she long ago privately ceased to honor. I am among those who prefer to take the Justices at their word until strong evidence to the contrary warrants otherwise—a position, I realize, that not all observers share and that some would dismiss as naive. Be that as it may, crediting the Court’s acceptance of the basic norms of the Eighth Amendment does not require blind faith, for the Court has reaffirmed and furthered each of them in important ways in some of its most recent decisions.

*Morgan v. Illinois,\(^ {77}\)* which holds that jurors predisposed against mitigating evidence have no business deciding questions of life and death, deserves a place next to *Woodson v. North Carolina,\(^ {78}\)* *Lockett v. Ohio,\(^ {79}\)* and *Caldwell v. Mississippi\(^ {80}\)* in the book of paeans to reliable, individualized moral decisionmaking.\(^ {81}\) The Court likewise has lent its support to the principle of rational and orderly capital sentencing lately. In *Clemmons v. Mississippi,\(^ {82}\)* *Stringer v. Black,\(^ {83}\)* *Espinosa v. Florida,\(^ {84}\)* and *Richmond v. Lewis,\(^ {85}\)* strong majorities confirmed that the use of vague statutory aggravating factors violates the Constitution even though the sentencer’s discretion is otherwise channeled. *Dawson v. Delaware\(^ {86}\)* limited the types of evidence admissible against capital defendants. There, the Court set aside a death sentence returned

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77. 112 S. Ct. 2222 (1992).


81. On the interrelationships between mitigating evidence, jury selection, and *Caldwell*, see Bilionis, *supra* note 3, at 306-08.


85. 113 S. Ct. 528 (1992).

by a jury that had become acquainted with the inflammatory but irrelevant fact that the defendant was a member of a racist prison gang. In two important cases from Florida, *Parker v. Dugger* 87 and *Sochor v. Florida*, 88 the Court made clear that *Barclay v. Florida* 89 never meant to give state courts carte blanche to play fast and loose with the administration of their own state law standards relating to aggravating circumstances. Because a sentencer's erroneous use of an aggravating circumstance in contravention of state law might mean that the scales were arbitrarily tipped in death's favor, the Eighth Amendment requires that the effect of such an error be assessed in a principled fashion with fidelity to the particular facts of the record and the actual process of decisionmaking undertaken in the case. Finally, procedural decency received a promotion in *Lankford v. Idaho*, 90 which held that the defendant was deprived of due notice that the death sentence was a genuine and not merely theoretical possibility in his case.

If the Court means to abandon the Eighth Amendment and deregulate death, it has chosen a strange and seemingly counterproductive way to do it. Perhaps befuddlement and confusion reign in the High Court. Then again, maybe the Justices have some idea of what they are doing.

II. APPROACHING LEGITIMACY: METHODOLOGY IN THE COURT

In fact, there is a way to conceptualize capital punishment adjudication that casts the Court's recent efforts in a more flattering light. It requires that one walk through the problem of death penalty regulation under the Constitution as might a conscientious Justice coming to the problem for the first time today — isolating the central issues facing the Court, the values and interests at stake, and the choices that ultimately must be made.

Our starting point is the same fundamental question that has faced every Justice who has had to pass judgment in a death case since the constitutional implications of capital punishment began to draw the Court's attention in the 1960s. Does constitutional law have a role to play in securing a more decent and legitimate administration of the death penalty and, if so, what is that role? 91

91. Of course, the question assumes that the Constitution does not categorically prohibit capital punishment, and that any constitutional strictures therefore will be of the regulatory variety. No one on the Court today disputes the holding of *Gregg v. Georgia*, 428 U.S. 153 (1976), that the death penalty is not per se unconstitutional.
One possible answer makes quick work of our inquiry: "No. Constitutional law has nothing to do with the issue." The supporting argument has a familiar cast to it. The Constitution explicitly contemplates the possible use of the death penalty and therefore can bear no construction that leads to capital punishment's abolition. Matters relating to the legitimacy of the death penalty in its application implicate the kind of debatable or, worse, intractable details which the Constitution makes no effort to resolve but assigns to the workaday play of social policy. This reading of the Constitution, and the hands-off approach to the death penalty's legitimacy it counsels, certainly had currency in 1971, when John Marshall Harlan and a majority of the Court endorsed it in *McGautha v. California*. But this position is not likely to win serious support on the Court today, regardless of whatever intrinsic appeal it might have in a case of first impression. The Court has spent two busy decades refuting *McGautha*, and, though never given the grand funeral associated with an express overruling, the decision lies buried beneath a capital punishment jurisprudence of monumental proportions. Whatever else this formidable precedent has accomplished, it surely makes untenable any current claim that constitutional inquiry into the legitimacy of death penalty practices cannot be undertaken because the Constitution is mute on the point. The nation has listened to the Eighth Amendment's normative pronouncements too long for the Court to tell us now that they do not exist, that they have no meaning, that they lack suitable pedigree, or that they are somehow unjusticiable. The values of moral appropriateness, rational orderliness, and procedural fairness comprise a sound and respectable constitutional vocabulary, too entrenched in case law to ignore and demonstrably sufficient to conduct a meaningful constitutional discourse.

Conceding that the Constitution speaks to the issue, and that the Burger Court's careful examination of the Eighth Amendment in the 1970s succeeded in correctly identifying its normative language, answers our question only in part. Ascertaining the relevant constitutional values, the bookish exercise that one might label "norm articulation," is doubtless an essential predicate to constitutional ad-

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94. The process of "norm articulation" is what customarily comes to mind when people think of constitutional litigation: aided by the submissions of litigants and interested amici as well as the labors of their own chambers, the Justices wend their way through constitutional text, history, precedent, and other source materials to ascertain the normative vision against which the constitutionality of challenged social practices might then be tested.
judication. In Justice Brennan's words, it establishes "the reach of the Constitution" in the area. But constitutional adjudication goes nowhere until the Court also determines the extent of the judicial grasp in that same field. The Court must define the role that it can and should play in implementing the constitutional norms it has identified.

Here is the point in constitutional adjudication where the harder choices arise and the starker divisions of opinion crop up. The Court's task of "role definition" involves a wide array of appraisals over which reasonable jurists easily might disagree — even though they start from shared premises about the norms at stake and the need for judicial protection of them. What judicial techniques are available to the Court? Which ones will help successfully realize Eighth Amendment norms in our complex and stubbornly imperfect world? How well will they work in transforming social practices for the better? At what cost to the Court's limited reservoir of capital — and how limited, by the way, is that reservoir? Which judicial vulnerabilities will be exposed, and what significance should be attached to this exposure? What other values stand to suffer in the process of enforcing Eighth Amendment norms? How dearly do we hold those other values, and according to what standard of reference? To what extent, and under what justifying conditions, may the Court sacrifice these values? Are other institutions positioned to lend a hand in the quest to better realize Eighth Amendment values? How will they respond to the Court's ac-


96. See, e.g., id. at 319 (noting that capital cases challenged the Court to determine both "the reach of the Constitution and the role of the Court in such cases"); Louis Michael Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436, 440 (1980) ("Setting forth norms and implementing them are, however, two different matters . . . .").

The generations that came of age in the glow and afterglow of Warren Court constitutional activism may be forgiven if their instincts lead them to view the Supreme Court's work product as "the Constitution" in its definitive exposition. But lawyers of earlier generations had no problem with the idea that the Constitution's normative reach may and frequently does exceed the Supreme Court's grasp. As Professor Lawrence Sager has demonstrated in a stimulating article that sets forth insights I will be putting to use later in this article, the proposition "enjoys a venerable provenance" in our constitutional heritage, forming the conceptual basis of the theory of judicial restraint articulated by James Bradley Thayer and brought to the Court by the likes of Louis D. Brandeis, Oliver Wendell Holmes, Jr., Felix Frankfurter, and John Marshall Harlan. Lawrence G. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212, 1222-24 (1978). For Thayer's development of the judicial restraint thesis, see James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129 (1893).

Laurence Tribe's paraphrase sums it up well: "If it is, after all, a constitution, and not merely its judicial management, that we are expounding." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-9, at 17 (2d ed. 1988) (paraphrasing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).
tions? Will their contributions slacken or intensify, and with what effect on the net result of the entire enterprise? These are just some of the considerations that a disciplined approach to the problem might take into account.

Fortunately, we need not plunge headfirst into that thicket and thrash a path through each and every thorny issue therein. The Justices have greatly simplified our inquiry by simplifying their own. Over the years, they have narrowed the problem of role definition to a choice between two basic approaches. I will explore each of these approaches in turn.

A. Legitimacy and the Liberal School of Furman: Enforcing Norms to the Maximum

I have already made some reference to the first approach. It is the one that the Court's more liberal members have advanced since Furman and that the death penalty's strongest foes believe to be the essence of Furman and the regulatory project it initiated. Under this view, choosing the Court's proper role in the capital punishment sphere is not complicated. The judgments that matter most can be made at the wholesale level, and when rightly reached they dictate that the Court's role should be to promote and defend Eighth Amendment norms to the maximum extent possible in each and every instance.

Justices Brennan and Marshall promoted this view for many years, with Justices Blackmun and Stevens joining them in part but not entirely.97 The approach's central points are easily summarized. Eighth Amendment values, like other aspirations to individual liberty recognized in the Bill of Rights, rightly assume a preferred position in the constitutional pantheon and deserve uncompromising judicial protection commensurate with their fundamental status.98 A vigorous enforcing role for the Court is all the more imperative once one considers capital punishment's particulars. At issue is the purposeful extinguishing of human life, and a constitutional hierarchy worth its moral salt must acknowledge that an individual's protected interests merit the utmost judicial solicitude when life literally hangs in the balance.99 Nor are there convincing reasons for the Court to hold back out of

97. Given the frequency with which Justices Blackmun and Stevens voted with Justices Brennan and Marshall in death cases, death penalty lawyers and Court watchers tended to characterize the four as a single voting bloc. There were important differences between the two pairs, however. See infra note 106.
deference to the judgments of the political departments. Political discourse about the death penalty is notorious for generating far more heat than light, with the debaters invariably focusing on a different question than the one of concern to the Court — whether the death penalty should exist, rather than how to administer it in a dependably and fundamentally legitimate manner — and, even then, typically proceeding from poorly informed premises.100 The individuals with constitutional interests at stake, moreover, are by definition heinous villains accused of brutal crimes, and they almost always come from the ranks of society's powerless downtrodden.101 It nears folly to expect the political process to produce the kind of carefully reasoned and sensitively drawn accommodations between the public's penological goals and the individual's constitutional interests that might warrant special judicial deference. Finally, the legitimate state interests underlying capital punishment do not weigh heavily enough to militate against a regime of strictest judicial enforcement of Eighth Amendment norms. Presuming that there is a social gain represented by the margin between life imprisonment and capital punishment, there is no good reason to believe it is more than marginal and mainly symbolic.102 Judicial action to enforce and protect genuinely fundamental values — including those founded in the Eighth Amendment — cannot be withheld simply because social interests point in a contrary direction. Only the most compelling interests should give the Court pause, and no such interests are conceivably implicated.

While much could be written about the liberal call for maximum judicial enforcement of Eighth Amendment values just sketched, three of its aspects merit our attention here. First, note the approach's basic strategy. Its evident aim is to save Eighth Amendment norms from the kind of gradual erosion they predictably might suffer if their judicial enforcement were to depend on how courts happen to weigh them, in case after case, against the passel of possible countervailing interests and concerns. The approach avoids the norm-threatening business of ad hoc, case-by-case balancing by establishing a rigid decisional framework. Eighth Amendment norms, under this framework, are pre-

100. See Furman, 408 U.S. at 362-63 (Marshall, J., concurring) (contending that a well-informed citizenry would reject capital punishment); ZIMRING & HAWKINS, supra note 5, at 38-45 (noting heated, irrational political discourse regarding capital punishment).

