

The U.S. Death Penalty and the Transition of Constitutional Authority

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### Abstract

This paper seeks to explore the philosophical influences that shaped American political thought surrounding the death penalty. Its purpose is to trace the dynamics of U.S. penological evolution to better understand the currently cited justifications and application methods for punishing capital offenders and discuss its constitutionality. Further analysis will demonstrate how the development of the Supreme Court's capital punishment jurisprudence has resulted in a transitioning effect of its judicial authority over the death penalty toward the will of state legislatures. What implications this outcome may signal for the protection of other social policies will also be explored, highlighting abortion as a case study.

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### The U.S. Death Penalty and the Transition of Constitutional Authority

On February 22, 2018, Doyle Hamm survived a lethal injection after a two-hour execution attempt left him with a punctured bladder and femoral artery. The execution team failed to find viable sites to administer the IV catheters due to blockage and damage to Hamm's veins caused by lymphoma and hepatitis. As a result, Hamm's execution was cruelly and unusually "prolonged, exceedingly painful, bloody, and botched" (Berry, 2019, p. 1781). While Hamm's case has every element to be the ultimate nightmare, it is not a unique or new phenomenon. Since the Supreme Court's ruling in *Gregg v. Georgia* (1976) that reinstated the death penalty after invalidating it four years prior, state legislatures jumped onto the development and administration of the lethal injection, now making it the most commonly used execution protocol for enforcing a death sentence. Higher frequency brought along increased failed attempts. With the lethal injection now carrying a botch rate of more than 7%, it surpasses the rate of electrocution by three-fold and doubles that of hangings (Lain, 2015). The emergence of the lethal injection was paradoxically justified and supported by the Court as a transition toward a more civilized, humane, and dignified technique for executing the condemned (Merrill, 2008). Even though empirical evidence has proven the method to contradict the Court's constitutional standards for human dignity more than the most barbaric methods of early American tradition, the death penalty remains protected under the Court's lock and key.

How did we get here?

For execution methods to meet constitutional muster, the Supreme Court has held that it need only not impose 'unnecessary' or 'arbitrary' harm to the condemned. Otherwise, the Court routinely ignores constitutional challenges that address the death penalty itself and has agreed only to hear cases that challenge the policy on other grounds. After the Court invalidated the

death penalty in *Furman v. Georgia* (1972), and especially since its subsequent reinstatement in *Gregg*, judicial authority has shown to be incrementally transitioning toward non-uniformed political branches across the country. The impacts of the Court's silence have allowed state interpretation to dictate the nature of the death penalty, causing significant consequences for the sanctity of the fundamental rights to life, substantive due process, and those of the accused as they are understood today. This transition may not be unique to death penalty policy, but potentially implicates the way other social policies are controlled, enforced, or overturned—namely abortion.

Thus, this thesis seeks to explore the philosophical influences that shaped American political thought surrounding the death penalty. Its purpose is to trace the dynamics of U.S. penological evolution to better understand the currently cited justifications and application methods for punishing capital offenders and discuss its constitutionality. Further analysis will demonstrate how the development of the Supreme Court's capital punishment jurisprudence has resulted in a transitioning effect of its judicial authority over the death penalty toward the will of state legislatures. What implications this outcome may signal for the protection of other social policies will also be explored, highlighting abortion law as a case study.

### **Historical Overview**

This section of the thesis will survey the history and literature on the contributing factors that shaped the development of the capital punishment system to serve two purposes. The first is to inform the role of the political and judicial dynamics of the Supreme Court, and the second is to determine how the death penalty fits under its constitutional safeguard as a result. Before one can adequately afford such analysis, first there must be a discussion over the political philosophies and the active historical movements that influenced the core fixtures emphasized by the Framers and throughout the Constitution, of which would set the tone for the development and effects of modern political thought on capital punishment.

**Colonial Era (1607-Mid-18<sup>th</sup> Century).** Since the start of the Colonial Era, the total executions that have been performed extralegally as well as by officials of the criminal justice system is still unknown, with some estimates ranging well over 20,000. The first official execution took place in 1608 just shortly after the founding of the first U.S. colony of Jamestown, Virginia. Likewise, Massachusetts Bay Colony, founded in 1629, imposed its first execution as early as 1630. Overall, speedy implementation of a large variety of death-eligible offenses and the enforcement of punitive executions were normative of the time and portrayed the widespread acceptance of capital punishment since the origin of American penological tradition.

The use of the death penalty on American soil began virtually simultaneously with the start of its colonization. American settlers brought with them similar penological tendencies of the British rule they left behind. Comparable to the underlying foundation of English criminal codes, (and otherwise its overall government structure), religion greatly influenced the role and scope of the initial set up of colonial political processes and capital punishment enforcement. The

predominant colonial belief was that God had granted them such authority over the new land to settle and cultivate in the way they felt was best under their natural order. The state viewed those who did not strictly follow the rules of what they believed to be the appropriate, divine way of living set forth by their institutions as “deviants that needed to be purged from the community” (Abili, 2013, p. 84), with execution being a popular means to such end.

Since power was initially afforded to individuals who were higher-ranked members of the Church, alternative views were received as criticisms against God. For some colonies, these beliefs translated over to the construction of their legislation almost verbatim. In 1641, Massachusetts enacted its “Body of Liberties” that outlined twelve offenses to be punished by death, such as adultery, idolatry, blasphemy, and witchcraft, among others. In 1642, Connecticut enacted its capital laws, criminalizing the same twelve capital offenses borrowed from Massachusetts. In both cases, eleven out of twelve offenses cited biblical scripture as the basis for its enforcement (Bessler, 2014). These developments are attributed mainly to the colonial settlements of Puritan social groups. The Puritans attempted to make Massachusetts Bay Colony a crimeless society by criminalizing the source of deviance, in which they pointed to any behavior considered to be offensive to their religious identity. As a result of these perceptions, many immigrants from England were denied entry to the Massachusetts Bay Colony, and barbaric punishments such as “banishment, ear amputation, whipping, and hanging” were strictly enforced (Waters, 2007, p. 17). Quakers who arrived in the New World in the 1650s were subjected to such criminalization for theological disputes at contention with Puritan ideology. Despite their persecution, Quakers who settled the colony of Pennsylvania still acted in adherence to their own religious beliefs and attempted to legally restrict the use of the death penalty only to punish convictions of murder and treason (Bessler, 2014). The legislation, drafted

by William Penn, was rescinded by English authorities, and criminal codes like those of Massachusetts and Connecticut were adopted in its place. Execution in early America, therefore, symbolized the colonists' initial intolerance to religious opposition, alternative views to their political ideals, and the universal enforcement of capital punishment to curtail its expression.

Support for the death penalty came from penological theories separate from a religious component as well, with many surprisingly inspired by the works of John Locke. In 1689, Locke's *Two Treatises of Government* informed political philosophy death could be imposed to punish any criminal offense if such degree of severity is sufficient to curtail a potential offender from proceeding with his or her transgressions as well as others from joining in the same behavior. In this view, even though Locke famously believed that all men were entitled to the inalienable natural rights of life, liberty, and property, an individual choosing to violate the law represents the simultaneous choice to abandon the rules of reason and common equity, which he or she agrees to abide by in the interest of preserving their security. As such, that individual becomes a danger to society, breaking its ties with the law, and affords *every* man the right to preserve the safety and common good of humankind. In which case, it is the right of every man to punish and "be executioner of the law of Nature" (Dunn, 1982, p. 169). It is no dispute that the philosophical underpinnings of Lockean thought, particularly regarding his concepts of natural rights and consent of the governed via the social compact, undoubtedly influenced the political theories of the Founding Fathers, as evidenced throughout the Declaration of Independence, the U.S. Constitution, and the Bill of Rights. Even if seemingly more discrete, it is evident that the same theories can also be traced throughout the development of political thought on the use and maintenance of the death penalty.

Criminal codes for death-eligible crimes greatly expanded as the New World society moved into the 1700s, in some respects, arguably mirroring the strict, punitive expansion of Britain's criminal codes, which increased to over 100 capital offenses by 1760 (Kind, 2019). This expansion is especially true in response to the rise of political tensions concerning slavery, where many states would begin to introduce modified penal codes for African Americans as early as 1712, resulting in the criminalization of more than fifty capital offenses. Condemned acts were far and wide, and often seemingly obscure, including offenses such as man-stealing, ravishing women, homosexuality, bestiality, and even the acts of children who smite their parents (Warden & Lennard, 2018). As the number of capital offenses expanded, so did the violent impositions of death sentences, which ultimately represented the common attitudes toward crime and punishment of early America without receiving much backlash until the mid-1700s and the emergence of the Founding Era.

**Founding Era (Late 18th Century – 1800s).** Among the several other political questions that consumed the Founding Era, crime and punishment also emerged as a source for contesting political and moral philosophy. Beginning with Jean-Jacques Rousseau's (1762), *The Social Contract*, he argued that individual life is a conditional gift from the state under which it is governed. Drawing upon social contract theory initially developed in 1651 with Thomas Hobbes' *Leviathan* and like that of Locke's thought on punishment, Rousseau asserted the average citizen loses his or her ability to judge which dangers will be exposed to them by the construction of the law upon agreeing to the rules of the social contract. Rousseau (1762/2001) further indicates that if the state suggests the death of a citizen as "expedient to the State," then such death is justified and valid for it was on that condition alone that granted him or her security (p. 15). The nature of law, therefore, rests on this condition of mutual exchange because the

social contract's purpose was to further the preservation of both citizenry and state. To this end, the death penalty is a mechanism of the state's effort to fulfill this purpose as "it is in order that we may not fall victims to an assassin that we consent to die if we ourselves turn assassins" (Rousseau, 1762/2001, p. 15). Thus, Rousseau is among the first notable articulations of the school of penological thought that supports the death penalty for its deterrent effect on crime, both specific and general, as the right to impose death ultimately secures others' right to life and creates a balance whereby neither the citizenry nor the state should necessarily fear the wanton deprivation of life.

Just two years later, Cesare Beccaria published his *On Crimes and Punishment* (1764), which is now widely held as the source of philosophical foundations that anticipated the start of the abolitionist movement for the death penalty. Beccaria rejected Rousseau's argument that the state had the right to take a citizens' life for the interest of deterring the arbitrary murder of citizens—by citizens—through their acceptance of the social contract. Contrary, Beccaria specifically stated that such right does not come from the law, and the enforcement of the death penalty, in particular, is not justified by any law from any sovereign state. Only after removing all of his or her private liberty, if a citizen still poses a substantial danger to national security, then it may be justified to take his or her life (Poveda, 2000). This exception only applies to situations in which the nation is suffering such dire levels of disorder that they outweigh the existing laws constructed to maintain societal order, such as in tyrannical or absolute anarchical national threats. In any other case, in a sovereign nation with a central government designed by the consent of the governed, the right of the government to take the life of a citizen as a form of punishment is never authorized because citizens would not agree to enter the social contract for the sake of protection if the very agreement itself threatened the right to life.

Beccaria also rejected Rousseau's position on the deterrent effect of capital punishment on other murderous offenses and expanded on its potential to cause irrevocable damages through the execution of the innocent. While Rousseau would argue a criminal punishment system ought to compensate for crimes based on 'just desserts' to further deterrence and establish security, Beccaria argued deterrence could be realized through enforcement of a proportional punishment without excessive severity. Instead, a legal system can better access crime control if it can, one, make punishment feel less like a risk left up to chance and more like an inevitable outcome of crime, and two, impose punishment with celerity. (Poveda, 2000). His treatise is also among the first documented arguments that life imprisonment could achieve the same deterrent effect many had believed to only be associated with capital punishment. The argument provided a basis for further discourse regarding what constitutes necessary versus unnecessary degrees of punitive severity. He reasons, no matter how great the perceived benefits associated with the crime by the potential offender, no one would choose to lose his or her freedom wholly in order to complete it. Thus, life imprisonment would be sufficient to realize the effectiveness of capital punishment at deterring others from the same crime, and anything beyond that, if any, provided by execution would be unnecessary. In essence, Beccaria was the first to initiate the debate on what would later be incorporated into the spirit of the Eighth Amendment—for a criminal punishment to be just, the level of severity should equal only what is justifiably necessary to deter others and protect the general good.

Beccaria's efforts were certainly influential, as were other prominent political figures of his time, such as the dramatic contributions made on behalf of Dr. Benjamin Rush. Rush was a physician in Philadelphia who also acted as one of the most prominent anti-death penalty abolitionists and penal reformists in Early America. Rush rejected the use of the death penalty for

any crime, arguing in his essay, *On Punishing Murder by Death* (1792), its enforcement is “contrary to reason, and to the order and happiness of society” (Bessler, 2018, p. 319). He joined Beccaria in his opinion that the death penalty was unnecessarily severe and cruel, and that it emboldened a brutalization effect due to the violent example it demonstrates to society. Rush not only spoke freely about his opposition to capital punishment, but he also took decisive actions to limit its scope that earned him the reputation as the founder of the death penalty abolition movement. He founded what is now called the Pennsylvania Prison Society that led the state in 1794 to become the first in the U.S. to introduce degrees of murder and to limit the death penalty only to those found guilty in the first-degree.

Together, the political philosophies of Beccaria and Rush had significantly influenced the theories supported by the Founding Fathers, attracting support from George Washington, Benjamin Franklin, Thomas Jefferson, and James Madison, among many others (Kaplan, 2012). Anti-death penalty activists like Beccaria and Rush certainly paved the way for the abolitionist movement throughout and beyond the Enlightenment period; however, the death penalty was so far ingrained in the American experience and routine that the founding of the United States and the composition of the Constitution neither considered nor impacted the legal status of the death penalty (Poveda, 2000). For the next two centuries, the death penalty and any future developments operated only under a presumption of constitutionality, posing no violation of cruel and unusual punishment *per se*.

### **On the Constitutionality of the Death Penalty**

The purpose of this section is to trace the development of the Supreme Court's early and modern-day jurisprudence regarding capital punishment and its effects on the application of the death penalty in both ideological and legal terms. The section then attempts to fill in the gaps left by the Court's rulings by reanalyzing how the death penalty measures up to the very standards and rationales to determine the overall constitutionality of capital punishment *per se*.

#### **The Role of the Supreme Court**

The first time a capital punishment issue made its way to the U.S. Supreme Court was not until 1879. In the case of *Wilkerson v. Utah* (1879), the accused challenged the state of Utah's method of execution by firing squad. *Wilkerson* is significant for not only being the first death penalty methods case granted certiorari but also for being the first of only eleven Supreme Court decisions to discuss the Cruel and Unusual Punishment Clause in American history (Goldberg, 1973). Thus, it stands as the starting point for the development of overall Eighth Amendment jurisprudence. The holding, however, was not a result of a direct application and analysis of the clause. The Court argued it would be too difficult to provide an exact definition as to the provision's prohibition of cruel and unusual punishments, but reasoned any punishment considered to be torture or those "in the same line of unnecessary cruelty" were violative (Goldberg, 1973, p. 356). Execution by firing squad was unanimously upheld in *Wilkerson* for being a commonly used method versus the more antiquated techniques such as quartering, crucifixion, or breaking on the wheel (Roth Heilman, 2009). The ruling did not set an articulable standard for determining the permissibility of an execution method, except through the comparison to other methods and their impositions of torture. This ruling distanced execution method challenges from receiving an impartial analysis of the U.S. Constitution within the

constraints of the Eighth Amendment. It signaled that the subjectivity of societal contexts would instead judge the constitutionality of capital punishment. Despite the fact this same execution triggered twenty-seven minutes of bloody, painful suffering endured by the accused, to this day, death by firing squad is considered constitutionally valid and still exists within the statutes of Utah's capital punishment legislation as a permissible execution method.

The Court deferred to *Wilkerson* in its next capital punishment case, *In re Kemmler* (1890), which challenged the state's authority to punish by electrocution. It added that the death penalty is not to be considered "within the meaning of that word [cruel] as used in the Constitution" (Goldberg, 1973, p. 356). The *Kemmler* decision held that for such punishment to meet the level of cruelty associated with torture, the clause implies "a lingering death" or "something inhuman, barbarous and beyond the mere extinguishment of life" (1890, p. 447). It was determined that electrocution would not surmount to this level since it was presumed to inflict the quickest and most painless death through execution possible. The Court was still silent as to what measures could be applied to conduct a general analysis of methods for determining whether one versus another could conceivably meet these violations.

This trend persisted throughout the rest of the Supreme Court's early death penalty decisions up until the late 1900s. For example, after *Kemmler* came *Rooney v. North Dakota* (1905), *Malloy v. South Carolina* (1915), and *Powell v. Alabama* (1932), and none of these cases directly took issue with the death penalty. Only in *Malloy* did the issue inch close to challenging the actual application process of the death penalty, where the accused took issue with the state's decision to change the method of execution to electrocution after already being sentenced to death by hanging. Since the South Carolina statute only switched the execution method to one

they deemed would impose a more humane death but did not change the penalty of death itself, the Court ruled it would not add to the severity of the punishment or render it cruel or unusual.

Two of the more intriguing rationales offered by the Court from this era came from *Weems v. United States* (1910) and *Louisiana ex rel Francis v. Resweber* (1947), but only the latter dealt with issues associated with an accused who was sentenced to death. The relevance of *Weems* to the understanding of the Eighth Amendment, however, cannot be understated. This case was the first of its kind to offer any tests for the constitutionality of criminal punishments based on excessiveness and severity (Goldberg, 1970). The Court opined a punishment violates the Eighth Amendment for excessiveness and severity if a less severe sentence could achieve the same end without diminishing the power of the state:

The purpose of the punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal (*Weems v. United*, 1910, p. 381).

*Weems* also informed society on the role and scope of legislative and constitutional enactments:

Legislation, both statutory and constitutional... should not be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are... designed to approach immortality as nearly as human institutions can approach it (*Weems v. United States*, 1910; Goldberg, 1970, p. 358).

With these rationales combined, the Court completely changed the means of interpretation and application of the cruel and unusual proscription for criminal punishment. It required that the

punishment type, the procedure for imposing the punishment, and the severity of the punishment as a whole must not violate the Eighth Amendment. At the very least, *Weems* suggests a punishment is cruel and unusual if one of less severity is of equal effectiveness, or if the punishment contradicts the society's standards of decency, or otherwise causes worse harm regardless of effectiveness (Goldberg, 1970). Notwithstanding the clarity of this case that was certainly peculiar among those of its kind at the time, it did not seem to have much cross-over in application to death penalty considerations. *Louisiana ex rel Francis v. Resweber* (1947) is significant in that it was the first case since *Weems* to challenge an execution attempt, but the analysis applied did not seem to follow the same tests as previously prescribed. It was in *Francis*, after the botched electrocution of a sixteen-year-old boy, where the Supreme Court found a *re-execution* of the accused after an initial failed attempt was neither cruel or unusual, and argued it could "see nothing upon which we could conclude the rights of the petitioner were infringed" on the grounds of the Fifth, Eighth, or Fourteenth Amendments (Miller & Bowman, 1982, p. 4).

To this end, *Wilkerson* remained the overriding precedent despite other case developments, marking the last time the Supreme Court would directly consider an execution method's constitutional inherency for more than a century to come. Until then, the holdings of *In re Kemmler* (1890), and eventually *Trop v. Dulles* (1958), amended jurisprudence by providing a loose framework for interpretation but doing so still without outlining standards for states' methods or protocols. *Trop* held that Eighth Amendment violations are to be interpreted based on the "evolving standards of decency that mark the progression of a maturing society" (1958, p. 101). The ruling in *Kemmler* narrowed the scope for challenges—the method itself is purely the means to mere death; its type does not inherently render excessive punishment (Sarat, 2014). *Trop* motioned violations would be judged based on the common, preferred practice at the time

indicated by legislative actions of the state (Hood, 1994). The holding enhanced states' authority to protect and defend methods and design protocols they deemed as efforts to advance the human dignity of executions and triumphed the debate of the death penalty's constitutionality until reconsideration in the 1970s with *Furman v. Georgia* (1972).

*Furman* was the first time the Supreme Court heard a *per se* challenge to the death penalty on the premise of cruel and unusual punishment, but it still did not address it on the same grounds. In that case, the Court handed down a 5-4 decision with a one-page *per curiam* that held the three death penalty statutes at issue violated the Eighth and Fourteenth Amendments. In the more than two-hundred pages to follow, there was no official opinion, but nine separate views. Only two justices believed the death penalty to always be unconstitutional, with the four dissenters arguing that state legislatures should decide whether or not it should be eliminated. Nevertheless, *Furman* functionally invalidated forty capital punishment statutes, including federal application, commuted 629 death row inmates to life imprisonment, and was received as a great victory for the abolitionist movement.