101. E.g., Furman, 408 U.S. at 249-57 (Douglas, J., concurring); Furman, 408 U.S. at 363-69 (Marshall, J., concurring).

102. E.g., Furman, 408 U.S. at 301-05 (Brennan, J., concurring); Furman, 408 U.S. at 345-54 (Marshall, J., concurring).
sumptively entitled to full enforcement — in much the same way, and for essentially the same reasons, that other fundamental interests are presumptively entitled to full enforcement under the Fourteenth Amendment’s strict scrutiny doctrines.103 Interest balancing is not eschewed altogether, but it is confined primarily to a global evaluation, performed by the Supreme Court alone and undertaken before any particular question of death penalty practice ever reaches adjudication.104 The Court appraises the competing interests potentially at stake — the Eighth Amendment norms running to the individual’s benefit and the practical and prudential factors which might counsel judicial restraint in implementing those norms — in categorical terms and at a level of generality that precludes any nuanced distinctions or finely calibrated accommodations. Eighth Amendment norms win this showdown convincingly,105 establish their “fundamental” credentials in the course of doing so, and gain a presumptive entitlement to exacting judicial protection in all subsequent litigation. Theory does not demand an irrebuttable presumption of maximum enforcement. Eighth Amendment norms, like the fundamental values protected by strict scrutiny under the Fourteenth Amendment, might be overcome when genuinely compelling state interests cannot otherwise be attained satisfactorily. That theoretical concession has little bearing in practice, however, because alternative punishments generally exist that will serve the penological goals underlying capital punishment acceptably, though perhaps not completely.106

103. Note the pronounced “Carolene Products footnote four” flavor of the argument for maximum enforcement of Eighth Amendment values. For discussions of United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938), and strict judicial scrutiny, see John Hart Ely, Democracy and Distrust 75-77, 148-53 (1980); Tribe, supra note 96, § 16-6, at 1451-54.


105. Few would eagerly quarrel with the proposition that norms of individual liberty, admittedly rooted in the Constitution, belong as a general rule at — or at least very near — the top of our constitutional hierarchy, particularly when human life hinges upon their treatment. By contrast, competing structural or institutional considerations that might counsel judicial restraint lose much of their force — and threaten to prove all too much — when pressed categorically.

106. Though he did not have capital punishment jurisprudence in mind, Gerald Gunther’s familiar phrase perfectly captures the approach to judicial review advocated by Justices Brennan and Marshall under the Eighth Amendment: “[S]crutiny that was ‘strict’ in theory and fatal in fact . . ..” Gerald Gunther, The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). Of course, Brennan and Marshall were both fundamentally opposed to capital punishment and wished to see it abolished. One might fairly wonder whether their insistence upon such stringent scrutiny was an attempt to bring about indirectly what they could not accomplish directly.

It is on this point that Justices Blackmun and Stevens parted company with their now-retired brethren. Neither Justice Blackmun nor Justice Stevens holds a categorical constitutional objection to the death penalty, and both Justices have been willing over the years to pay greater heed
Second, note the approach's clear, unadulterated conception of what it means for the Court to say that a death sentence is constitutionally legitimate. That distinction is earned when, and only when, the process that produces the sentence has succeeded in realizing Eighth Amendment norms to their fullest potential. If the sentencer imposes the death penalty in the absence of an identifiable safeguard which would enhance capital punishment's moral appropriateness, rational orderliness, or procedural fairness, the sentence lacks legitimacy and the execution may not proceed. The failure to provide that safeguard might be politically or economically justifiable, might even represent a prudent accommodation under all the circumstances, but the death penalty's constitutional legitimacy is not a shorthand label for a "reasonable" or even an "optimal" compromise. Legitimacy results from society's best efforts to fulfill the Eighth Amendment's normative vision, not efforts that might pass as good enough for government work. As such, capital punishment finds itself in a state of constitutional probation — its existence never guaranteed; its legitimacy never firmly and unalterably established, but always open to reexamination.

Third and finally, note the approach's institutional ramifications. The approach candidly accepts a strong federal judicial presence in the capital punishment sphere as a necessary and appropriate incident to responsible constitutional administration. The states, of course, surely cannot and should not be wholly displaced. They retain primary authority to fashion and operate the systems by which they sentence criminals to death and move such cases to the finality of execution. They also face an obligation to construct carefully and administer conscientiously their systems with fealty to the Eighth Amendment's normative vision, a duty which our federalist ideals naturally lead us to hope they will discharge willingly and effectively. But whenever capital punishment issues reach the Court — and they do and will, in many shapes and many ways — the principle of maximum enforcement will dictate the Court's response. The case before the Justices might draw into question any aspect of capital practice — the defini-

to claims that the proposed regulation at issue would be of dubious value in contributing to greater enforcement of Eighth Amendment norms, that it might conflict with other legitimate interests of an individual defendant, that it would pose demonstrable practical problems, or that it would take the Court's regulatory efforts into uncharted or unconventional realms. Compare Whitmore v. Arkansas, 495 U.S. 149 (1990) (opinion of Rehnquist, C.J., joined by Blackmun and Stevens, J.J.) (declining to hold that a third party has standing to assert that the Constitution forbids another capitaly sentenced individual from waiving appellate review) with Whitmore, 495 U.S. at 166-81 (Marshall, J., dissenting, joined by Brennan, J.) (arguing contra); compare Zant v. Stephens, 462 U.S. 862 (1983) (per Stevens, J., joined by Blackmun, J.) (upholding constitutionality of jury's use of nonstatutory aggravating circumstances) with Zant, 462 U.S. at 904-18 (Marshall, J., dissenting, joined by Brennan, J.) (arguing contra).
tion of the capital offense, 107 the aggravating factors that make an offender death-eligible, 108 the method by which the condemned few are drawn from the larger group of death-eligible offenders, 109 the allocation of sentencing authority, 110 pretrial matters, 111 jury selection, 112 the conduct of the trial, 113 the quality of state appellate 114 or collateral review, 115 or the rules that will govern federal review of death cases pursuant to the Supreme Court’s appellate jurisdiction 116 or the federal judiciary’s habeas jurisdiction. 117 But the overriding question, at bottom, remains the same for the Court: Is the safeguard the defendant seeks one within society’s ability to provide, and might it reasonably contribute to greater realization of Eighth Amendment norms?


108. See, e.g., Lewis v. Jeffers, 497 U.S. 764, 784-804 (1990) (Blackmun, J., dissenting) (contending that Arizona’s “especially heinous . . . or deprived” aggravating circumstance is too vague to narrow the class of death-eligible defendants meaningfully).


115. See, e.g., Murray v. Giarratano, 492 U.S. 1, 15-32 (1989) (Stevens, J., dissenting) (contending that death row inmates must be provided with counsel for postconviction proceedings).

116. See, e.g., Lewis v. Jeffers, 497 U.S. 764, 784-804 (1990) (Blackmun, J., dissenting) (arguing that state supreme court’s determination that aggravating circumstance existed should not be entitled to respect in federal habeas if factual basis for that finding is in doubt).

117. See, e.g., Sawyer v. Whitley, 112 S. Ct. 2514, 2525-30 (1992) (Blackmun, J., concurring) (contending that the Court should not import “actual innocence” standard into habeas petitions questioning capital sentencing).
B. Legitimacy and the Judicial Restraint School: Bringing Structural and Institutional Concerns into the Balance

What alternative exists for the Justice who hears the Eighth Amendment's normative messages and admits the judiciary's responsibility to enforce them at least occasionally? Predictably, it is the very thing the liberal interpretation of *Furman’s* mission strives so hard to avoid: a less categorical, issue-by-issue approach to the implementation of Eighth Amendment norms that enables the Court to strike finer balances between the recognized need for judicial enforcement and the institutional and structural considerations that argue for judicial restraint. In the areas of equal protection and substantive due process, it is called "middle-tier," "intermediate," or "heightened" scrutiny — a loosely structured form of balancing, flexible enough to permit some accommodation of the interests that militate against the fullest conceivable enforcement of the norms of individual liberty.118 A solid majority of the Justices now employs just such a methodology in conducting its capital punishment business.

I do not wish to say that the Court has formally embraced balancing in the death cases. Far from it. The Court has not yet elevated balancing to the status of a "standard" or "test" of Eighth Amendment jurisprudence, and you will search in vain for any explicit, unequivocal use of the methodology in the opinions. Nonetheless, one can make a strong case that the balancing methodology is busily at work just beneath the surface of the cases, its operation only thinly masked by the compact, precedent-bound analyses that often make up the veneer of death penalty opinions these days.

1. The Allure of Balancing

Consider, first, some general observations about the Court and the traditions of constitutional criminal adjudication. Were we all forced to bet, blind to the details of capital punishment law, on what kind of methodology most of the Justices now use to implement constitutional values in such cases, the smart money certainly would rest on issue-specific balancing. The majority of the Court today consists of self-

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As Aleinikoff explains, balancing can take two forms. The first calls upon the court to determine which of two competing principles is most important and, metaphorically speaking, decide the case in accordance with which way the scales tip. The second form of balancing — and the one on which I am focusing — calls upon the court to strike a balance between competing interests, fashioning a rule that accounts for each interest to the extent of its relative weight. Aleinikoff, supra note 104, at 946-47.
styled moderates or conservatives,\textsuperscript{119} precisely the kind of jurists for whom such balancing ought to have strong appeal. Those who espouse "judicial restraint" in the 1990s \textit{need} the power to strike balances as they go about determining how to implement the Constitution's norms of individual liberty. For even when they relish those principles of liberty and sincerely desire to see them better realized in practice, Justices of this sort nonetheless will blanch at the thought of maximum enforcement. Other values near and dear to their hearts — in particular, those political values that give rise to the structural and institutional postulates of our constitutional order — stand to be sold short by any one-sided, rights-dominant approach to the Court's role in implementing norms.\textsuperscript{120} Considerations of governmental structure and institutional responsibility carry sufficient constitutional weight to require that the Justices accommodate them, to the extent possible within the bounds of principled judgment, in the course of resolving enforcement questions. The task demands a roomier methodology, and a balancing approach fits the bill perfectly. If balancing's appeal holds in the case of the more comfortably settled principles of individual liberty, like those found in the First Amendment,\textsuperscript{121} then it surely prevails in the case of the less firmly rooted, more controversial norms that depend heavily on stare decisis for their constitutional security, like a woman's unenumerated right to control her reproductive affairs.\textsuperscript{122} The pressures that build up in constitutional adjudication must escape somewhere, and flexibility on the enforcement side of the ledger permits them to be vented off with minimum damage to the Constitution's core normative content.

Alluring as a general proposition,\textsuperscript{123} balancing would seem to cut

\textsuperscript{119} I doubt that readers of this article require authority to support this proposition, but those in search of a good general account of the Rehnquist Court's rightward leanings might wish to consult DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992).


\textsuperscript{121} As Aleinikoff details, balancing analyses have spread across the constitutional landscape "like wild clover." Aleinikoff, \textit{supra} note 104, at 963-972 (cataloguing doctrinal areas in which Court has adopted balancing methodology).

\textsuperscript{122} See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2803-33 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.) (accepting the constitutional nature of women's privacy interest with respect to abortion for reasons of stare decisis, but agreeing to enforce that interest only pursuant to a standard of intermediate scrutiny).

\textsuperscript{123} As Kathleen Sullivan has demonstrated, the prominence of balancing is clearly evident in much of the Supreme Court's recent work. Sullivan attributes the unexpected moderation displayed by the Court during the 1991 Term to the adoption of balancing by a newly formed coalition of Justices. Sullivan, \textit{supra} note 118. Sullivan notes that in five key areas — abortion rights, freedom of religion, freedom of speech, takings, and federalism — Reagan and Bush appointees to the Court have "split not only on results but on methods — on the forms that the vast grid of doctrines, tests, and formulas comprising constitutional law should take. They split over
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an especially attractive figure for the Justices in the area of capital punishment. The death penalty is, after all, a predominantly state law phenomenon, administered in different ways by different jurisdictions with different perceived needs and different views on some of the most sharply controverted philosophical and practical issues associated with crime and punishment. It is, indeed, the quintessential exercise of criminal law authority that our system of government has traditionally held to reside foremost with the states. As any student of constitutional criminal procedure should know, the Supreme Court has always been especially mindful of the structural claims of federalism and the institutional ramifications of using federal judicial power when determining its role in bringing the Constitution's norms to bear upon state criminal law. In no other area, moreover, has the Court so consistently turned to balancing — sometimes explicitly, other times less openly — to oblige those concerns in the decisional process. When the Court has implemented constitutional liberties in the realm of state criminal law, measured accommodation at the case-specific or issue-specific level — not strict scrutiny, not maximum enforcement — has been the name of the game.

Although balancing is by no means uncontroversial, there is no doubt that the current Court appreciates its prominence in constituting the choice of rules or standards — over whether to cast legal directives in more or less discretionary form.” Id. at 26. Directly likening this contemporary rift to the one between Justices Black and Frankfurter a generation ago, id., Sullivan concludes that the more flexible balancing approach is prevailing because the center of the Court — Justices O'Connor, Kennedy, and Souter — favors it. Id. at 122-23.


125. In the years before the Warren Court selectively incorporated most provisions of the Bill of Rights into the Due Process Clause, the Court openly balanced these countervailing considerations against the normative implications of a challenged state criminal practice on an issue-specific basis under the rubric of “fundamental fairness.” See, e.g., Francis A. Allen, The Supreme Court, Federalism, and State Systems of Criminal Justice, 8 DePaul L. Rev. 213, 220-21, 252-55 (1959). Ad hoc balancing took a brief hiatus in the 1960s while the Warren Court pursued its selective incorporation agenda. Employing a global balancing approach, the Court concluded that the interests of federalism were not as a general rule sufficiently weighty to militate against categorically extending the chief criminal procedure provisions of the Bill of Rights to the states pursuant to the Due Process Clause. But as soon as selective incorporation was accomplished and attention once again turned to the disposition of concrete cases and the articulation of doctrine, more particularized issue-specific balancing returned. See Jerold H. Israel, Foreword: Selective Incorporation Revisited, 71 Geo. L.J. 253, 325-26 (1982).

126. Balancing certainly has its critics. See, e.g., Aleinikoff, supra note 104, at 972-95; Laure- b B. Frantz, Is the First Amendment Law? — A Reply to Professor Mendelson, 51 Cal. L. Rev. 729, 744-53 (1963); Laure- b B. Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424, 1440-49 (1962); Paul W. Kahn, The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell, 97 Yale L.J. 1, 47-59 (1987). However, even balancing's most determined foes must concede that the methodology has "become widespread, if not dominant, over the last four decades." Aleinikoff, supra note 104, at 943-44.

For a defense of balancing from one of its most noted advocates, see Justice Frankfurter's
tional criminal adjudication over the years and identifies with the concerns that prompt judges to balance. Those considerations can be characterized in varying ways, but they fall naturally into three general categories. First, there are concerns that excessive use of the federal judicial power may undermine the autonomy of the states that federalism envisions. The point is not that the states are "sovereigns" entitled to the respect customarily due to those who hold fundamental political power, although more than a few "state's rights" arguments have been pitched to that mistaken note. In our nation, sovereignty resides firmly with the People. However, strong, independent states — states with healthy governmental and political institutions — can provide the People a more accessible government, the promise of a more participatory political life, and the means to check and influence the use of the national power.

Second, there are concerns that too heavy a federal judicial hand might frustrate the search for better, more enduring solutions to society's problems. As Justice Brandeis eloquently explained some sixty years ago, state experiments can contribute mightily to the resolution of social problems "without risk to the rest of the country" and should therefore not be discouraged lightly. Federal courts, furthermore,


129. See, e.g., 1 Bruce A. Ackerman, We the People: Foundations 216-18 (1991); Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1429-66 (1987).


131. See, e.g., Amar, supra note 129, at 1504-19 (explaining how state institutions can provide remedies against unconstitutional action by federal officials).

132. See, e.g., Rapaczynski, supra note 130, at 386-91 (explaining how groups can organize at the state level in order to attempt to influence policy at the federal level); Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 546-58 (1954) (discussing influence of states on organs of national power).

133. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Brandes' full statement reads as follows:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to
do not hold the patent on wisdom, and their distance from the fray — advantageous for some purposes — can impede their ability to grasp fully the diverse needs, problems, and limitations each state faces.  

Third and lastly, there are concerns that the federal courts may debase their own legitimacy or exhaust their own limited resources. When the federal judiciary wields its power in state criminal cases too casually, it may cross the fine line that separates sound, well-grounded implementation of constitutional values from highly consuming, insufficiently productive, unduly subjective, or needlessly abrasive "judicial activism."  

In the eyes of a believer in judicial restraint, use of the federal judicial power to regulate state capital cases could seriously implicate all three of the foregoing concerns. States that employ the death penalty have made a choice that the Constitution permits and their political processes have mandated. The states cannot pursue their objective in a completely unfettered manner; they must abide by constitutional values as they carry out their policies, and the federal judiciary has an important part to play in ensuring that they do so. But, at some point along the imaginary graph that charts federal judicial involvement — as the Court imposes increasingly rigid constitutional rules upon the states, or heightens federal judicial scrutiny of state criminal prosecutions on direct or collateral review — the structural frictions and institutional frustrations attain critical mass. The states suffer a symbolic blow to their power to govern, their ability to advance perceived needs and their willingness to experiment to that end are both undercut, and the Court — held to blame for these untoward consequences along with the general dissatisfaction its behavior has engendered in the federal system — experiences a diminution in respect and, this theory holds, in its capacity to lead. Jurists schooled in the virtues of judi-
cial restraint — that is to say, most of the Justices now sitting on the Supreme Court — surely will not disregard these possibilities as they seek to implement the Eighth Amendment today. It is entirely reasonable to expect that they would reserve the right to moderate their use of the federal judicial power, employing it when the anticipated benefits seem to justify the costs. 137


Examining the Court’s recent death cases with these background observations in mind, it is difficult to resist the conclusion that balancing has triumphed as the methodology of choice for resolving Eighth Amendment enforcement questions. Why balancing’s victory has not been formally declared — why the Justices strike their accommodations between Eighth Amendment norms and countervailing interests behind closed doors — remains a mystery and a potentially fertile ground for those who like to speculate on the ways of the Court. But the signs of its ascension are there for willing eyes to see.

The Court’s rhetoric is certainly indicative of balancing’s presence. Recent death penalty opinions frequently recognize that there are established Eighth Amendment norms that, due to the death penalty’s unique severity and irrevocability, the Court must protect and enforce through constitutional rules and judicial review. 138 But the discussion rarely stops there. The opinions also express concern and respect for state autonomy, 139 the virtues of state experimentation, 140 and the need to preserve the institutional integrity of the federal courts 141 —

137. Nor, it might be noted, would a Justice have difficulty defending a willingness to accommodate matters of governmental structure and institutional responsibility as consistent with the spirit of Furman. Furman itself may easily be conceptualized as a decision aimed primarily at stimulating state institutions to revisit capital punishment and to assume the responsibility to regulate it more conscientiously. See, e.g., Bilionis, supra note 3, at 331 n.156.


139. The state autonomy theme figures prominently in cases dealing with the scope of federal habeas review in death cases, and the Court’s habeas reforms admitted are inspired by a felt need to accommodate the concerns of federalism. See, e.g., McCleskey v. Zant, 111 S. Ct. 1454, 1469 (1991) (deploying the federal judicial power to review collaterally the final judgments of state courts “frustrate[s] . . . ‘both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.’ . . . Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.”) (citations omitted). The desire to preserve state autonomy also surfaces, however, in opinions directly concerned with the proper interpretation of the Eighth Amendment. See, e.g., Walton v. Arizona, 497 U.S. 639, 652-56 (1990); Boyd v. California, 494 U.S. 370, 377 (1990).


141. E.g., Graham v. Collins, 113 S. Ct. 892, 914-15 (1993) (Thomas, J., concurring); Booth
precisely those restraining structural and institutional values that the Court dwells upon when it employs a balancing methodology, and whose relevance to the constitutional analysis is otherwise hard to fathom. With all of balancing's requisite ingredients so neatly laid out on the countertop, it is a fair inference that the Court is following the recipe.

Some opinions, moreover, smack so heavily of balancing as to defy explanation on any other methodological ground. Justice O'Connor's remarkable concurrence in *Thompson v. Oklahoma*\(^\text{142}\) springs immediately to mind, as does Justice Kennedy's cautious opinion concurring in the judgment in *Murray v. Giarratano*.\(^\text{143}\) But the most vivid example is Chief Justice Rehnquist's opinion for the Court in *Payne v. Tennessee*.\(^\text{144}\) At issue was the prohibition against victim-impact evidence in capital sentencing proceedings established in *Booth v. Maryland*.\(^\text{145}\) Defending *Booth*, the condemned inmate stressed how its exclusionary rule helps ensure that sentencers remain focused upon the individual

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\(^{142}\) 487 U.S. 815, 848-59 (1988) (O'Connor, J., concurring in judgment). The case concerned the constitutionality of the death penalty for juveniles under the age of 16. Justice O'Connor conceded that the case for holding the penalty unconstitutionally disproportionate in such cases — in other words, banning the penalty in such cases on a per se basis — had its strengths. Preferring not to substitute the Court's "inevitably subjective judgment . . . for the judgments of the Nation's legislatures" on the question, however, Justice O'Connor sought an intermediate point of accommodation between the interests of the juvenile and the interests of federalism. *See 487 U.S. at 854*. She would not ascribe to the state legislature an intention to make juveniles under the age of 16 eligible for the death penalty and therefore would not reach the ultimate constitutional question, in the absence of clear evidence that the legislature forthrightly confronted the issue and explicitly opted in favor of eligibility. Her resolution was admittedly "unusual," but commendable because it protects the defendant's Eighth Amendment interests, *487 U.S. at 858 n.*, at the same time that it "allows the ultimate moral issue at stake in the constitutional question to be addressed in the first instance by those best suited to do so, the people's elected representatives." *487 U.S. at 858-59*.

\(^{143}\) 492 U.S. 1, 14-15 (1989) (Kennedy, J., joined by O'Connor, J., concurring in judgment). The case raised the question whether death row inmates are constitutionally entitled to the appointment of counsel to assist them in pursuing collateral review in state or federal court. Justice Kennedy acknowledged the constitutional nature of the inmates' interest, pointing to the importance of collateral review for prisoners sentenced to death and their dependence upon legal assistance to meaningfully utilize the procedures made available. Like Justice O'Connor in *Thompson*, Justice Kennedy sought an intermediate point between full enforcement and no enforcement at all, a resolution that would accommodate institutional and structural interests while affording some protection for the inmates' constitutional interest. He accomplished that by carefully linking his concurrence in the judgment to the fact that the Virginia death row inmates involved in fact were receiving legal assistance from various sources. *492 U.S. at 14-15*.


circumstances of the offense and the characteristics of the offender, rather than upon potentially invidious considerations relating to the victim’s race or station in society. 146 Interestingly, the Chief Justice did not deny that Booth aimed to advance legitimate Eighth Amendment values by promoting capital sentencing’s moral appropriateness and its rational orderliness. Booth’s salient shortcoming, according to the Chief Justice, was its unaccommodating rigidity. In its zeal to enforce Eighth Amendment norms, Booth took the risks associated with victim-impact evidence too seriously 147 and the states’ interest in using such evidence too lightly. The harm done by an offender often figures prominently in sentencing policy, and states might reasonably believe that for a capital sentencer “to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.” 148 A proper respect for federalism principles, the Chief Justice insisted, requires that the Court afford the states some latitude to experiment in the area:

Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States. The state laws respecting crimes, punishments, and criminal procedure are of course subject to the overriding provisions of the United States Constitution. Where the State imposes the death penalty for a particular crime, we have held that the Eighth Amendment imposes special limitations upon that process. . . . But, as we noted in California v. Ramos, “[b]eyond these limitations . . . the Court has deferred to the State’s choice of substantive factors relevant to the penalty determination.”