The *Furman* case was not without limitations, though. The element that banded enough opinions to form a majority was based on the statutes' *discretionary* application of the death penalty and how they resulted in arbitrary sentencing, thus constituting cruel and unusual punishment. Thus, there was no Supreme Court invalidation of capital punishment based on its inherent unconstitutionality, meaning the decision did not condemn the capricious nature of death sentence application for being true of capital punishment in all instances. It only invalidated capital punishment as it was implemented at that specific point in time. Therefore, it implied that there was potential for a society where the death penalty could still be enforced under newly designed legislation to the extent it controlled for arbitrariness. This caveat created

what immediately became the *Furman*-loophole, with 35 state legislatures rushing to rewrite their capital punishment codes to meet this threshold and pressure the Supreme Court to reconsider its decision.

According to Goldberg (1973), addressing the inherency of the constitutionality of the death penalty should have been inevitable due to *Furman*'s absence of a majority opinion, as "surely this generation of Americans has experienced enough killing" (p. 368). Unfortunately, Goldberg was only half-true. The Court reversed its decision only four years later with *Gregg v. Georgia* (1976). The Georgia statute in contention outlined a bifurcated process so that the guilt and sentencing phases would be determined in two separate trials, as well as provided for guided discretion via appellate review and proportionality review. With these provisions, the majority opinion found no such constitutional violation, but only due to "the absence of more convincing evidence" needed to disprove the states' holdings that the death penalty serves a compelling interest (Barry, 2019, p. 1572). The Supreme Court neither fully endorsed nor repudiated the use of death as a constitutional form of punishment, but its silence translated to an implicit confirmation that became the prevailing precedent as it is understood today. Thus, the death penalty was reinstated. Executions resumed in 1977, and its use proliferated in the years to come, peaking in 1994 with 311 death sentences and 1999 with 98 executions (DPIC, 2020A; DPIC 2020B).

Bedau (1985) contends that the current status of the death penalty is in large part due to the Supreme Court decision of *Gregg* and those that followed. Since 1976, the Court has upheld capital punishment "as not unconstitutional [under] the basic proposition that if a legislature wants to enact a capital statute, it may do so in the confidence that nothing in the federal constitution is thereby necessarily violated" (Bedau, 1985, p. 3). The ruling implied that the

death penalty does not violate the Constitution inherently without actually having to say so explicitly. Instead, the Court decided a series of related death penalty cases that would chip away at the scope of its application in an attempt to reduce risks of the arbitrary or capricious removal of life. For example, mandatory death sentences for capital murder were held unconstitutional wholesale in *Woodson v. North Carolina* (1976), and *Roberts v. Louisiana* (1976) held that a death sentence could not constitutionally be mandated because the murder victim was a member of law enforcement personnel. The rationale was that mandatory sentencing statutes took away juries' discretion in considering any mitigating factors and thus infringed on the right to a fair trial for the accused, which was echoed in *Lockett v. Ohio* (1980) requiring sentencing authorities to review all mitigating factors and circumstances surrounding a case. Furthermore, to protect the right to a trial by jury, a jury, rather than a judge, must decide whether and which aggravating factors exist that would make a sentence recommendation of death appropriate, later confirmed in *Ring v. Arizona* (2002) and reaffirmed in *Hurst v. Florida* (2016). Still, these holdings dealt more with issues regarding the understanding of the Sixth Amendment proscriptions and the Fourteenth's safeguarded right to due process rather than those under the Eighth Amendment.

Without developing the Court's Eighth Amendment interpretation, there was little guidance or restrictions when it came to how the death penalty should be imposed after the trial and sentencing proceedings. Barry (2019) argues, *Gregg* did not exactly overrule *Furman*, but it "set in motion a process of constitutional regulation that still endures—one designed to tame the death penalty's arbitrary, discriminatory, and excessive applications through a growing set of constitutional doctrines" (p. 1572). This argument became evident following increasing numbers of failed execution attempts. Since *Trop* only requires state revisions to demonstrate that the execution method and procedure represents an effort to impose a more dignified death,

constitutional challenges manifested a pattern of everchanging death penalty statutes that prompted an overall transformation of capital punishment application from hanging, to electrocution, to ultimately the modern-day lethal injection protocol (Roth Heilman, 2009). The lethal injection was developed after *Gregg* ended the decade-long moratorium, and states regarded the method as society's most civilized form of capital punishment. The protocol called for an anesthetic to induce unconsciousness, so inmates could not sense a paralytic chemical causing suffocation, while potassium chloride forced cardiac arrest (Buchmann, 2016). The three-drug protocol in place today still mirrors this model designed in 1977 by a medical examiner who admitted having no expertise, no prior research, and no consultation with other medical professionals (Roth Heilman, 2009; Merrill, 2008). Just as they have in the past, however, state capital punishment laws persist with only minimal revisions claiming to be a continued transition toward an adequate, humane execution technique.

According to Denno (2002), continuous transition justified as seeking greater humaneness is fundamental to the overall paradox of execution methods as subsequent death penalty jurisprudence contradicts the intentions of the Cruel and Unusual Punishment Clause. Consequently, inconsistent rationale permits the Court to maintain its restrictions on challenges of the methods *per se* yet progresses with additional restrictions to challenges of the protocol. For example, the Court decided in *Francis v. Resweber* (1947) that even in the event of unforeseeable accidents, such executions would not surmount to wanton inflictions of unnecessary pain to be considered torture. This means that the Court does not see it as cruel or unusual to execute an individual more than once if the first attempt failed to end in permanent death, even if or when the first attempt resulted in substantial pain for the condemned. Nonetheless, after more than thirty states started implementing the same lethal injection

procedure nationwide, in 1982, the very first execution to ever utilize the world's *most* humane and dignified method yet, was botched. The Court then held in *Whitley v. Albers* (1985) that unnecessary pain was constitutional when officials were acting in good faith (O'Connor, 1985). There appeared to be a new window of opportunity for inmates with the decision of *Nelson v. Campbell* (2004), in which the Court explained how inmates could petition procedural characteristics of the lethal injection after recent federal appellate restrictions prevented challenges to methods. The caveat was that execution protocol was still to be judged by the evolving standards of humaneness derived from a consensus found within states' legislation. Therefore, the Court reasoned such procedural challenges, regardless of the outcome, could not bar the state from still imposing the lethal injection (Merrill, 2008). The overall stance became a summation of juxtaposing standards: factors that should otherwise trigger cruel and unusual punishment are mitigated or incomparable. As long as execution regimens symbolize an effort to implement the most humane imposition of death possible, the ability to petition is significantly reduced.

The lethal injection then, by default, remains in line with the U.S. Constitution, but the Supreme Court's refusal to articulate clear standards caused inconsistencies in lower courts (Roth Heilman, 2009). The pressure for uniformity prompted the Court to directly consider a method challenge for the first time since *Wilkerson* via *Baze v. Rees* (2008). *Baze* upheld the three-drug lethal injection and rejected claims that the Eighth Amendment prohibited any risk of pain. The Court's attempt at uniformity translated to more draconian restrictions for inmates rather than guidelines for states. It requires future challengers to persuade the Court of a "substantial or objectively intolerable" risk of serious harm, to suggest a readily available alternative, and to prove it to be feasible and of lesser risk (Gee, 2011, p. 217). The Court still failed to consider

such risks as intrinsic to the method *per se*, even when directly presented with statistical data showing rising trends in botched lethal injections. Instead, the plurality maintained *Francis* stating “isolated mishaps” were not cruel and unusual (Roth Heilman, 2009, p. 653). Though the Court did not address the fact *Francis* was decided 30 years *before* the lethal injection even materialized, these holdings were still reaffirmed in *Glossip v. Gross* (2015) and again in *Bucklew v. Precythe* (2019). As a result, the defendant has the burden to persuade the Court that, one, the method of their execution will impose a death wrought with a level of intolerable pain so substantial that it would constitute cruel and unusual punishment, and two, that there exists a different and readily available alternative method that would not. There is no analogous obligation put onto the state to prove the method of execution will *not* impose such level of pain, and should the defendant show otherwise, the state is neither compelled to proactively or retroactively provide or seek out alternative methods or other legal remedies for the punishment.

### **Constitutional Framework**

Despite the abundance of scholarship dedicated to the Framers’ original intent, there stands no consensus regarding the political philosophies among those of its time. Without question, there was substantial support for the use of capital punishment during the ratification of the U.S. Constitution and Bill of Rights. Still, many Framers agreed with arguments supporting abolition, including its primary drafters, James Madison and Thomas Jefferson. Proponents of maintaining capital punishment commonly cite the Fifth Amendment as the source of constitutional permission to implement and enforce the death penalty, incorporated to the states by the bridge of the Fourteenth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation (U.S. Const. amend. V).

This justification is given primarily for being the only location in the U.S. Constitution that mentions capital offense, and it also posits that life and liberty shall not be restricted without due process of the law. A capital offense is referenced in the first clause, only articulating that a Grand Jury indictment is required prior to forcing any sort of redress on behalf of the accused. The reference to the deprivation of life, liberty, or property only asserts the necessity of due process, meaning a fair application of the law. There is no further meaning given to this statement as to whether deprivation is to be understood as equivalent to the removal of life. Both of these clauses are separate, but it becomes evident that originalist-oriented arguments tend to conflate these clauses to produce an argument in favor of capital punishment. Thus, its interpretation lends itself to presumption at best, which seemingly negates the supposed importance of strictly relying on what the Framers intended based on what they chose to explicitly say or not say. Some have attempted to reconcile its ambiguity by looking at it in conjunction with the Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted (U.S. Const. amend. VIII).

This forms two main arguments. First, since the term “cruel and unusual” came from the English Bill of Rights of 1689, the clause could not have applied to the death penalty when the Framers ratified their own Bill of Rights in 1791, as they would not have intended to replace it with the

Eighth Amendment (Gilreath, 2003). Second, since the Fifth and the Eighth Amendments were written and ratified at the same time, their choice to reference capital offenses in the former and not in the latter suggests the Framers did not originally intend for death as a form of criminal punishment to be interpreted as inherently cruel and unusual.