“Within the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder should be punished.” Blystone v. Pennsylvania. The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. 149

Booth’s per se bar against victim-impact evidence simply struck an un-

146. Payne, 111 S. Ct. at 2607.

147. The Chief Justice went to great pains to argue that the risk that victim-impact evidence might distract the sentencer from its constitutional mission is more apparent than real. Payne, 111 S. Ct. at 2607.

148. 111 S. Ct. at 2608. The Chief Justice’s opinion in Payne made nothing of the fact that Booth struck a controversial symbolic blow to the “victim rights” reform movement, though the fact surely crossed the Court’s mind. See Payne, 111 S. Ct. at 2613 (Scalia, J., concurring) (noting that Booth’s holding “conflicts with a public sense of justice keen enough that it has found voice in a nationwide ‘victim’s rights’ movement”); see also Booth, 482 U.S. at 520 (Scalia, J., dissenting) (noting the same).

acceptable balance for the Court. The Court held a capital defendant’s constitutional interests would be protected by a less intrusive, more flexible case-by-case review.\textsuperscript{150}

More broadly, balancing reveals itself in the shape of the Court’s capital jurisprudence as a whole. No other constitutional methodology so cleanly and convincingly explains and reconciles the seemingly divergent strains of current death penalty law that have led the most studious observers to wonder whether there is rhyme or reason to the Court’s efforts.

When capital defendants have won in the High Court — as noted earlier, they have secured some important victories in recent years\textsuperscript{151} — they have asked for no more than what a reasoned and principled balancing of the interests would deem just and right. Reflecting upon those cases reveals that three conditions invariably have been present:

1. The Court identified an appreciable risk that at least one of the Eighth Amendment’s central norms was not being realized in practice;
2. The Court could eliminate or minimize the risk by imposing a constitutional rule upon the states or by authorizing the exercise of federal jurisdiction to scrutinize the work of the state; and
3. The Court had little reason to fear that its effort to eliminate or minimize the risk would do real violence to the structural and institutional values that generally counsel restraint.\textsuperscript{152}

\textsuperscript{150} “In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.” \textit{Payne}, 111 S. Ct. at 2608.

It is doubtless true that the Due Process Clause could guard against the evils associated with victim-impact evidence, and capital defendants are justified in reading \textit{Payne} as a promise the Court has made and must keep. But do not fault those who have represented capital defendants if they regard this portion of the \textit{Payne} opinion with skepticism. They have seen firsthand how much havoc to Eighth Amendment values can be wrought without violating the Due Process Clause’s sense of “fundamental fairness.” \textit{See} \textit{Darden} v. Wainwright, 477 U.S. 168, 178-87 (1986); \textit{Darden}, 477 U.S. at 188-206 (Blackmun, J., dissenting).


\textsuperscript{152} The decision in \textit{Morgan} v. Illinois, 112 S. Ct. 2222 (1992), provides the clearest illustration. The Court there held that capital defendants are constitutionally entitled to a particularized voir dire of prospective jurors to facilitate their right to remove for cause any “juror who will automatically vote for the death penalty [and thus] will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require.” \textit{Morgan}, 112 S. Ct. at 2229. The ruling has obvious importance for the protection of a defendant’s Eighth Amendment interest in obtaining a meaningful individualized determination of the morally appropriate sentence. Moreover, and as the Court recognized, the states are hardly in a position to lament the ruling as substantially burdensome. After all, the states already provide extensive jury voir dire \textit{for the prosecution’s benefit} to root out those jurors whose opposition to the death penalty makes them excludable for cause under Witherspoon v. Illinois, 391 U.S. 510 (1968), and Wainwright v. Witt, 469 U.S. 412 (1985). \textit{Morgan}, 112 S. Ct. at 2232-33.
It is hardly surprising that the cases in which capital defendants have succeeded fit this description. When these three conditions exist, even card-carrying members of the judicial restraint school would agree that the balance favors judicial action. The case for restraint comes nowhere close to outweighing the case for enforcing Eighth Amendment values.

When the states have prevailed, the more frequent result these days, the conditions — as perceived by the Justices, at least — have been quite different. A survey of those decisions reveals that they meet one of the following descriptions:

1. The defendant asked for a constitutional rule to govern the capital trial that the Court regarded as stricter than necessary to protect the defendant's Eighth Amendment interests and unduly restrictive of the states' power to fashion their own procedures and to respond to local needs; 154 or
2. The defendant asked that a feature of the state's capital sentencing system be tested not facially, and not as applied to him, but as applied in the run of cases — an approach objectionable to the states because it renders them helpless to structure a system that they know with certainty will pass muster and because it places the federal judiciary in an especially scrutinizing oversight role; 155 or
3. The state asked for flexibility in dealing with constitutional errors in capital sentencing, seeking permission to employ, at its option, a technique to remedy prejudicial errors (appellate reweighing) or to excuse inconsequential ones (harmless error analysis); either of these techniques, when conscientiously applied, might in theory respect an accused's substantial constitutional interests while preserving state resources; 156 or
4. The defendant asked the Court to authorize the use of federal habeas corpus jurisdiction to review a question already reached and resolved by the state courts in good faith on state or federal grounds or on a fairly supported determination of the facts then presented; 157 or
5. The defendant asked the Court to authorize the use of habeas to review a death sentence more than once. 158

Small wonder that death row's disappointments in the Supreme Court

156. Clemons v. Mississippi, 494 U.S. 738 (1990); see also Walton, 497 U.S. at 652-56.
conform to this pattern, for it is the result one would expect from moderate and conservative jurists who measure their role in capital punishment by balancing the competing interests at stake. In each instance, the structural and institutional costs of a ruling for the defendant can easily be accented enough to cause a judicial restraint sympathizer to pause. And in each instance, the marginal contribution that a ruling for the defendant might make to the realization of Eighth Amendment values can be depreciated enough to permit that same Justice to find against the defendant without suffering sharp pangs of guilt. After all, the Justice can reason, in none of the foregoing situations would a ruling for the state leave capital defendants bereft of a federally mandated safeguard designed to protect, at least in part, the constitutional interests at stake, nor would a ruling for the state permit any defendant to complain that he was never afforded an opportunity to seek the benefit of that safeguard. The issue in these cases is whether capital defendants should receive more protective rules and broader opportunities to call upon those rules. Granting them these benefits might concededly enhance the death penalty’s legitimacy — but not appreciably enough, in the estimation of a moderate or conservative Justice, to justify the sacrifice of federalism values and the expenditure of federal judicial capital that such a step would entail.

Finally, balancing permits us to unravel, as no other methodology can, the riddles many observers find latent in the Court’s capital jurisprudence. Why is it that the Court extols the Eighth Amendment’s normative vision on one day, going so far as to dismiss criticism of that vision as “jaundiced,” yet seems reticent to fulfill that vision on another day? Why do some shortcomings in capital sentencing inspire elaborate regulatory responses from the Court when even more troubling examples of illegitimacy elicit nothing more than a shrug of the

159. This point would not be true when the only safeguard available for the defendant is one that did not exist until the defendant’s conviction and sentence were final, and where neither the state nor federal courts are willing to apply the safeguard retroactively and excuse the defendant’s failure to have sought and obtained recognition of the safeguard earlier. Query whether the Court would readily admit that one of its “new rules” lacked an antecedent upon which earlier defendants could have relied for some protection against the evil at issue — such as the Due Process Clause’s ever-existing guarantee of “fundamental fairness.” Cf. Payne v. Tennessee, 111 S. Ct. 2597, 2608 (1991) (suggesting that the protection which had been afforded by Booth v. Maryland, 482 U.S. 496 (1987), merely amplified preexisting due process protections); Sawyer v. Smith, 497 U.S. 227, 236 (1990) (suggesting that the protection afforded by Caldwell v. Mississippi, 472 U.S. 320 (1985), augments preexisting due process protections). Query, too, whether a truly new constitutional rule relating to capital sentencing, lacking any less-protective antecedent whatsoever, could fail to qualify as a novel claim for which procedural defaults may be excused under Reed v. Ross, 468 U.S. 1 (1984), and as a rule calling for retroactive application under one of the exceptions recognized by Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion).

Court's shoulders? Why, in short, is death penalty law in the Court so tentative, so contingent?

The answer is obvious once we appreciate balancing's role in capital cases. Simply put, the Court is striving to promote competing objectives. The Justices who now make up the Court recognize the Eighth Amendment's well-grounded values and, all things being equal, stand willing to contribute to their better realization and thereby make capital punishment more legitimate in practice. But the Justices in the current majority also place great weight on the structural and institutional values embodied in the Constitution — much more weight than jurists like Brennan or Marshall might assign such immediately impersonal considerations but, in fairness, maybe no more than jurists like Frankfurter or Harlan would. They want to reduce the presence of the federal judiciary in what are fundamentally state cases of intensely state concern, and thus they expect to reap the perceived benefits of judicial restraint: rekindled respect for state self-governance, renewed confidence in state institutions, rejuvenation of the role of the states in the federal system, and conservation of limited federal judicial resources.

Not even the most inventive Court could fully accomplish these objectives simultaneously. Accommodations have to be made, bal-


163. If not, they by now would have abandoned any pretense of regulation or, lacking the courage to do that, at least would have found ways to rule differently in cases like Morgan, 112 S. Ct. at 2228-35; Sochor, 112 S. Ct. at 2119-23; Stringer, 112 S. Ct. at 1134-40; and Parker, 111 S. Ct. at 735-40.

prises must be struck. The resulting jurisprudence will inevitably partake of tentativeness and contingency. In some circumstances, the Court will underenforce Eighth Amendment norms because structural or institutional values dominate at the margin, whereas, in other instances, the contrary will be the case. The rules that emerge from these situation-specific balancings will not assure capital punishment's legitimacy because they were never formulated with that single-minded intention. What they express — and all that they express — is the role the Court is willing to play in promoting Eighth Amendment norms, a role encumbered and restrained by competing objectives.

Brennan and Marshall's *Furman*, if it ever lived outside the hopes and dreams of capital punishment's confirmed critics, has for the time being lost out to a different conception of the Court's role in legitimating the death penalty. The Eighth Amendment itself lives on, its norms still vital and still claiming the Court's attention. But that attention is divided, the federal judicial commitment tempered in deference to other values. Some will say this is what *Furman* called for all along; others will swear by Brennan and Marshall's interpretation. In a very real sense, both views are right and wrong — right because each is consistent with *Furman* and its 1976 progeny, and wrong because neither view triumphed over the other in those cases. The decisions, it should be remembered, were rendered by a divided Court that did not settle upon a single vision in a single opinion.166

What the *Furman* project meant at its genesis will never be resolved. What it means for the Court's current majority is balancing.

### III. Balancing's Implications: Implementing Constitutional Values at the State Level

Readers who are familiar with the scholarship and commentary surrounding capital punishment jurisprudence should appreciate the descriptive significance of the framework outlined above. As noted earlier, the journals regularly carry pieces excoriating the Court's decisions — particularly those which reject the claims of a death row inmate — and ruminating about the apparent demise of the Eighth Amendment. They frequently feature creative projects — many of which are quite good — that seek to locate death penalty law within a

165. Those wishing to make that case might begin by pointing to the fact that during the formative post-*Furman* years, Justice Lewis Powell's pivotal swing vote often dictated the result in death cases and therefore shaped the course of the law. As Paul Kahn has demonstrated, balancing dominated Justice Powell's jurisprudence. Kahn, *supra* note 126.