The biggest issue with these arguments is that they interpret the means in which the government gains its authority as flowing directly from the clauses. To assume such a relationship exists mischaracterizes the scope of the document. The U.S. Constitution was created to *limit* central authority; its clauses are negative grants of power purposefully designed so that they can withstand the inevitability of both foreseeable and unforeseeable political challenges throughout intergenerational progression. That is not to be construed as an advocacy for a living constitution argument necessarily, but only that its vagueness in some places and specificity in others was intentional. Its expressed enumerated powers are located in a completely separate section of the Constitution in Article 1, Section 8, of which the list is slim and makes no mention of policing nor punishment. This makes sense, considering the Framers were not in agreement on the issue themselves at the time it was drafted and ratified. As explained by the dissenting opinion in *Furman*, “the Framers’ exclusive concern was the absence of any ban on tortures based on the substance of the constitutional convention debates” (1972, p. 377). Therefore, rather than providing a set of guidelines for what government *can* do, the Bill of Rights functions as an outline for what government *cannot* do.

The choice to construct a constitution with built-in flexibility as the foundation is the epitome of the original intent. As Gilreath (2003) concludes, the Framers’ intention behind the Constitution was to establish a body that could “serve American posterity,” and so, to limit the overall interpretation of its clauses to the historical context surrounding its ratification would

reject such intent (p. 560). Thus, attempting to decipher the semantics of each clause as interpreted by each of the Framers to answer whether the death penalty is constitutional *per se* provides little enlightenment, as that is not how the Constitution was intended to be used:

Laws and institutions must go hand in hand with the progress of the human mind...and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors... let us provide in our Constitution for its revision at stated periods (Jefferson, 1816/1904-5).

Since the purpose of its fruition was to set up a contract between the central authority and the public to protect those under its rule by creating restrictions—not expansions—to its power, such claims are also presumably fallible. The way the Constitution was constructed to allow for interpretations to be based on the context of future generations is precisely its “true genius” (Gilreath, 2003, p. 563). Therefore, it is counterproductive to the originalist debate to determine, that because the Framers did not include capital punishment as an inherent cruelty at the time they created the Constitution, that they intended to prevent future generations of governments and publics from ever coming to this conclusion. We must instead look to the actual holdings and their rationales for criminal punishment writ large as given by the Court and applied under the Eighth Amendment to determine its relation with the death penalty. From this, we can begin to identify the grounds for or against the constitutionality of capital punishment.

### **Grounds for Unconstitutionality: Evolving Standards of *Indecency***

The grounds for the unconstitutionality of the death penalty stem from how its application interacts with society's evolving standards of decency. This comes from the case of *Trop v. Dulles* (1958), and despite its ambiguity in its own right, it is arguably the most citable direction given by the Court to be used for interpreting the meaning of the Eighth Amendment. In short, whether or not a punishment is cruel and unusual should be based on how its enforcement encourages societal progression. Through reanalysis, it is evident that the continued application of the death penalty as a result of early and modern-day Supreme Court decisions has ignored this standard and caused a punishment system that instead symbolizes societal regression. This section identifies those mechanisms of regression that ultimately demonstrate the unconstitutionality of capital punishment as a whole.

*Trop* was an Eighth Amendment case involving an issue of whether taking away one's citizenship was a cruel and unusual punishment for military desertion. Chief Justice Warren delivered the opinion of the Court, asserting that denationalization could not be unconstitutional on the grounds of excessive cruelty since war desertion could also be punishable by death. Instead, a punishment's cruelty depends on whether it imposes an outcome onto the individual that is "forbidden by the principle of *civilized treatment* [emphasis added] guaranteed by the Eighth Amendment" (*Trop v. Dulles*, 1958, p. 99).

The purpose of the Eighth Amendment was argued to signify an assurance that civilized standards limited the authority to punish:

Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect...the words of the Amendment are not precise and that their

scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society (*Trop v. Dulles*, 1958, p. 100-101).

Overall, the meaning of ‘cruel’ came to refer to the “basic prohibition against inhuman treatment,” while ‘unusual’ is argued to mean “something different from that which is generally done” (*Trop v. Dulles*, 1958, p. 100-101). Although decided over a decade before *Furman*’s temporary nullification, the Court chose to address the death penalty itself in *Trop*, only it did not incorporate those principles for the meaning of civilized treatment or the Eighth Amendment identified just immediately preceding the justification of capital punishment:

Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment... the death penalty has been employed throughout history, and, in a day when it is still widely accepted it cannot be said to violate the constitutional concept of cruelty (*Trop v. Dulles*, 1958, p. 99).

According to the opinion, the Eighth Amendment is righteously described as standing for “nothing less than the dignity of man” (*Trop v. Dulles*, 1958, p. 99), but it seems only arguments that are not constitution-specific are appropriate for the discussion of the permissibility of capital punishment. Not only is the given rationale counter to the Supreme Court’s duty to make judgements based on constitutional analysis and alignment, but to rationalize the appropriateness of a particular punishment based on historical trends threatens impartial policy review for its unstable dependence on the type of lens one elects to view American tradition. For this, there is much evidence to conclude the view of the Warren Court is inconsistent with America’s experience with the tradition of capital punishment enforcement.

Though the start of the U.S. death penalty was dramatically more severe, gruesome, and arbitrarily sentenced, the historical experience carries a theme of increasing restriction since its inception: an evolving standard of decency *away* from the use of capital punishment. As expressed by Justice Marshall's concurring opinion in *Furman*, the death penalty was "tempered considerably" as soon as it was brought to American soil (Barry, 2019, p. 1568). This trend continued throughout American tradition. Even while some colonial governments made death a mandatory sentence for those found guilty of a capital offense, various exceptions were often made to sentence the condemned to some alternative punishment. By the mid-1800s, several capital punishment reforms found success on behalf of the momentum of the abolitionist movement, with transformative restrictions vastly limiting its use in the North and resulting in three states permanently invalidating it altogether.

On the other hand, society cannot ignore the death penalty as it relates to historical tradition among the southern states. The Court may look to the sheer numbers of occurrences capital punishment was enforced to derive its perception of popularity, but in doing so, there is an added burden to examine the nature and mechanism behind such enforcement. This burden the Court does ignore. Along with it are the sociopolitical and legal factors that piloted the southern restructuring of capital punishment and the criminal justice system and created a runway for the magnitude of death sentences and executions carried out to take off. Heightened, excessive criminal punitiveness and the discriminatory expansion of death-eligible offenses and application of the death penalty to African Americans was a response of resistance in the face of increasingly restrictive penological legislation, especially in years leading up to the Civil War although persisting long after the ratification of the Thirteenth Amendment. As abolition gained more support throughout the Reconstruction Era, such expansion represented a mechanism to

ensure a perceived necessity to maintain a social order that was being threatened by criminal justice reform and the traction of other equalizing efforts at the time. Such gross malleability of the justice system and its impacts on the African-American community should never be minimized, nor should the position of this thesis be misconstrued as to mean that the extralegal effects of prejudice and caprice do not still systematically discriminate against minorities today, but on the contrary, that the death penalty is proven to be another one of its tools of social divisiveness. What can be said about the southern manipulation of the criminal justice system, however, is that it still supplements the tradition of death penalty restriction, just through efforts to protect other, more opaque American traditions that supersede its importance and that of an equal justice system. Eventually, the persistence of anti-death penalty sentiments culminated in a ten-year moratorium on executions, and the Supreme Court decided in 1972 to invalidate its use entirely, compounding the southern strategy with a trend of restriction and an overarching temperament of execution enforcement.

If *Trop* is to be the benchmark for judging society's evolving, civilized standards, a pre-*Trop* analysis reflects mirroring trends non-unique to early American history. Even in its current use, Executive Director, Richard Dieter (2013) reports in a study from the Death Penalty Information Center that, "contrary to the assumption that the death penalty is widely practiced across the country... only 2% of the counties in the U.S. have been responsible for the majority of cases leading to executions" since the Supreme Court validated reinstatement four decades ago (p. iii). That means that between 1977 and January 1<sup>st</sup> of 2013, all 1,320 executions conducted in the U.S. were results of decisions of just 15% of U.S. counties. Additionally, the study concluded as of 2012 that 80% of all U.S. counties have no death row population, meaning they have not so much as handed down or upheld a sentence of death, and 85% have not

conducted an execution in almost fifty years (Dieter, 2013). This regional disparity has only continued. As of 2020, the U.S. reached 1,517 executions, yet 82% were carried out by the South, of which Texas was responsible for 38% just by itself (DPIC, 2020A). For perspective, the entire Northeast region since 1977 has carried out a total of 4 executions. These figures are essential to remember when the Court implores the constitutionality of the death penalty ought to rest on traditionally widespread standards of civility. The expansion and widespread use of capital punishment within the South throughout history should not be remembered as widespread popular acceptance of the death penalty itself, nor a widespread commonality among traditional, civilized standards of human dignity in the past or the present.

Aside from historic trends, the same civilizing justification given in *Trop* that was not applied to its discussion of capital punishment is also inconsistent with later Supreme Court findings. In terms of the Eighth Amendment specifically, the Court has held:

There was no discussion of the interrelationship of the terms ‘cruel’ and ‘unusual,’ and there is nothing in the debates supporting that the Founding Fathers would have been receptive to tortuous or excessively cruel punishment even if *usual* in character or *authorized by law* [emphasis added] (*Furman v. Georgia*, 1972, p. 377).

The Court argues that what little meaning is given to the Eighth Amendment’s significance comes from previous rulings. Notwithstanding, this finding in *Furman* contradicts its position to rely on a degree of similarity among state death penalty legislation and frequency of use for judging the soundness of capital punishment. This deference acts to take away the Court’s charge to address capital punishment *per se* in virtually all circumstances, as doing so would require an examination and a ruling on other grounds. In effect, it would open the door to scrutinize capital punishment in an additional context. One in which the Court’s articulated necessity for the dual-

consideration of the *direction* of progressing standards and the *comparison* of historical and modern use across jurisdictions to determine the evolution of decency are absent, leaving behind only inherent barriers for review. It informs society that such a finding is possible, but only if the Court wills it.

While evolving standards and the inherency of a policy do not have to be mutually exclusive, both require judicial attention. In cases where they are found to be incompatible, such that a policy is inherently constitutional except goes against society's standards, those issues may be remedied outside the Court through political institutions and various democratic means. In cases where a policy is inherently unconstitutional, however, even if widely accepted and encouraged by society, the *per se* determination must prevail. A reapplication of the standards of *Trop* and cases of the like to the constitutionality of the death penalty shows capital punishment does constitute a level of inherent unnecessary cruelty that violates the Eighth Amendment. For example, the Supreme Court overruled a punishment of denationalization not because it inflicts any physical mistreatment or torture, but because that person risks a total loss of his or her right to judicial relief. The Court opined, "the suggestion that judicial relief will be available to alleviate the potential rigors of statelessness assumes too much," even reprimanding itself for its role in *Shaughnessy v. United States ex rel. Mezei* (1953), whose denial of judicial examination of any kind resulted in an undocumented citizen's inevitable imprisonment (*Trop v. Dulles*, 1958, p. 102). The individual spent four years confined at Ellis Island before being freed through executive action, and the Court condemned its previous decision as an "intolerable situation" (*Trop v. Dulles*, 1958, p. 102).