166. See, e.g., Weisberg, *supra* note 5, at 315-17 (describing *Furman* as "a badly orchestrated opera, with nine characters taking turns to offer their own arias").
particular philosophical tradition or to advance some rights-oriented theorization about what the Eighth Amendment should, but does not now, mean. A few projects even demonstrate that the Court’s own doctrines establish the death penalty’s unconstitutionality,\textsuperscript{167} a proposition I am supremely confident the Justices neither intended nor will seriously entertain anytime soon. Strange as it might seem, however, it is a novel step, out of keeping with the run of death penalty scholarship, to suggest that an intelligible and constitutionally respectable methodology actually underlies the Court’s Eighth Amendment jurisprudence.

As it is, the ideas developed above also have important implications for how we should discuss and resolve capital punishment issues in the future. By understanding capital punishment jurisprudence in balancing terms, we can begin to bring into proper focus the roles which state constitutional law, judge-made interstitial law, and gubernatorial clemency should play in the administration of the death penalty today. These alternative sources of regulatory authority have a vital constitutional mission to perform in the realization of Eighth Amendment norms and the legitimation of capital punishment under \textit{Furman}.

\textbf{A. Critical Independent Assessments Under the State Constitution}

Much has been written about the renaissance of state constitutional law,\textsuperscript{168} and lawyers everywhere now comprehend that the states are free to interpret their own constitutions to grant more rights and

\textsuperscript{167} See, e.g., Sundby, supra note 18, at 1174-75 (“The death penalty would be invalid not because it is \textit{per se} cruel and unusual, but because it cannot be procedurally implemented in a constitutional fashion.”); Steiker & Steiker, supra note 18, at 868 (“\textit{Furman}’s failure to fulfill its promise of principled, nonarbitrary decisionmaking renders the death penalty unconstitutional”). Insofar as these arguments stress the inevitable unpredictability of death sentencing judgments produced by a discretionary process, they are reminiscent of the classic case against capital punishment spelled out by Charles Black. See \textit{Charles L. Black, Jr., Capital Punishment: The Inevitability of Caprice and Mistake} (1974).

protections to individuals charged with crimes than the federal Constitution requires. Getting a state court to act with constitutional independence in a capital case is not, however, an easy feat to accomplish. On the one hand, there are craft-related obstacles. Rarely will the language used in the relevant state constitutional texts differ from the Eighth Amendment in ways material enough to invite, let alone compel, a fundamentally different interpretation; most state provisions simply prohibit, as does the Eighth Amendment, the imposition of "cruel and unusual punishments." Nor is there likely to be much precedent directly construing the state constitution that might bring a meaning to that text that is substantially broader than the federal. On the other hand, entrenched attitudes also conspire to retard the development of a state constitutional capital jurisprudence. State judges are not by predisposition a leftward leaning lot eager to bestow new rights upon murderers, and, in states where the judiciary is elected, some portion of the bench is apt to consider it a questionable career move to support more protections for killers than the U.S. Supreme Court says

169. E.g., GA. Const. art. I, § 1, para. 17; TENN. Const. art. I, § 16; UTAH Const. art. I, § 9; see also Acker & Walsh, supra note 168, at 1321 & n.112 (detailing 15 states whose provisions against cruel and unusual punishment are "virtually identical" to the Eighth Amendment). Some state clauses, unlike the federal provision, ban cruel or unusual punishments. See, e.g., N.C. Const. art. I, § 27. This textual distinction could prove important if the Supreme Court ever follows Justice Scalia's lead and attaches controlling significance to the Eighth Amendment's use of the conjunctive "and." See Walton v. Arizona, 497 U.S. 639, 656 (1990) (Scalia, J., concurring in part and concurring in judgment) (stressing that punishment must be both cruel and unusual before it may be held to violate the Eighth Amendment); Medley v. North Carolina Dept. of Correction, 412 S.E.2d 654, 660 (N.C. 1992) (Martin, J., concurring) (suggesting that state prohibition against "cruel or unusual punishments" is more protective than the Eighth Amendment because the former employs the disjunctive whereas the latter employs the conjunctive); Harry C. Martin, The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge, 70 N.C. L. Rev. 1749, 1755-56 (1992) (same).

170. Do not let the excitement surrounding state constitutional law's revival lead you to believe otherwise. Insofar as criminal procedure is concerned, the revival is a much less liberal phenomenon than either its proponents or its critics would care to admit. Some so-called "breakthroughs" at the state level are distinctly preservationist in nature, recognizing under the state charter protections that were just recently removed from the federal catalogue. See, e.g., State v. Carter, 370 S.E.2d 553 (N.C. 1988) (preserving exclusionary rule intact on state constitutional grounds; rejecting new federal good-faith exception of United States v. Leon, 468 U.S. 897 (1984)). Many of the remaining state constitutional cases of note involve claims of right that are near misses under the Federal Constitution, involving only modest differences of opinion over the full doctrinal reach of an uncontroversial principle. See, e.g., State v. Oquendo, 613 A.2d 1300, 1307-11 (Conn. 1992) (defining seizure broadly for state constitutional purposes; rejecting California v. Hodari D., 111 S. Ct. 1547 (1991)); State v. Stoddard, 537 A.2d 446 (Conn. 1988) (granting broader protection to an arrestee's interest in the assistance of counsel in interrogation; rejecting Moran v. Burbine, 475 U.S. 412 (1986)); State v. Quino, 840 P.2d 358 (Hawaii 1992) (reaching same conclusion as Oquendo court); Commonwealth v. Hess, 617 A.2d 307, 311-15 (Pa. 1992) (granting broader protection to defendant's interest in securing counsel of choice; rejecting Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989)). For a general discussion of the conservatism in state constitutional law, see Barry Latzer, The Hidden Conservatism of the State Court "Revolution," 74 JUDICATURE 190 (1991).
they have "a right to." In addition to these realistic if fairly crass considerations, there also exists a deeply ingrained tendency on the part of state jurists to regard the Supreme Court as the definitive expositor of all things constitutional. Given the sweeping, intricate web of death penalty law already woven by the Justices in Washington, state judges — mere mortal souls that they are — have trouble imagining there might be anything of constitutional magnitude remaining for them to contribute.

State jurists who think in this manner have surely overestimated the Supreme Court's capital jurisprudence. If the foregoing examination of balancing's role in capital cases makes nothing else clear, it demonstrates that the Supreme Court's death penalty jurisprudence leaves a potentially large constitutional void unfilled. Precisely because the Court balances, the rules it lays down do not coextend with the Eighth Amendment's normative content, do not exhaust the potential of those constitutional values, and do not ensure a normatively legitimate system of capital punishment. As Lawrence Sager would put it, "what the members of the federal tribunal have actually determined is that there are good reasons for stopping short of exhausting the content of the constitutional concept with which they are dealing," leaving in the process an "unenforced margin[ ] of underenforced norms." This constitutional vacuum exists in the death penalty area solely because the Supreme Court finds its own ability to implement constitutional norms constrained by institutional and structural limitations. The problem is the Court's grasp, not the reach of the underlying norms.

Therein lies the key to unleashing the potential of state constitutional law. Nature abhors a vacuum, and so too, in its own way, does our national constitutional environment. State constitutions are a


173. See generally Gardner, supra note 168, at 805-06.

174. Sager, supra note 96, at 1221; see also Paul Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 STAN. L. REV. 585, 589 (1975) ("Decisions not striking down laws do not always mean that the laws are constitutional, however, for a court's failure to invalidate may only reflect its institutional limitations.").
force that can fill the void, adding a measure of enforcement to constitutional norms that the Supreme Court, because of its own limitations, cannot itself provide. Thus conceived, state constitutional law is not a liberal activist’s ploy to evade the Supreme Court’s Eighth Amendment doctrine,175 but in fact an integral means to complement the federal law.

The norms that the Supreme Court uses to address capital punishment’s fundamental legitimacy are not exclusive to the federal Constitution. The principles of moral appropriateness, rational orderliness, and procedural fairness resonate as convincingly within the boundaries of a state as they do throughout the nation at large and thus can act as norms of state constitutional law that the state judiciary is obligated to enforce. In implementing these norms, a state court might well reserve the same right to balance that the U.S. Supreme Court reserves for itself, accommodating whatever relevant concerns might weigh against the fullest enforcement of the values in question. The important point, however, is that a state court will have to balance for itself because the concerns that are relevant to the exercise of state judicial power are not the same as those which are germane to federal action. Federal and state courts are different institutions differently positioned, facing different claims on the exercise of their powers and different restraining influences. The costs associated with the use of federal judicial power are one matter; the costs of using state judicial power to the same end can be quite another. It makes no sense, indeed it is unprincipled and irrational, for a state court uncritically to adopt as its own a balance struck by the U.S. Supreme Court. Depending on the circumstances, it is certainly possible for the federal balance and the state balance to tilt in the same direction. But this possibility cannot be confirmed until the state court balances the relevant considerations independently with intelligent awareness of the various differences.176

175. Some commentators have derided expansive state constitutional interpretations as result-oriented efforts to countermand conservative federal constitutional rulings by the U.S. Supreme Court. See, e.g., George Deukmejian & Clifford K. Thompson, Jr., All Sail and No Anchor—Judicial Review Under the California Constitution, 6 HASTINGS CONST. L.Q. 975, 987 (1979); Donald E. Wilkes, Jr., More on the New Federalism in Criminal Procedure, 63 KY. L.J. 873, 873, 894 (1975); Donald E. Wilkes, Jr., The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court, 62 KY. L.J. 421, 434 (1974).

176. Because Eighth Amendment normative concepts may easily be recognized in state constitutions as well, there is no need to argue here for state court authority to heighten the enforcement of those norms in the name of the federal Constitution. Some have contended that state courts have such authority generally. See Sager, supra note 96, at 1242-50; Robert C. Welsh, Whose Federalism?—The Burger Court’s Treatment of State Civil Liberties Judgments, 10 HASTINGS CONST. L.Q. 819, 862-68 (1983). The Supreme Court has suggested otherwise, see Oregon v. Hass, 420 U.S. 714, 719 (1975) ("[A] State may not impose . . . greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them"), with
To illustrate, imagine a jurist grappling with the application of capital punishment to mentally retarded offenders. Suppose, further, that study has led the judge to recognize that cases exist in which the severity of the offender’s handicap render the death penalty an excessive and hence morally inappropriate punishment. What rule should the judge announce to implement the constitutional principle of moral appropriateness in these situations? One viable possibility would be to draw a line that categorically immunizes from the death penalty those offenders for whom it would most likely be excessive. But what are the costs of using judicial power in that way? The answer depends on where this hypothetical judge sits.

If the President appointed this judge to the Supreme Court, the proposed ruling’s impact on federalism values and on the federal judiciary’s effectiveness would weigh in her balancing. This Justice might note that state legislatures and courts have not wholly ignored the mentally retarded offender’s claim to constitutional protection; indeed, most states deal with the problem by having their capital sentencers consider the offender’s mental retardation as a mitigating circumstance entitled to some, but not legally dispositive, weight in an overall sentencing calculus. Supplanting those state judgments in favor of broader protection might be desirable, but inevitably would come at a price. Distanced from those state determinations, the Supreme Court Justice usually cannot know how much, if any, reflection and deliberation went into them. Federalism protocol thus prescribest — until some contrary reason surfaces — that the Court treat expressions of state policy as the products of reasoned, good faith efforts to harmonize local wants with respect for constitutional principles. When the Court overrides these dignified-by-hypothesis efforts, the authority of state institutions receives a direct hit, their enthusiasm for experimentation wanes, and the Court’s own reservoir of good will dips. Moreover, these consequences are magnified if the Court’s preferred rule is, as bright-line formulations sometimes are, open to easy criticism as inappropriately legislative in nature. How strongly these considerations figure in the final balance need not be of concern now.

understandable though debatable reasons. See Tribe, supra note 96, § 3-4, at 40-41 (essaying to explain why “Hass rule serves on balance to advance rather than retard responsible constitutional decisionmaking”).


178. For an example of contrary reasons surfacesing, consider Justice O’Connor’s opinion in Thompson v. Oklahoma, 487 U.S. 815, 848-59 (1988) (O’Connor, J., concurring in judgment) (refusing to presume, in the absence of explicit statutory statement, that state legislature purposely intended to make juveniles under the age of 16 eligible for capital punishment).