The Court held denationalization was overruled as a form of punishment for being decidedly worse than physical torture:

This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated... a condition deplored in the international community of democracies (*Trop v. Dulles*, 1958, p. 102).

Thus, it is the severity of the situations that would be exposed to the individual that makes the punishment more primitive than any physical mistreatment. The Court makes it clear that its unconstitutionality is not based on a principle of inevitability of these disadvantages for a denationalized individual, but rather on the sheer risk of the individual losing all means of protection against them if endured. Therefore, the separation of the cruelty of denationalization from the cruelty of capital punishment is a presumption that at least death row inmates should have the right to appeals or judicial relief. By its nature, this holding also assumes the same risk of enduring such disadvantages, regardless of the potential of judicial protection and the adequacy of legal representation, is not true of an individual existing on death row. Yet unlike *Trop*, the Court has never recognized or weighed how the consequences of its death penalty jurisprudence pervades the stability of this claimed distinction or its right hand in chipping away the guarantee of protection or relief.

The finding excludes the death penalty from the same measurement outlined in *Trop* by default, but many of the scenarios that were given are characteristic of the existence, procedures, and effects of capital punishment. All of which interconnect with the prominent feature of arbitrariness that accompanies capital punishment, or its 'lightning strike factor.' In *Furman*, Justice Stewart famously declared that the infliction of the capital punishment became so random

that it was just as likely for a man to be killed by a strike of lightning as it was for him to be killed by execution:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these [the petitioners], the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed... I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under systems that permit this unique penalty to be so wantonly and so freakishly imposed (*Furman v. Georgia*, 1972, p. 310).

Controlling the death penalty's arbitrariness has been the fixation of the Court and state legislatures dominating most of its constitutional challenges and contentions. The tone of the Court is to continually limit its application over time that is minimizes the possibility of handing down a sentence of death for non-objective legal reasons, such as discrimination, political attitudes, trial errors, or ineffective counsel. These limitations were added gradually as new legislative provisions that took cues from the Court's direction would often result in other forms of unanticipated, arbitrary consequences. For example, by the 19<sup>th</sup> century, states began removing automatic death sentences from their capital punishment laws, but this quickly led to arbitrary and discriminatory sentencing procedures by extending to juries and judges unguided discretion:

The fate of the prisoner was the total caprice of those in the jury box; and it is not always certain, indeed it still is not, that such decisions were not based upon extrajudicial factors (Gilreath, 2003, p. 567).

The capricious nature of death penalty sentencing was precisely what led to its abolition by the Supreme Court with *Furman* in 1972, explaining that the level of randomness associated with its operation at the time violated the Eighth Amendment. As Dow (2008) puts it, “the concept of arbitrariness has resided at the very core of modern death penalty law” (p. 967), and *Furman* was met with a new wave of state legislative revisions passing various new capital punishment laws. *Woodson* (1976) held mandatory death sentencing laws were unconstitutional for not complying with societal standards that the appropriateness of a specified punishment should be determined by considering the mitigating and aggravating factors of the individual in his or her case. Along with *Gregg* (1976), the Court recognized a need for a discretionary sentencing procedure, but one that would instruct juries’ consideration of such factors to decide whether or not to impose a sentence of death. All legislative nuances aside, the result is a trial and error experimentation of legal procedure to create a perfected capital punishment regime among state legislatures as the Supreme Court continues to amend the development of its jurisprudence.

It is essential to note that arbitrariness does not hold the same meaning in the legal context as it does in the general, societal sense. In law, arbitrariness refers to the *process* and whether the operations of a particular state “create a substantial *risk* that a given death sentence will be arbitrary” (Dow, 2008, p. 967). Whether the punishment of death itself is arbitrary or not is distinct from this measure as far as the law is concerned, but therein lies the paradox. In any form of capital punishment sentencing procedures, whether statutes remove discretion entirely as they had pre-1976 or choose to limit it through guided jury instruction and other added means as they do post-1976, both would lead to an arbitrarily imposed death. In one version, a sentence of death is automatic, meaning everyone convicted of a capital offense is sentenced without taking mitigating or aggravating factors into account, resorting to more killing without careful due

process in penalty phases, and carries an even more heightened probability of executing the innocent. The other version operates under guided discretion, which allows for the killing of some but not others despite being convicted of the same crimes, and with the advent of *Kansas v. Marsh* (2006), consideration of aggravating and mitigating factors can also become moot if jurors were to determine they were in equipoise. Thus, guided discretion invites a higher probability of discriminatory-based sentencing, too, and still carries the risk of executing the innocent of which false conviction is ever-present in any criminal case, just irrevocable when enforced in the capital sense. In other words, the means still do not justify the end, and the death penalty becomes arbitrary both procedurally and as a type of punishment itself. Since the wanton infliction of death cannot be escaped in either version, this should be grounds for the death penalty to be found unconstitutional *per se*.

This is not the reality of death penalty cases in the United States. The Supreme Court has defined the principle of arbitrariness in a way that synonymizes it with irrationality (Dow, 2008). A death sentence cannot be overruled on arbitrariness because the reasons for which it was handed down are unclear. A death sentence is arbitrary if it is deemed to be handed down *without reason*. One must detail the reasons for which a case received a sentence of death, and if no such basis can be provided, then it may be found arbitrary. This is consequential because “death sentences are more commonly unconstitutional not because they are based on no reason, but because they are based on impermissible, or illegitimate, reason” (Dow, 2008, p. 971). For example, there may not be one explanation that neatly confines to all cases, but that does not mean the outcomes of many of those cases are not both, in fact, arbitrary and consequences of reason. In *McCleskey v. Kemp* (1987), for instance, the petitioners proved with statistical evidence that race played a significant role in whether a defendant found guilty of murder would

receive capital punishment or life without parole. The Court mentioned it would make no attempt to negate the validity of the evidence, nor did it make any suggestions against its credibility. Nevertheless, the Court upheld the constitutionality of capital punishment because it felt the petitioners needed to additionally prove that the procedures employed by the state *purposely* discriminated against those specific defendants based on race, rather than proceed with the statistical finding that it discriminates based on race in general. Here there was a reason given that explained why patterns in death sentences were disproportionate between blacks and whites, and the Court itself acknowledged the veracity of race as a real reason, but how and why the statutes contributed to those patterns was unclear:

Ironically though, once we identify race as explaining much of the ‘freakish’ distribution that Justice Stewart apprehended, the distribution ceases to be arbitrary—for it was based on a reason. It is just that the reason was abhorrent... There is not a single comprehensive study of jury behavior that supports the conclusion that juries act without reasons... The role of the courts should be ferreting out those impermissible motivations, rather than looking for coin flips that never took place (Dow, 2008, p. 971).

Moreover, perhaps the fact that no one explanation neatly confines to all cases suggests the impossibility of eradicating caprice from death penalty enforcement.

As defined in *Foucha v. Louisiana* (1992), the Due Process Clause of the Fifth and Fourteenth Amendments prohibit certain government actions that are arbitrary or wrongful, even if legislation and substantial efforts were put in place to ensure procedural fairness. Thus, a policy can meet due process requirements procedurally, as set by the standards of the Supreme Court, without doing so substantively. Arguably, the Court gradually amends its death penalty jurisprudence to maintain capital punishment under the notion that it does not violate the

fundamental right to life procedurally. This is achieved through various means, such as outlawing mandatory sentencing, requiring the consideration of aggravating and mitigating circumstances, limiting its application to adult inmates only, and excluding the mentally ill and the intellectually disabled. The underlying impact, however, is that state legislatures need only revise their capital punishment legislation insofar that their execution protocols are said to cause a less arbitrary or wrongful application. The actual methods themselves become virtually untouchable, and therefore so does a sentence of death in and of itself, because the Court justifies its procedural integrity and resists addressing how they both substantively interact with the Due Process Clause. If one were to challenge the substantive violation of capital punishment, the state governing the law under which the challenge originated would be obligated to persuade the Supreme Court that such law serves a compelling interest that could not be achieved “through any means less restrictive of the right” (Barry, 2019, p. 1562). The exception to this is when the contested right is not found as fundamental. In such cases, legislation may still be constitutional if it does serve a compelling interest, and even if there is an available, lesser alternative.

According to criminologist, Martin Levin, criminal punishment serves several purposes, one being to express and emphasize society’s ultimate values (Oldenquist, 2004). Durkheim’s law on penological evolution furthers overemphasis is more conspicuous in societies marked by a lower degree of civilization and operate under a more absolute, central power. Thus, crime and punishment are functional in the progression of society toward a more mature, civilized collective. When the Supreme Court first invalidated the use of capital punishment in *Furman*, only Justice Brennan and Justice Marshall found the death penalty to be cruel and unusual in all instances. Justice Brennan’s rationale dealt with its arbitrariness, while Justice Marshall argued that the death penalty served no compelling retributive, deterrent, or even economically sensible

purposes (Hurwitz, 2008). Thus, the dynamic of criminal punishment is based on a balancing test of utilitarian and retributive goals that would promote societal progression. In this view, the principles of Durkheim's theory can serve as the foundation supporting the argument that the abolishment of the death penalty would be a step toward a more civilized American criminal justice system and citizenry (Reiman, 1985).

The U.S. Supreme Court has explicitly recognized that the same principle of societal progression should be the standard that all criminal punishments should meet. Except when it comes to the state-enforced removal of life, this balancing test creates a paradox. The death penalty violates substantive due process guaranteed by the Fifth and Fourteenth Amendments for three non-exclusive reasons, and in some part, due to its intersection with procedural unfairness as well. Foremost, the issue does involve the matters of a fundamental right in that it concerns the removal of life, of which the Constitution takes careful steps to safeguard in general and in the specification of criminal rights of the condemned to protect life from the power of state punishment. Secondly, capital punishment takes away such right through means of arbitrary and discriminate infliction and mistreatment or cruelty, and third, does so using procedures that are not carefully designed to serve a permissible purpose of punishment:

The condemned's right to life is fundamental because of: history and tradition of restriction and regionalization of the death penalty; the dignity of the condemned, as articulated by federal and state judges, moral philosophy, human rights, and religious teaching; and the negative right at issue, namely, the freedom to not be killed by the State and the death penalty is not narrowly tailored to achieve deterrence or retribution because its imposition is marred by arbitrariness, delay, unreliability, and because execution belies narrow tailoring (Barry, 2019, p. 1563).

Justice Blackmun recognized this paradox when the majority Court denied certiorari to hear *Callins v. Collins* (1994), arguing it put the constitutional rights to fair due process and individual freedom in competition with each other, and declared it impossible to reconcile:

The proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them... Experience has shown that the consistency and rationality promised in *Furman* are inversely related to the fairness owed the individual when considering a sentence of death. A step towards consistency is a step away from fairness (Gilreath, 2003, p. 570)

While Justice Blackmun argued the only remedy would be to prohibit the use of the death penalty altogether, this still was not a wholesale declaration of capital punishment as unconstitutional *per se*. Like many other Justices, Blackmun still only addressed the death penalty in the context of how it was being imposed at the time (Gilreath, 2003). Though his dissent did not directly address this critical question, in recognizing its existing paradox he suggests a remedy that would operate as its functional equivalent and should be a testament to the overall inherency of the death penalty. If constitutional safeguards are eroded in either

mechanism used for sentencing procedures, and the only way to avoid such violations would be to prohibit the imposition of death as a form of punishment entirely, then that appropriate outcome would necessarily wholly invalidate the administration of capital punishment.

The Court, however, continues to uphold execution methods as inherently constitutional. This is true even when faced with instances where the death penalty has explicitly failed to serve any compelling end, often in ways so dire that it has been recognized to trigger violations on other grounds, such as through breaches of equal protection, due process of the law, and unnecessary cruelty in terms of the numerous cases of wrongful or botched executions. This pattern has created a capital punishment system where each new hearing has further eroded the inmates' freedom to challenge the conditions of their death sentence yet eased the states' ability to defend its inadequate protocols. As a result, the Court's jurisprudence increases the probability of enduring substantial pain beyond the mere extinguishment of life. It also ignores the ongoing threat of executing the innocent and perpetuates the longstanding racially and economically discriminative removal of human life of mostly minorities and lower-income defendants, among several other associated issues. The result is a type of government policy that skews the threat of execution to bear the most weight on:

People who killed whites, people who received inadequate representation, people whose legal claims have been brushed aside by the courts... people whom we literally cannot understand because, thankfully, our own lives, unlike theirs, do not hang by the merest single thread (Dow, 2008, p. 990).

Despite widespread debate regarding the constitutionality of the death penalty, there is one rule of thought that certainly both sides of either camp can agree. Life is fragile. It is one of the only values that the U.S. Constitution asserts neither the state nor one's neighbor can rightly

infringe upon nor take away, and the principle is virtually upheld as one that is universally fundamental. But it is not absolute. Since the nation's inception, state-sanctioned killing can be inflicted as a legal remedy for punishing violations of the law. While its use has been undisputedly curtailed, its application in modern society is still riddled with significant error, arbitrariness, and unresolved issues that result in procedural unfairness and extralegal outcomes inherently contrary to the spirit and legitimacy of the Constitution. There is no excuse for murder, and "[s]ocieties that execute do so because they think they are implementing justice," but as told by Justice Scalia, and staunch death penalty advocate, in his dissent over ten years ago, "this is not justice. It is caprice" (Dow, 2008, p. 964/990). The U.S. Supreme Court has yet to directly face these issues despite having the opportunity to do so for nearly a century and a half, leaving the meaning of the Eighth Amendment and every human life subject to the risks of capital punishment in limbo as the ultimate consequence.

### **Policy Implications**

There is an equally important issue with capital punishment to be addressed that goes beyond the constitutional debate itself. Over time, the Court has demonstrated a peculiar level of ambiguity and hesitance with each amendment to its death penalty jurisprudence. This section analyzes the Court's overall constitutional authority to determine how the death penalty and its procedures ought to fit within the grounds of the U.S. Constitution. Due to its reluctance to articulate clear, identifiable standards, the result is a transition of interpretive authority from the Court over to state legislatures. The implication is that, as state legislatures' influence increases, their strengthened authority results in the creation of a more dangerous capital punishment regime and further erosion of democratic safeguards.

### **Transitioning Constitutional Authority**

During the short period between *Furman* and *Gregg*, 35 state legislatures rewrote their death penalty laws in an attempt to change the Court's position on the invalidation of capital punishment. Its reinstatement rested on the slightest contingency that its unconstitutional nature for the time being—its randomness—may not be true in all circumstances. Since its reinstatement, the death penalty has managed to stay in place in large part due to how well state legislatures can persuade the Court of the efforts and measures taken to reduce its arbitrariness which interconnects other constitutional issues such as due process violations and unnecessary cruelty. The Court depends on its evolving standards of decency test, which seems to provide a low threshold in terms of the obligation state legislatures must prove to meet to maintain its capital punishment procedures and methods. This is where the idea of the 'transitioning effect' comes to life, otherwise defined as the shift of constitutional authority over capital punishment policy from the Court to the dynamics and interests of state legislatures.

The reinstatement of capital punishment post-*Gregg* came about after *Furman* triggered a wave of legislative revisions even among states that had already decided to move forward with abolishment before 1972. The Supreme Court rejected the *per se* constitutional challenge to the death penalty in *Gregg* on the grounds that it did not amount to cruel and unusual punishment. The Court has since ignored any subsequent challenges that target the inherency of the death penalty, even those beyond Eighth Amendment grounds. It has also effectually ignored any challenges based on the fundamental right to life and substantive due process (Barry, 2019). Admittedly, this effect logically follows the Court's interest since setting *Gregg's* precedent, as reviewing issues on either premise would risk invalidating capital punishment as a whole.

Instead, what the Court has done, is grant certiorari to cases that limit its applicability and enforcement under special circumstances and for specific individuals while steadfastly standing behind *Gregg's* presumption that the death penalty itself is constitutionally sound. This means that challenges to the constitutionality of an execution method are also mostly ignored, for its effect mayhap result in a functional equivalent. New death penalty legislation continues to be passed and subsequently further challenged to limit its use, application, and procedures. States produce only slightly different modifications to their capital punishment statutes with each supplemental decision apiece, simply having to meet the minimum thresholds articulated by the Court. Goldberg and Dershowitz (1970) explain that state and federal courts have managed to maintain the application of capital punishment and its justification as a permissible criminal punishment by resolving issues of its constitutionality with just "two or three sentences" (p. 1775). They argue that a shallow and brief treatment such as this generally illustrates the legislatures' strict adherence to precedent pronounced by the Supreme Court. Oddly, when it comes to capital punishment jurisprudence, there is no explicit precedent for states to follow.

According to Goldberg and Dershowitz (1970), the Supreme Court has only struck down criminal punishments as violative of the Cruel and Unusual Punishment Clause on three occasions: *Weems v. United States* (1910), *Trop v. Dulles* (1958), and *Robinson v. California* (1962). These are the only instances in American history where the Court has specifically disclosed what punishments are inherently cruel and unusual and provided some tangible, objective standard for interpretation. None of which involve issues or events associated with the death penalty or inform how to assess the appropriate application in the context of measuring its constitutional soundness:

While the Court's modern Eighth Amendment jurisprudence has gradually reduced the circumstances under which the death penalty may be imposed, this trend is inconsistent with the Court's unwillingness to critically examine the specific procedures states use to execute, even in the face of growing concerns over the humaneness of such procedures (Roth Heilman, 2009, p. 636).

Upon further analysis, it is evident that a significant degree of authority has been forfeited to state legislatures that can now stay ahead of the next constitutional challenge through minor modifications to capital punishment codes and procedures.

In his concurring opinion in *Furman*, Justice Brennan points to similar concerns raised during the drafting of the Constitution, like that of Patrick Henry during the Virginia Convention, citing that the Framers "recognized that Congress [has] to ascertain, point out, and determine what kinds of punishments shall be inflicted on persons convicted of crimes" and "insisted that Congress must be limited in its power to punish...and no latitude ought to be left, nor dependence put on the virtue of representatives" (*Furman v. Georgia*, 1972, p. 238). The substance of the constitutional convention debates proves that the motivations behind the

purpose of its adoption were to curtail legislative power because “the legislature would otherwise have unfettered power to prescribe punishments for crimes” (*Furman v. Georgia*, 1972, p. 264). Nevertheless, there is little instruction written into the lines of its holdings and a great deal of latitude left undetermined for the nature and enforcement of capital punishment. Meanwhile, the Court has, on several occasions, deferred the authority to such branches in determining whether a method or protocol of imposing capital punishment is constitutional (Roth Heilman, 2009). For instance, electrocution was upheld in *In Re Kemmler* because “it was for the legislature to say in what manner sentence of death should be executed” and “this act was passed in the effort to devise a more humane method of reaching the result” (*In Re Kemmler*; 1890, p. 447; Roth Heilman, 2009, p. 639). Decisions such as this combine to allow for a perpetuated history of non-uniform, random, and dangerous capital punishment policy across the country.

Two components constrain judicial interpretation: precedent and principled decisions (Goldberg & Dershowitz, 1970). This means a policy or procedure can be unconstitutional “as an implication of established doctrine” or “as an authoritative judicial declaration” (p. 1776). The Supreme Court has avoided developing standards of either category regarding the Cruel and Unusual Punishment Clause—especially and uniquely so for issues concerning capital punishment. Rather than applying a critical lens to the death penalty itself, the Court relies on three vague principles to develop its jurisprudence. These principles are based on historical usage of a particular punishment, the consensus of statutory authorization in other civilized jurisdictions, and the status of general public opinion (Goldberg & Dershowitz, 1970). From *Wilkinson*, it is understood that a particular execution method is only unconstitutional based on whether it is considered normative compared to past methods that would be presently considered inhuman or barbaric. *Weems* and *Trop* taught that a virtually unanimous condemnation of a

particular punishment in other civilized nations should signal a continued implementation in our own to be against the morals of a maturing, progressive society, regardless of effectiveness. *Weems* and *Robinson* explained that the judgement of such morals should be based on some national consensus of public opinion that would offend or shock the reasonable man's conscience or fundamental values but turns to non-uniform legislative cues to establish the consensus regarding capital punishment. Despite most of these holdings coming as late as the mid-20<sup>th</sup> century, the Supreme Court still declares that the exactness of the Cruel and Unusual Punishment Clause's meaning continues to remain undetailed and clouded. As for capital punishment, the presumption that it fits within such an unclear meaning carries an awkward sentiment of exactitude being that the Court has yet to steer itself out of such a vast sea of gray.