179. See, e.g., Alschuler, supra note 47, at 241-42; Joseph D. Grano, Prophylactic Rules in
although readers familiar with *Penry v. Lynaugh*\(^{180}\) know the decisive weight that the Supreme Court assigned to them. For our purposes, it is enough to identify them.\(^{181}\)

If the judge presides on the state supreme court and undertakes to evaluate the wisdom of the same rule under the state constitution, the countervailing considerations should look different for reasons entirely associated with the jurisdictional change. First and most obviously, any adverse institutional ramifications of granting greater protection to the mentally retarded offender are bound to be fewer in number and less daunting in magnitude simply because they will be confined to a single jurisdiction. State courts work in a relatively closed microcosm; rarely, and even then only if they really exert themselves, can they make state constitutional capital punishment law that does any appreciable violence to another state's institutions or impedes another state's freedom to experiment and meet local needs.\(^{182}\) Second, the court's close proximity to the affected system will allow it to give the potential institutional costs a finer appraisal and more accurate accounting. Unlike the Supreme Court, which must generalize across the nation, state judges enjoy an intimate familiarity with how policy and law are formulated at the state level, since they help produce the tapestry of constitutional, legislative, and judge-made law that constitutes the state's *corpus juris*. They know firsthand the roles of the various institutions of state government, their strengths and weaknesses, and the legal and customary relationships between them. State judges understand better than most the structure and operation of the state's criminal justice system. They need not indulge in speculative assumptions about the climate that produced the state's modern capital punishment enactments and the judicial constructions that have been placed upon them.

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*Criminal Procedure: A Question of Article III Legitimacy, 80 NW. U. L. REV. 100, 123-56 (1985).*

180. 492 U.S. 302 (1989) (refusing to hold the death penalty categorically unconstitutional as applied to the mentally retarded).

181. Until Teague v. Lane, 489 U.S. 288 (1989), the federal accounting might also have included the potential costs associated with upending final judgments that failed to comport with the more protective constitutional rule. As constitutional litigators know, a judge's fear of "making any rulings that . . . may open the door to 'general gaol delivery' " can operate as a disincentive to the making of new law or the extension (or even the forthright application) of old law. Anthony G. Amsterdam, *Foreword*, in 1 JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE i, v-ix (1988). Conversely, a stingy approach to retroactivity "avoid[s] the problem of the jail delivery" and thus eliminates or reduces "one of the traditional inhibitions associated with the exercise of judicial power." Allen, *supra* note 135, at 530.

182. For an example, see Johnson v. Mississippi, 486 U.S. 578 (1988) (holding that Mississippi Supreme Court violated the Eighth Amendment when it let stand a death sentence based in part upon a prior conviction in New York that had been vacated by the New York Court of Appeals).
How might this positional advantage affect the judge's determination in the case of the mentally retarded offender? Depending upon the state in question, she might conclude that a more protective state constitutional rule would not impinge upon institutional prerogatives or principles of democratic self-governance in the way that a generalized conjecture might lead her to fear.

A close look might reveal, first, that the local practice of treating mental retardation as a mitigating circumstance in the sentencing decision does not represent a considered societal judgment against broader protection. Perhaps the practice originated in the post-Furman rush to get some capital sentencing law on the books that stood a chance of winning the Supreme Court's approval, or maybe it simply came about as a defensive reaction to Lockett v. Ohio's dictate that all mitigating factors at the very least be put to the sentencer for its consideration.¹⁸³ In either case, there is a substantial likelihood that neither the People nor any of their state institutions actually rejected greater protection for the mentally retarded offender's constitutional interest as an inordinate sacrifice of other state interests. Implementing the more protective rule, accordingly, would not signify a direct challenge to another department's judgment.

A decision to promulgate the more protective rule would curtail the legislature's freedom to respond differently to the problem in days to come. Rulings of genuinely constitutional dimension generally have that effect,¹⁸⁴ but further inquiry by the state court could reveal good reasons for discounting its seriousness in this case. State laws, policies, traditions, and practices, for instance, may demonstrate an ambivalence about using the death penalty in the case of mentally retarded offenders that belies any claim that significant countervailing interests need debate in the political arena.¹⁸⁵ The treatment of the mentally retarded in other contexts within and beyond the criminal justice system might fortify that conclusion. Furthermore, local sources also might provide a vocabulary the court could use in articulating the new, more protective state constitutional rule, ensuring a smoother in-


¹⁸⁵. A local inquiry possibly might reveal that prosecutors refrain from pursuing the death penalty against mentally retarded offenders, or that local juries tend to favor imposing life sentences upon mentally retarded offenders even in severely aggravated cases. Similar evidence of a national nature has been deemed relevant to the disposition of questions under the Eighth Amendment. See, e.g., Stanford v. Kentucky, 492 U.S. 361, 373-74 (1989); Penry v. Lynaugh, 492 U.S. 302, 334 (1989).
integration of the rule into existing practice and blunting any charge that the court's standard lacks an acceptable foundation.

When considerations like the foregoing are present, they can swing the balance decisively in favor of broader judicial enforcement of the constitutional norm. So it was in Fleming v. Zant, a Georgia Supreme Court decision forbidding the death penalty for mentally retarded offenders under the state constitution. True, the case was especially easy because Georgia's legislature had recently passed a statute prospectively immunizing the mentally retarded from capital punishment. A different state court facing different local conditions should not follow Fleming uncritically, for the question might be considerably closer in its own jurisdiction. But, for the very same reason, it would be a mistake for that court to accept uncritically the balance struck by the U.S. Supreme Court in Penry. Independent judgment is necessary, and independent judgment is where state constitutional law begins.

There are signs that state court judges have started to think in these terms in death cases. In a textbook example of critical independent assessment, the Louisiana Supreme Court held in State v. Perry that the state constitutional prohibition against cruel, excessive, or unusual punishment forbids the practice of forcibly medicating a defendant in order to make him sane enough to be executed. Pivotal to the case was the court's candid recognition that it need not, as a state court adjudicating under the state constitution, indulge in the kind of deferential assumptions that federalism principles might require if the case arose under the federal Constitution. From that premise, the court confidently concluded that the practice in question would infringe upon a "well-established norm," the moral prohibition against execution of a prisoner who has lost his sanity, and that the practice would do so without a hint of justification founded upon local consensus or legislative pronouncement. Of similar import is the Colorado Supreme Court's decision in People v. Young. There, the court relied upon its appreciation of the facts of local institutional life — to wit, a trial level sentencer's superiority over the legislature when it comes to rendering judgments about the moral correctness of the

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186. 386 S.E.2d 339 (Ga. 1989).
187. GA. CODE ANN. § 17-7-131 (Supp. 1991). The constitutional question arose because the legislature made specific its intent that the law apply only prospectively, and not retroactively, to defendants like Fleming who were already awaiting execution.
188. 610 So. 2d 746 (La. 1992).
189. 610 So. 2d at 749-50.
death penalty in specific factual settings — to invalidate legislation that required imposition of the death penalty upon a jury finding that aggravating and mitigating circumstances balance equally. Critical independent assessments have also been undertaken, with expectedly mixed results, in Tennessee, Indiana, New Jersey, and North Carolina.

I suspect that some hard-core death penalty supporters take a dim view of these developments, but believers in federalism should be pleased. The federal system is at its best when the states understand their independent obligation to heed and promote constitutional values. No governmental institution — federal or state; executive, legislative, or judicial — can single-handedly ensure the full realization of constitutional values. The task requires tremendous power, much more than the American people have been willing to entrust in any single governmental body. That power has been diffused vertically and horizontally throughout the federal system to guard against its abuse — but not to prevent it from effectuating constitutional norms. When a state court grasps these basics and uses its power to supplement the enforcement of fundamental values pursuant to the state constitution, listen carefully to the objections and consider the source.

B. The Law Beneath the State Constitution

At times, a state court's critical independent assessment will suggest the possibility of greater enforcement of a capital punishment


192. State v. Middlebrooks, 840 S.W.2d 317, 341-47 (Tenn. 1992) (holding that the use of an underlying felony as aggravating circumstance in a case of felony murder fails to narrow adequately the class of defendants eligible for the death penalty, and thus fails under state and federal constitutions), cert. granted, 113 S. Ct. 1840 (1993); State v. Black, 815 S.W.2d 166, 193-97 (Tenn. 1991) (invalidating "especially heinous" aggravating circumstance under the state constitution for failure to channel adequately sentencer's discretion).

193. Cooper v. State, 540 N.E.2d 1216, 1218-20 (Ind. 1989) (invalidating on state constitutional grounds application of death penalty to person who was 15 years of age at time of offense).


norm than the Supreme Court has mandated, but not so convincingly as to justify carving a more protective rule in state constitutional stone. However, that realization hardly ends the analysis. The state court is not limited to implementing fundamental values through hard-and-fast constitutional rules that only judicial reconsideration or constitutional amendment can change.¹⁹⁷

To the contrary. Anyone familiar with capital punishment as practiced knows that the lion's share of state death penalty law is not only judge made, but subconstitutional in nature. State capital punishment statutes may not be as open-ended as, say, the Rules Enabling Act,¹⁹⁸ but they surely leave countless important and recurrent issues unresolved. Some of those issues no doubt were unanticipated, whereas others probably were left to the courts for later resolution informed by experience with the statute in operation.¹⁹⁹ In either case, courts routinely plug the statutory gaps by drawing upon their power to construe legislation, to fashion common law, and to supervise adjudication.

A state court's broad powers to make interstitial law obviously can be used to supplement the protection of constitutional capital punishment norms which have been underenforced by the federal judiciary. Indeed, critics of capital punishment — concededly disgruntled with developments in the federal courts — have begun to press the point enthusiastically, proposing ways that state courts might augment the protections they afford capital defendants and compensate for the cutbacks in federal judicial scrutiny.²⁰⁰ As to all such proposals, how-

¹⁹⁷. Before passing the point, it merits observation that state constitutional rulings are more easily undone by amendment than federal constitutional rulings — an institutional consideration that weighs in favor of broader judicial enforcement of constitutional norms at the state level. Compare U.S. CONST. art. V (amendment requires ratification by three fourths of the states) with, e.g., N.C. Const. art. XIII, § 4 (amendment by legislative initiative, taking three-fifths majority, and electoral ratification by simple majority). "[I]t is said that the Amending Clause of the [Federal] Constitution has been employed to reverse the work of the Court only twice, perhaps three times; and it has never been used to take away or diminish the Court's power." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 21 (1962).


ever, the fair response is "Why?" Why should a state court make interstitial law to "compensate" for the alleged shortcomings of federal death penalty jurisprudence? The ideas developed above show that principled reasons rooted in Eighth Amendment capital punishment jurisprudence — and not just somebody's personal preference for a different result — commend that course. When the federal judiciary stops short and underenforces Eighth Amendment norms, such action is theoretically justified by the promise that states will use their freedom to further, rather than detract from, capital punishment's legitimacy and endeavor in good faith to integrate constitutional values into the fabric of local law, policy, and practice. Federal underenforcement becomes tolerable because it creates space for states to govern responsibly, solving problems inventively and with a sensitivity to nuances which the Supreme Court cannot provide. That rationale for federal restraint is defeated when state courts default upon their obligation to bring a critical independent eye to capital punishment problems and to exercise principled and measured judgment.

A state court attuned to these observations and alert to its assigned duty in the constitutional scheme should quickly see the important role that interstitial judicial lawmaking must play in the quest to legitimate capital punishment. Quite simply, when a state court acts interstitially it can extend added protection to underenforced Eighth Amendment norms at bargain basement prices.

First, a sizeable portion of the institutional cost of such interstitial lawmaking — the price of making law before the political process has addressed the point in question — will be incurred whether or not the court rules in favor of greater norm enforcement. To dispose of the case, the court necessarily must resolve the legislatively unanswered question, at least implicitly, and thus will make law that binds until further notice.201 The costs actually attributable to giving that judge-made law a more norm-protective cast are thus incremental.