The choice to remain ambiguous on the issue arguably diminishes the role of the judiciary while still managing to maintain a strong sense of adherence to democratic virtues such as federalism, checks and balances, and constructionist constitutionalism enshrined in American political tradition. These decisions actually redistribute balanced power opposite of the expression of the Constitution, so that judicial interpretation becomes subject to various political dynamics, organization, and construction of the states' authorization. Put best by Hurwitz (2008), though the Supreme Court has been an integral actor for facilitating the debate over capital punishment thus far, "the outcome of capital punishment may be determined by the political process engaged by legislative and executive branches" (p. 255). The impacts translate to an ongoing threat to the constitutional safeguards established to prevent the erosion of American values against cruel and unusual punishment, equal protection, and due process of the law. A threat that has manifested itself since the death penalty began on American soil nearly four-hundred years ago, and without substantial attention and reform will inevitably persist:

There is stark evidence of illegitimacy in the legal system... it results primarily from judicial indifference (Dow, 2008, p. 985).

Ultimately, the paradox of the death penalty jurisprudence stems from the Court's deference of authority to state legislatures (Denno, 2002). Instead of the Court deriving standards from its direct interpretation of the Constitution, the Court's rationale conforms to the consensus of states' legislative transitions. Such influence distorts judicial philosophy, and without clear guidance, execution methods and procedures may continue to erode constitutional safeguards. Left ignored, it morphs the death penalty protocol into an instrument of procedural experimentation, as states seek just enough nuance to offset future constitutional challenges that would jeopardize the death penalty as a whole. Many former Supreme Court Justices have come to repudiate their past positions or holdings on capital punishment, admitting that the failure of such experimentation is precisely why it must be abolished. As Justice Blackmun declares in his dissent from the denial of certiorari in *Callins v. Collins* (1994):

From this day forward, I shall no longer tinker with the machinery of death. For more than 20 years... I have struggled... along with a majority of this Court, to develop procedural and substantive rules that would lend more than the appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved... I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. [N]o combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies (Berry, 2011, p. 443).

As noted, this opinion comes from the dissent to a case that the Court never formally heard, so like many other statements of its kind that have surfaced in recent years, it has not yet become

part of the majority position of the Court or influenced the means of its constitutional approach. Therefore, regardless of how painful, botched, discriminatory, or arbitrary an execution attempt may be today, the states maintain the authority to continue enforcing capital punishment under claims of supposedly furthering its humaneness because their influence is what now defines the standard.

### **Examining the Transitioning Effect in Anti-Abortion Trends**

Recent legislative actions in the last two years regarding the status of abortion seem to be following similar patterns identified in the initial inter-*Furman-Gregg* period. Interestingly, the Supreme Court came out with the decision of *Roe v. Wade* (1973) only a year after deciding *Furman*. Before offering any further critical analytics between abortion law and capital punishment law, however, it is important to offer a brief orientation of the history and surrounding facts of and leading up to the decision of *Roe*.

*Roe* considered the constitutionality of Texas statutes that criminalized a successful attempt to terminate a pregnancy punishable between two to five years in prison and to be doubled if administered with the mother's consent. Those who provide any means knowing its intention would be found guilty as an accomplice and be treated as murder should the attempt end in the death of the mother. The only exception to these statutes would be if acting under medical advice to save the mother's life. The plaintiff challenged the constitutionality of these statutes when she could not obtain a legal abortion by a licensed professional in Texas because the pregnancy did not pose a life-threatening danger, and she could not afford to travel to other jurisdictions where she could have the procedure safely. A licensed physician, who was granted leave to intervene in *Roe*'s action, also filed a complaint arguing the ambiguity of the statutes posed difficulty in determining which cases fell within the life-threatening exception and resulted

in pending prosecutions against him. Both Roe and the physician appealed to the Supreme Court, arguing the statutes were unconstitutional in large part due to vagueness and on the basis of their right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. The physician's complaint in intervention, however, was dismissed and "remitted to his defenses in the state criminal proceedings against him" (*Roe v. Wade*, 1973, p. 127). The complaint detailed Roe was seeking to "sue on behalf of herself and all other women" (*Roe v. Wade*, 1973, p. 120).

At the time they were reviewed, the Court notes that the statutes were first enacted and practically unchanged since 1854. Despite being heard more than a century later, the Court notes the majority of abortion laws in effect at the time of *Roe*, such as the Texas statutes that were presently in contention, were "not generally appreciated for their recency" (*Roe v. Wade*, 1973, p. 130). The Court still found that throughout the establishment of common law, the U.S. Constitution, and most of the 19th century, "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today" (*Roe v. Wade*, 1973, p. 141). Ultimately, the Court's culminated analysis of abortion law in ancient jurisdictions and the Hippocratic Oath, as well as that of English statutory law, common law, and American law posit the concept of the right to choose is older than the ever increasingly more punitive laws of the late 19<sup>th</sup> century as well as less stigmatized.

The Court cites the American Medical Association's (AMA) position on abortion as being a general demoralization in 1857, which called it an "unwarrantable destruction of human life" and called on state legislatures to rewrite their laws (*Roe v. Wade*, 1973, p. 141). In the 1840s, however, only eight states implemented anti-abortion laws, regulations, or proscriptions to begin with, and thus the position of the AMA is argued to have influenced the growing state control and punitiveness on the issue. Laws continued to increase in severity of offense and punishment

well into the 20<sup>th</sup> century as a “large majority of the jurisdictions banned abortion however and whenever performed” by the 1950s, with preservation of the mother’s health being the only exception (*Roe v. Wade*, 1973, p. 139). Again, in 1967, the AMA’s Committee on Human Reproduction continued to urge legislatures to pass similar anti-abortion laws, solely recommending the procedure when found ‘therapeutic.’ This meant an abortion ought to be permissible only when documented medical data and information can point to three, limited situations: when there is a substantial threat to the woman’s health or life, when the fetus would be born with substantial physical or mental deficiencies, or when examination suggests the pregnancy is a result of rape or incest. In most cases, two doctors would have to agree—in writing—that the patient should receive the procedure. Those seeking termination in cases resulting from rape or incest needed to be legally established, and providing an individual’s medical information to legislatures for this determination would not violate any code of ethics.

A partial justification behind the gradually more stringent abortion laws following the 1850s and again the 1950s is thought to be rooted in a theory of the legitimate state interest to protect or preserve the life or health of pregnant women. Up until the 1940s, the procedure carried significantly higher risks and mortality rates. Due to modern advancements, however, the Court refers to medical data showing mortality rates of legal abortions to be “as low as or lower than the rates for normal childbirth” and therefore reasons “any interest of the State in protecting the woman from an inherently hazardous procedure...has largely disappeared” (*Roe v. Wade*, 1973, p. 149).

Liberalization movements advocating for more lenient abortion laws started gaining momentum in the early 1970s and has since marked an increasing polarization within the medical field and other legal and social organizations contributing to the constitutional discussion of *Roe* in 1973.

When it did come time for the discussion, however, the only plaintiff the Court found had standing to sue in *Roe* was Roe herself. A married couple also filed under the pseudonym, *The Does*, who were not seeking to be parents and feared their accessibility to a legal abortion in the event they become pregnant in the future as medical advice warned it could pose serious health risk or injury to the mother. The Does' complaint was dismissed as speculative:

Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. . . . [W]e are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy (*Roe v. Wade*, 1973, p. 129).

In the case of the Does', the Court did not find that their present injury concerned the potentiality of life, either of the mother or the potential embryo, but "only an alleged detrimental effect upon their marital happiness" (*Roe v. Wade*, 1973, p. 129). It is important to note that there were other complainants in addition to Roe's and the physician's, the fact their complaints were dismissed, and the grounds for its dismissal, because it proves the many facets of the discussion ignored by the Court and the concerns cited therein comport with the many concerns of the modern-day debate over abortion and accessibility to reproductive healthcare and their increasing vulnerability to state legislatures' anti-abortion policymaking.

Those concerns are not without warrant. Since the 1973 ruling, the anti-abortion movement focused its resources on state legislatures (Pritchard & Parsons, 1999). The political backlash became the "incremental strategy... chipping away at *Roe* throughout history" and resulted in a mobilization to limit the interpretation and application of the right to privacy

(Machado, 2020, p. 235). Many subsequent Supreme Court decisions allowed for additional restrictions in state policies that could create additional requirements needed to qualify for the procedure. Requirements could range from obtaining a judge's permission to raising the cost of the procedure by excluding it from Medicaid coverage (Pritchard & Parsons, 1999). In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Court ruled states could restrict accessibility to obtaining the procedure but without imposing undue burden:

A state law or regulation places an undue burden on a woman's access to an abortion if ... it has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" (Medoff & Dennis, 2014, p. 208).

This holding has become the legal standard and with it came waves of new state restrictions to the overall accessibility to obtain an abortion:

Since the 1992 *Casey* decision, the United States has experienced a steady decline in the number and incidence of abortions. The number of abortions declined from 1.52 million in 1992 to 1.21 in 2005. The abortion rate fell from 25.7 abortions per 1,000 women of childbearing ages 15-44 years in 1992 to 19.4 in 2005. The abortion ratio declined from 27.5 abortions per 100 pregnancies in 1992 to 22.4 in 2005 (Medoff & Dennis, 2014, p. 208).

The anti-abortion movement's goal is to reduce the number of abortions through additional statutory restrictions. Due to the Court's deference to state legislatures power in abortion policymaking, accessibility is significantly reduced more so for those who cannot afford the higher costs of healthcare or those who cannot afford to travel across jurisdictions where accessibility is more easily obtained. As the national abortion rate has continued to decline over the last decade, state legislatures have only continued to pass restrictions to limit accessibility,

from cutting funding to medical facilities and abortion clinics that threaten or lead to closures, or through passing currently unenforceable legislation that would criminalize women and physicians for attempting the procedure:

Many states are passing pro-life laws, knowing that the laws are unconstitutional under the current abortion precedent. The passage of these new state laws is a deliberate attempt to entice pro-choice defendants to challenge the laws in court, eventually opening the door for the ‘new’ Supreme Court to review the current abortion precedent... Pro-life legislatures know that now is the best chance to overrule the precedent created by *Roe v. Wade* (Oeding, 2020, p. 137).