Second, those marginal costs will frequently prove insufficient to justify the court in passing up the benefits, assuming that the judicial analysis is undertaken objectively and with no hostility toward the constitutional norms themselves. In the right circumstances, a fair-minded, independent assessment will lead the court to conclude that a

201. Sometimes courts purport to refuse to answer a question necessary to the resolution of a case, explicitly passing the matter to the legislature for its determination. See, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 646 (1981); United States v. Gilman, 347 U.S. 507, 511-13 (1954); United States v. Standard Oil Co., 332 U.S. 301, 316-17 (1947). In such cases, the judicial decision nevertheless establishes a rule of law, announcing the way in which similarly positioned cases will be decided until legislative action dictates otherwise. See BATOR ET AL., supra note 26, at 949-50 (noting that such decisions are not "neutral").
more protective rule would fit reasonably well into its own existing system and would not likely impede the fair and efficient prosecution of capital cases. No one can guarantee the correctness of the court’s evaluation, but the state judiciary’s superior vantage point and its unsurpassed experience in regulating the criminal adjudicative process make its determination creditworthy. Since the legislature has not spoken to the point — indeed, it may even have deliberately left the problem to the judiciary — the court also can take comfort that a decision in favor of greater norm enforcement is less apt to offend institutional prerogatives, legislative sensibilities, or a statewide consensus.

Third, choosing a more protective rule directly serves the legislature’s most fundamental intention: that courts construe and apply the state’s death penalty legislation to maintain its continued, long-run constitutionality. Like the maxim that counsels avoidance of statutory interpretations that raise constitutional complications, 202 a policy that favors filling statutory interstices with rules that promote under-enforced Eighth Amendment norms can be a valuable form of preventative medicine, guarding the state’s death penalty system against future shocks in the event that the U.S. Supreme Court upwardly revises its estimation of the federally enforceable minimums. 203

Fourth, if a judicial decision favoring greater norm enforcement turns out to have been mistaken, or if changed circumstances render it inadvisable, the costs of correction or modification by either the legis-


203. Consider, for example, the trouble that North Carolina could have avoided had its state court chosen the path of greater norm enforcement when making the interstitial law that was struck down in McKoy v. North Carolina, 494 U.S. 433, 438-44 (1990) (invalidating state court’s interpretation of ambiguous legislation to require that mitigating circumstances cannot be considered in sentencing decision unless accepted by a unanimous jury). Even assuming that federal habeas corpus relief will not require the reversal of cases that become final before the defective state rule was invalidated by the Supreme Court in McKoy, but see Williams v. Dixon, 961 F.2d 448 (4th Cir.) (holding that McKoy qualifies for exception to Teague v. Lane’s antiretroactivity rule), cert. denied, 113 S. Ct. 510 (1992), cases in the direct appeal pipeline when McKoy was decided must be remedied whenever infected by the error. Griffith v. Kentucky, 479 U.S. 314, 328 (1987). At present count, the North Carolina Supreme Court has had to reverse and remand 42 cases under McKoy for costly resentencing proceedings in the trial division.

Some might discount the value of cautious interstitial lawmaking, since Teague v. Lane prevents the retroactive application in federal habeas of most new constitutional rules. But state judges would be wise to think twice before placing too much reliance upon Teague. For one thing, the Supreme Court has never been able to settle for long upon a consistent approach to retroactivity, and the current Court may prove no better. See supra notes 9, 35. For another thing, Teague is subject to modification or overruling by Congress. Proposals to that effect have been introduced in recent years. See, e.g., JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.3 (Supp. 1992) (discussing such proposals); Berger, supra note 11, at 1674-1713 (same).
lature or the court itself are relatively modest. Judge-made interstitial law is written in easily erasable ink. 204

It would be premature to say that state courts are consciously modeling their behavior along the foregoing lines. I argue that they should, and I hope that they will. Though experience warns against expecting too much, there is cause for cautious optimism. State courts already have handed down a number of progressive interstitial rulings that make perfect sense when the dynamics of balancing and norm enforcement are considered. In Florida, 205 Indiana, 206 and New Jersey, 207 for instance, state courts have interpreted statutory aggravating circumstances to require proof of a defendant’s individualized mens rea, thus increasing the likelihood that the circumstances will serve as meaningful indicators of the moral appropriateness of the death penalty. To similar effect, interstitial rulings in Alabama, 208 North Carolina, 209 Mississippi, 210 and Wyoming 211 now prohibit the use of duplicative aggravating factors that create the false illusion of heightened culpability. The supreme courts of Georgia 212 and Kentucky 213 have made capital sentencing trials safer from the subtle distorting influences of class and racial bias by holding victim-impact evidence inadmissible under state law, Payne v. Tennessee 214 notwithstanding.

204. The legislature can overrule the court by passing corrective legislation, or the court itself can point to a newly emerged legislative intention and give the rule a “respectful burial”, cf. Gideon v. Wainwright, 372 U.S. 335, 349-52 (1963) (Harlan, J., concurring) (expressing view that Court can respectfully overrule its own precedents when their premises are eroded by legal evolution or overtaken by changed factual circumstances).

205. Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991) (adopting narrow construction of “heinousness” statutory aggravating circumstance to forbid vicarious attribution of culpability).

206. Castor v. State, 587 N.E.2d 1281, 1289-90 (Ind. 1992) (interpreting aggravating circumstance based upon victim's status as law enforcement officer to require defendant's knowledge of victim's status, and not merely defendant's negligence or recklessness as to the existence of the fact).

207. State v. Ramseur, 524 A.2d 188, 229-31 (N.J. 1987) (interpreting “torture” aggravating circumstance to require a showing of conscious purpose on the part of the defendant that victim experienced suffering).


209. State v. Davis, 386 S.E.2d 418, 431 (N.C. 1989) (prohibiting use of “pecuniary gain” factor in conjunction with aggravating circumstance that killing was committed in the course of robbery), cert. denied, 496 U.S. 905 (1990).


211. Engberg v. Meyer, 820 P.2d 70, 87-90 (Wyo. 1991) (prohibiting use of “pecuniary gain” factor in conjunction with aggravating circumstance that killing was committed in the course of robbery).


standing. Residual doubt about the defendant's guilt — something that human beings instinctively find germane to the morality of capital punishment, but which the Supreme Court for institutional reasons has been reluctant to bring within the ambit of constitutionally protected mitigating factors\(^\text{215}\) — can be pressed at sentencing in South Carolina\(^\text{216}\) and Ohio.\(^\text{217}\) The North Carolina Supreme Court has gone beyond the federally enforceable minimum to restrict prosecutorial discretion in the name of greater rationality and consistency.\(^\text{218}\) In that state,\(^\text{219}\) and in New Jersey too,\(^\text{220}\) courts have assured fairer and more thoughtful consideration of nonstatutory mitigating circumstances by requiring that they be presented to the jury in written and oral instructions in the same way that statutory mitigating factors are presented. In Mississippi\(^\text{221}\) and New Mexico,\(^\text{222}\) courts have instituted procedures to check the irrational distortion in moral judgment that takes place when jurors erroneously assume that a life sentence will lead to the defendant's eventual release on parole.\(^\text{223}\)

State courts do the right thing when they take advantage of their unique institutional capacities to supplement the enforcement of Eighth Amendment norms and thereby further the legitimacy of the death penalty.\(^\text{224}\) But if the intrinsic rewards of following the constitutional plan are not incentive enough, state judges might wish to re-


\(^{224}\) I have focused on interstitial lawmaking by state judges because capital punishment is an overwhelmingly state phenomenon. The propositions advanced in the text would also bear on the practice of the federal courts in cases arising under federal death penalty legislation.
member that federal judicial intervention is invited when the state defaults on its obligation to reach some independently reasoned resolution of the hard questions relating to administration of the death penalty. When a state fails in this respect, federalism's theoretical promises are not being realized in practice, the interests which counsel judicial restraint at the federal level lose their weight, and the federal judicial balance accordingly swings in the direction of greater norm enforcement. This point has not eluded Justices of the U.S. Supreme Court. Read between the lines of Justice Kennedy's concurring opinion in Murray v. Giarratano, or Justice O'Connor's concurrence in Thompson v. Oklahoma, and you will see its logic at work.

C. Conceptualizing Clemency

The foregoing ideas also reveal clemency's proper role in society's effort to legitimate capital punishment through the furtherance of Eighth Amendment norms. The power that states traditionally vest in their executives to grant clemency and spare a condemned inmate from the executioner figured importantly in the pre-Furman history of American capital punishment, but the same cannot be said for the twenty years that have followed Furman. Although every state that employs the death penalty provides for clemency review by statute or constitutional mandate, and though the Court has intimated that such review might be necessary under the Eighth Amendment, 229


227. Twenty-nine states place clemency power in the governor alone, often establishing advisory boards that make nonbinding recommendations. In 16 states, clemency power is shared by the governor and an administrative board. In five states, a board holds the clemency power, but its members are appointed by the governor. Daniel T. Kobil, The Quality of Mercy Strained: Wrestling the Pardoning Power from the King, 69 TEXAS L.R. 569, 605 (1991) (reviewing state practices). For simplicity, the discussion will assume that the clemency power is vested in the state's governor as chief executive.


230. See Gregg v. Georgia, 428 U.S. 153, 199 n.50 (1976) (plurality opinion) (refusing to condemn the discretion inherent in executive clemency, and noting that a system without executive clemency "would be totally alien to our notions of criminal justice"). Commentators have
the prevailing wisdom holds that clemency in death cases entered a nosedive at roughly the same moment that judicial regulation of capital punishment under the Eighth Amendment skyrocketed. 231

It took sharp cutbacks in federal habeas review to supply the impetus, but the squandering of the clemency power in the post-Furman years is now finally drawing serious critical attention in the legal community. 232 A call for clemency's revitalization has been sounded, 233 and several constructive steps that might spur movement toward that goal have been proposed. Some of these suggestions aim to bolster the affirmative policy case for broader capital clemency review by demonstrating how it would serve the goals of punishment, 234 add an essential measure of mercy to the system, 235 and supply the "necessary assurances to the public respecting the reliability and non-arbitrariness of punishment" that state and federal courts seem unwilling to provide. 236 The remaining proposals, predictably enough, seek to make the commutation of death sentences a more attractive practical option for the executive by reducing the associated social 237 and

relied on the Gregg plurality's recognition of clemency's substantial historical pedigree to argue that the Eighth Amendment may require that capital sentencing systems contain a clemency component. See Cobb, supra note 229, at 400-02; Leavy, supra note 228, at 906-07.

231. See ZIMRING & HAWKINS, supra note 5, at 95-105; Bedau, supra note 229, at 261-66; Koosed, supra note 200, at 759-63; Cobb, supra note 229, at 393-95.


While some good literature on capital clemency predated the Supreme Court's contraction of the federal judicial role in death cases in the late 1980s, see, e.g., Abramowitz & Paget, supra note 228, and Leavy, supra note 228, the literature was "devoid of solutions to the more fundamental problem of how to encourage clemency-granting authorities to be merciful, in the face of the political unpopularity of executive clemency decisions and the unwillingness of many courts to allow juries to exercise merciful discretion." Cobb, supra note 229, at 390 n.2.

The past few years have produced a number of interesting examinations of capital clemency. See, e.g., Bedau, supra note 229; Koosed, supra note 200, at 752-807; Cobb, supra note 229; see also Kobil, supra note 227 (discussing clemency generally, without particular focus on capital punishment).

233. "[W]hat can be done to keep clemency hearings from becoming an empty formality, as some observers have complained has already happened? What if anything can be done to get governors and pardon boards to exercise their authority to review meaningfully . . . ?" Bedau, supra note 229, at 270.

234. See, e.g., id. at 271 (suggesting that "clemency should be viewed, like punishment itself, from a retributive point of view"); Koosed, supra note 200, at 778-82 (discussing clemency's consistency with retributive principles of punishment).

235. Cobb, supra note 229, at 407-08 (advocating that the concept of mercy, as rooted in history, should serve as a guiding principle for clemency review).

236. Koosed, supra note 200, at 756-63 (arguing that clemency serves a historical role of "filling in gaps in the legal system").

237. Professor Bedau, for instance, points out that favorable clemency decisions might be encouraged by making the sentence of life-without-parole an alternative to the death penalty and by undertaking clemency review before costly postconviction litigation ensues. Bedau, supra note 229, at 271-72.
political\textsuperscript{238} costs, both actual and perceived.

Both approaches hold out some promise, framed as they are to appeal to a governor’s political and policy instincts. But governors must understand that the revitalization of clemency is not merely a matter of choice. As the foregoing examination of the dynamics of Eighth Amendment enforcement demonstrates, meaningful clemency review is a governor’s constitutional obligation.

Under Article VI of the Federal Constitution, governors — like U.S. Supreme Court Justices and state judges — are “bound by Oath or Affirmation, to support this Constitution.”\textsuperscript{239} There is no reason to suppose that this duty does not extend to the eminently public act of passing upon clemency applications. How that solemn obligation should inform a responsible governor’s use of the clemency power is the question. One easy answer is that the executive must at least refrain from employing the power in a way that would abridge a constitutional rule laid down by the courts to delimit state action — for example, the rule prohibiting purposeful racial discrimination in the administration of the death penalty.\textsuperscript{240} This responsibility, it bears emphasis, exists even if the courts decline, in a show of interinstitutional respect, to review clemency decisions for compliance with such judicial dictates.\textsuperscript{241} A constitutional wrong is a constitutional wrong, whether or not the wrongdoer avoids detection, apprehension, or sanction.\textsuperscript{242}

But a governor cannot discharge the duty to support the federal Constitution merely by observing the explicit constitutional rules set forth by the courts, for those rules are a demonstrably incomplete expression of the Constitution’s full meaning. The oath runs to the entirety of the Constitution and thus professes allegiance to the

\textsuperscript{238} Professor Margery Koosed has shown the extent to which the perceived political costs of granting clemency in death cases may be exaggerated. Koosed, \textit{supra} note 200, at 782-93.

\textsuperscript{239} U.S. \textsc{const.} art. VI.


\textsuperscript{241} State courts have traditionally held that “the use of the clemency power for whatever reason, extra-legal or even illegal, is not reviewable.” Cobb, \textit{supra} note 229, at 392 n.19 (citing cases); see, e.g., 59 Am. JUR. 2D Pardon and Parole § 31 (1987) (collecting cases).

\textsuperscript{242} Some commentators have argued for judicial review of capital clemency decisions under the Eighth Amendment. \textit{See}, e.g., Leavy, \textit{supra} note 228, at 902-05, 908-11 (urging that clemency in death cases be accompanied by procedural protections to guard against arbitrariness and capriciousness); \textit{see also} Schimmel, \textit{supra} note 229, at 259-60 (analyzing constitutional challenges against clemency in capital cases and noting that they have failed in the courts). The Supreme Court has not reached the question directly, although it has held that Florida’s clemency review procedures were insufficient to determine an inmate’s sanity in a constitutionally acceptable manner. \textit{See} Ford v. Wainwright, 477 U.S. 399, 416 (1986) (plurality opinion of Marshall, J.).

\textsuperscript{242} \textit{See} Tribe, \textit{supra} note 96, § 3-4, at 36 (arguing that public officials are nonetheless under a moral obligation in such circumstances); Brest, \textit{supra} note 174, at 587-89 (reaching the same conclusion).
Constitution's *norms*, including those that courts, for institutional or structural reasons, are unprepared to enforce fully themselves. In the words of Lawrence Sager:

> [G]overnment officials have a legal obligation to obey an underenforced constitutional norm which extends beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies. This obligation to obey constitutional norms at their unenforced margins requires governmental officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions. Public officials cannot consider themselves free to act at what they perceive or ought to perceive to be peril to constitutional norms merely because the federal judiciary is unable to enforce these norms at their margins.  

The role of clemency review in the promotion of Eighth Amendment norms thus emerges. Having received from the People the power to grant or deny clemency, the governor must exercise it in strict obedience to the Article VI affirmation. This means using the clemency power to realize more fully the Eighth Amendment's underenforced norms, because the governor's obligation under Article VI is to support the Constitution in its complete normative sense, not just in its judicially underenforced manifestation. By these lights, clemency is a powerful complementary force in society's effort to ensure that basic Eighth Amendment values are realized in individual death cases and that the administration of capital punishment is thus legitimated. To attain the constitutional fullest enforcement, separate and distinct institutions — the federal courts, the state courts, and the state executives — have been set independently toward the same constitutional end, each institution protecting Eighth Amendment norms in ways that the others might not be able to effect.

How should a governor therefore approach capital clemency applications? Conscientious clemency review would entail a critical independent assessment of each case to determine whether Eighth Amendment values have not been fully realized. Freed from the formal strictures — substantive, procedural, evidentiary, and remedial — that courts create to accommodate their own perceived needs, the governor is uniquely situated to identify normative shortfalls in the cases that escaped detection or were left uncorrected by the courts; the governor is uniquely empowered to eliminate them expeditiously through


244. While this argument is certainly strengthened by positing that clemency review is essential to the constitutionality of a capital punishment scheme under the Eighth Amendment, see *supra* note 241, it does not depend upon that proposition.
commutation. Good, constitutionally respectable clemency review would capitalize on these institutional advantages. Anything less renders the clemency power a redundant superfluity and the executive branch a constitutional noncontributor.

Illustrations are not hard to find. Suppose the evidence as a whole, including evidence inadmissible at trial and evidence that only came to light after trial, raises questions about the defendant's degree of involvement in the killing that cast the moral appropriateness of the death penalty, but not its legality in a court of law, in serious doubt. Virginia Governor Douglas Wilder and North Carolina Governor James G. Martin were confronted with cases of this sort recently, and each wisely granted commutation. Imagine the defendant has shown convincing signs of rehabilitation during his years on death row

245. Needless to say, this critical independent assessment cannot be made unless the governor comprehends the distinction between judicial rules that implement constitutional norms and the constitutional norms themselves. To deny clemency merely because "the courts have spoken" misses the distinction entirely, and constitutes an abdication of the responsibility to employ the executive powers in independent service of constitutional norms.

Like the federal and state judiciaries, a governor should be free to accommodate legitimate countervailing interests when exercising the power to implement constitutional norms through clemency. The accommodation must, however, be a principled one, and only those countervailing interests that are genuinely relevant to the use of the power which the People have conferred upon the executive should be considered in the balance. The governor's personal political fortunes, for instance, would not merit consideration. In the typical clemency case, few if any genuinely countervailing interests will be present. Where Eighth Amendment values weigh in favor of commutation, rarely will the granting of clemency adversely implicate the legitimate interests of another institution or require the sacrifice of any value of sufficient magnitude to outweigh the Eighth Amendment norms at stake. A grant of clemency, it must be remembered, conveys no disrespect for the decisions of the courts and lays down no rules intended to govern their behavior.

Given the importance of a critical independent assessment, governors are well-advised to proceed with extreme caution in assessing proposals to formalize clemency review. Commentators have argued with some force that enhanced procedural safeguards should be adopted in clemency cases. See, e.g., Kob, supra note 229, at 695-99; Kob, supra note 227, at 633-36; Leavy, supra note 228, at 907-11. To the extent that such safeguards expand or facilitate the inquiry without undermining clemency's independence or its ability to detect the presence of underenforced constitutional norms, they should be welcomed. But the procedural rules favored by courts often produce normative underenforcement, generally because they accommodate institutional considerations which pertain to the judicial function. Adopting rules of this sort in clemency determinations might lead the governor to perpetuate the normative underenforcement, yet provide no institutional benefit.

By contrast, stringent procedural safeguards of the judicial variety rightly should be required when clemency review is used as an alternative to judicial review that otherwise would apply - at least so long as the safeguards operate to the defendant's advantage. See Ford v. Wainwright, 477 U.S. 399, 416 (1986) (plurality opinion of Marshall, J.) (holding Florida's clemency review procedures insufficient to render a constitutionally acceptable determination of defendant's sanity, a requisite to execution).

that, in any fair balance, make the death penalty an unnecessarily excessive response to his crime and his character combined. Or suppose, once all the facts are finally in, that the defendant's death sentence stands out as disproportionate because other individuals, equally or more culpable for the very same offense, have received lighter sentences. Facing cases of both types recently, the Georgia Board of Pardons and Paroles granted clemency.247

We live in cynical times, so it is natural to regard the grants of executive clemency in such cases as bold acts of political courage. Perhaps they are. But, properly understood, they are also acts of constitutional obligation. It is only right that we begin treating them so.

CONCLUSION

If legitimating capital punishment means cleansing the process of arbitrariness, eliminating invidious influences, foreclosing errors, and eradicating unfairnesses, then the death penalty quite plainly will never be legitimate. Even if such abstract legitimacy were within our reach as human beings, we could not possibly achieve it without working major modifications upon our federal, multitiered, adversarial, and discretionary system of criminal justice. It is for that reason, and because capital punishment's toll on society exceeds whatever negligible benefits it produces, that I remain convinced that the death penalty will, in time, pass from the American scene. Not in my time or yours, perhaps, but in time.

__247__ The Board commuted William Neal Moore's death sentence because evidence of Moore's rehabilitation and conversion to Christianity raised serious doubts about the moral appropriateness of the death penalty in his case. Among those requesting that Moore's sentence be commuted were members of the victim's family, Mother Theresa, and Jesse Jackson. Ronald Smothers, _A Day Short of Death, a Georgia Killer Is Given Life_, N.Y. TIMES, Aug. 22, 1990, at A1. Ex-Marine Harold Glenn Williams' death sentence was commuted by the Board due to concerns about the proportionality of the sentence. A codefendant who entered a plea agreement received only a ten-year sentence, despite having been the "ringleader" of the murder. See Jingle Davis, _Ex-Marine's Death Sentence for Murder Is Commuted_, ATLANTA J. & CONST., Mar. 23, 1991, at B5. No doubt, an appeal for leniency from former President Jimmy Carter helped; Williams had been a White House guard and played baseball with Carter at Camp David. _See id._
Until then, common civility and decent regard for Eighth Amendment principles demand that society acknowledge a responsibility to make reasonable efforts — within the restrictions imposed by our governmental structure and the limitations of the institutions that comprise it — to minimize the aforementioned evils. A collective societal endeavor, involving the various branches of government at both the federal and state levels, can never legitimate capital punishment in the abstract sense. But it can legitimate it in a looser and more relative sense of the word — one that takes Eighth Amendment values seriously, yet recognizes that structural and institutional values are important to the nation’s well being and merit accommodation in the constitutional equation.

The Supreme Court — for better or for worse, but not without precedential support — has embraced this latter conception of legitimacy and made it the foundation of current capital punishment jurisprudence. In so doing, the Court has accomplished what few would have imagined possible a decade ago. The Justices have brought methodological coherence, doctrinal stability, and a measure of constitutional respectability to this once unruly area of the law. Moreover, they have managed to do so while reaffirming the fundamental norms that have animated Eighth Amendment death penalty law since its conception.

Considerations of governmental structure, institutional capacity, and institutional responsibility clearly weigh heavily in the current Court’s Eighth Amendment balance. Anyone expecting to engage in useful Eighth Amendment discussions today must be prepared to hear about them and must be willing to talk about them. But make no mistake about it: the central normative vocabulary of capital punishment discourse since *Furman* — the principles of rational orderliness, moral appropriateness, and procedural fairness — survives today. Securely recognized under the Eighth Amendment, those norms remain powerful enough to sustain meaningful inquiries into the appropriateness of death penalty practices, to reveal injustices, to fashion claims for redress, and to make the case for continued reform.