According to Oeding (2020), currently, the Supreme Court still holds the upper hand on the current status of abortion but notes the "future depends on Supreme Court decisions," and states continue to mobilize support for further restrictions (p. 50). This type of state behavior keeps tension on the courts regarding abortion matters. Hence, state legislatures can “[provide] an arena for continually challenging *Roe*” in ways similar to the process in which capital punishment application has also been gradually reduced, but defended by the states (Oeding, 2020, p. 50). This could potentially result in a greater transitioning effect over time should the Court be pressured to revisit *Roe*, of which the only constitutional grounds given is that of the right to privacy, and the Court already noted in the decision that privacy is not guaranteed anywhere in the Constitution. Thus, like we saw capital punishment invalidated and reinstated based on opposite decisions regarding the grounds of arbitrariness, which is also not an expressly guaranteed protection by the Constitution, it is not unlikely that the Court may exercise a similar pattern in rationale that could potentially invalidate abortion should the opportunity arise.

### **Conclusion**

This thesis discussed the historical influences as well as the political and judicial dynamics that shaped the death penalty for the U.S., coming up with two initial, critical findings. In the review of incremental jurisprudence, first, the U.S. death penalty does not comport with the standards of decency against cruel and unusual punishment as articulated by the Supreme Court. The most clearly defined standards have come from cases challenging the grounds of non-capital sentences, and a line-by-line analysis of key holdings shows the current application, enforcement, and means of capital punishment do not meet constitutional muster. Second, the Supreme Court exercises a level of restraint that is unique to the issues associated with capital punishment. Even when presented with clear evidence pointing to arbitrary procedures, threats or actual impositions of unnecessary cruelty, failed deterrence, or discriminating features, when the issue involves addressing the constitutionality of the death penalty head-on, or even the effects of its administration, the Court becomes silent and defers to state legislatures. As a result, the use of capital punishment continues to become more non-uniform, increasingly arbitrary, and harder to challenge through judicial relief.

In analyzing the judicial-legislative relationship developed throughout capital punishment jurisprudence, a tertiary finding was that the current constitutional approach to the death penalty creates a transitioning effect of authority where the Court forfeits its role as a neutral arbiter and interpreter over to the dynamics of policymaking branches across the states. More research is required to understand the exact motivations or interests behind when and for what issues the Court chooses to exercise this restraint, but its odd hesitation to the death penalty begs the question of whether the same behavior could implicate its constitutional approach and authority governing other areas of social policy.

There is reason to believe the same pattern identified in the approach to capital punishment may be developing in the case of the current safeguards and accessibility to abortion and reproductive healthcare services. *Furman v. Georgia* (1972) was viewed as a massive victory for the abolitionist movement, but it did not explicitly overrule capital punishment. *Roe v. Wade* (1973) was a similar symbol for many pro-choice groups, but it did not explicitly uphold abortion. *Roe* defended the legality of abortion, but like the decision of *Furman*, the Court shied away from addressing its *inherency* relative to the Constitution. The decision again rested on an external contingency:

State criminal abortion laws... that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy (*Roe v. Wade*, 1973, p. 114).

From this, various parallels can be drawn, but at its core is the premise that a condemned's right is to non-arbitrary sentencing as a female's right is to privacy. Because neither holding addresses the issues *per se*, these claimed rights as well as their meaning and effects on how either policy is governed are subject to highly malleable judicial-legislative interpretation.

Whether and to what extent the administration of the rights to non-arbitrary sentencing and privacy will be maintained depends on the competing rights of the state. In terms of both maintaining capital punishment and restricting abortion, the Court acknowledges the right of intervention on behalf of the state due to claimed compelling government or societal interests. In *Furman*, the Court finds states have a compelling interest to deter capital crime and retribute for the injury it poses to society. Although the consensus among criminological scholarship is that

these state interests are unlikely to be realized through executions, continued capital punishment administration depends on whether the Court chooses to acknowledge its constitutional authority to overrule the policy in light of such evidence and on the same grounds:

[W]hen imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably justified. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked (*Furman v. Georgia*, 1972, p. 312).

In *Roe*, the Court finds states have a legitimate interest to protect the potentiality of human life:

A legitimate state interest... need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone (*Roe v. Wade*, 1973, p. 150).

The overall impact for both policies is that implementation is decreasing. In terms of application, handing down a death sentence and carrying out executions are becoming less common in order to circumvent challenges based on the arbitrary procedure. In terms of accessibility, provision of abortion and other medical services are restricted using this state interest as the state justification for reducing its frequency and enticing challenges that would jeopardize *Roe* without having to trample over it overtly.

This pattern has already been demonstrated during the inter-*Furman-Gregg* period. Since no executions had been carried out in nearly ten years by the time the Court came out with

*Furman*, the abolitionists thought capital punishment was gone for good, but many legislatures started rewriting their death penalty statutes following their discovery of the *Furman*-loophole. The decision in *Gregg* to reinstate capital punishment was a result of only a slight change in the interpretation of arbitrary sentencing and has since been the central contention of the Court's efforts to identify a society where the death penalty can be administered without arbitrariness or caprice. Similarly, "[*Roe*] was considered a stunning victor for the plaintiffs" and "the most concretely important thing that the American Supreme Court did for women" (Machado, 2020, p. 231), but the patterns following *Furman* echo the concerns regarding the decreasing status of accessibility to reproductive care and services resulting from new waves of legislative restrictions. The death penalty legislative wave ultimately caused the holding in *Furman* to be reversed, and now waves of anti-abortion legislation are causing "most political attention [to be] on the risks or expectations of *Roe v. Wade* being overturned" (Machado, 2020, p. 232).

In lieu of this mirrored trend, it is interesting to contemplate how the compelling interest of protecting the potentiality of life might interact with states' justification for capital punishment. With the shrinking use of the death penalty, especially true since the turn of the 21st century, evidence does not support that capital punishment protects life through general deterrence. Instead, its reinforcement of violence as a retributive value demonstrates a brutalization effect among society, thus threatening potential life in general. If other potential offenders are not deterred, but sometimes encouraged, by the symbolism of an enforced execution, the state interest either must shift to that of protecting the potentiality of life of the offenders themselves or it goes away completely. In any event, the interest in protecting the potentiality of life could never be achieved through maintaining capital punishment, and any state justification would become null:

At the moment that it ceases realistically to further these purposes... the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life.... A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment (*Furman v. Georgia*, 1972, p. 237).

Whether or not present society has reached this point of nonutility with the death penalty depends on the lens and political dynamics one elects to view its current enforcement, but it is important to note the Court's finding that retribution alone cannot be the sole interest for state authorization of a given punishment. If society evolves to a point where the death penalty only serves a retributive goal, then capital punishment would no longer maintain its constitutional muster. Because of the Court has chosen to explicitly recognize state interests over those subjected to their governance, however, the implication is that states may proceed with legislative restrictions or provisions claimed to further its own interests through policy. In regard to capital punishment, that translates to a diminished threshold required for the death penalty to meet the guidelines of the Eighth Amendment. States need only claim their death penalty statutes attempt greater humaneness while seeking to protect society through deterrence and retribution, and failures may be categorized as unforeseeable mishaps rather than unusual cruelty, protecting its overall maintenance and administration. In the regards to abortion, the Court has explicitly given states the right to pass legislation that would restrict accessibility to healthcare services, making the right to privacy useless when the opportunity to obtain such procedures are fused out and made essentially obsolete. Thus, the right to privacy may be constitutionally superseded by

the state's interest in protecting the potentiality of life rather than protecting the existing life who requests such medical care.

In conclusion, regardless of anyone's constitutional perceptions on capital punishment or abortion, the judicial-legislative relationship identified throughout their respective lanes of jurisprudence highlight the fragility of public policy and the ability for politics to permeate decidedly apolitical duties of the Supreme Court and its constitutional authority. Both the proscription of arbitrary death penalty sentencing and the provision of privacy are anchored only by the guarantee of the Due Process Clause of the Fourteenth Amendment. This ultimately means their significance or lasting power is subject to the will of the Court's interpretation and if it chooses to articulate clear standards or divert its role to the decision-making of extra-judicial political branches. The overall message is that both protections carry the same vulnerabilities to the wanton interpretations of the Supreme Court and the political dynamics of states' growing constitutional authority in either realm of social policy. The key takeaway, however, is that the Court may apply this same approach to any form of public policy and effectually lessen the importance of policymaking based on constitutional grounds and the universal integrity of its safeguards.

## References

- Abili, E. J. (2013). A historical comparative analysis of executions in the united states from 1608 to 2009. *University of Nevada, Las Vegas, ProQuest*. Retrieved from <http://proxy.library.umkc.edu/login?url=https://search-proquest-com.proxy.library.umkc.edu/docview/1513236757?accountid=1458>
- Barry, K. M. (2019). The death penalty and the fundamental right to life. *Boston College Law Review*, 60(6), 1545-1604,1545A. Retrieved from <http://proxy.library.umkc.edu/login?url=https://search-proquest-com.proxy.library.umkc.edu/docview/2288645640?accountid=14589>
- Bedau, H. (1985). *Gregg v. Georgia* and the new death penalty. *Criminal Justice Ethics*, 4(2), 3-17.
- Berry, W.W. (2011). Repudiating death. *Journal of Criminal Law & Criminology*, 101(2), 441-492. Retrieved from <http://proxy.library.umkc.edu/login?url=https://search-proquest-com.proxy.library.umkc.edu/docview/867686956?accountid=14589>
- Berry, W.W. (2019). Individualized executions. *University of California, Davis Law Review*, 52(4), 1779-1825. Retrieved from [https://lawreview.law.ucdavis.edu/issues/52/4/Articles/52-4\\_Berry.pdf](https://lawreview.law.ucdavis.edu/issues/52/4/Articles/52-4_Berry.pdf)
- Bessler, J.D. (2014). Foreword. In *The death penalty in decline: From Colonial America to the present* (pp. 245-262). Ontario, CA: Thomson Reuters.
- Bessler, J. D. (2018). The concept of "unusual punishments" in Anglo-American law: The death penalty as arbitrary, discriminatory, and cruel and unusual. *Northwestern Journal of Law and Social Policy*, 13(4), 307-416. Retrieved

from <http://proxy.library.umkc.edu/login?url=https://search-proquest-com.proxy.library.umkc.edu/docview/2069492750?accountid=14589>

Buchmann, B. (2016). Humane proposals for swift and painless death. *Richmond Journal of Law and the Public Interest*, 19(2), 153-xxviii. Retrieved from [https://heinonline-org.proxy.library.umkc.edu/HOL/Page?collection=journals&handle=hein.journals/richlapin19&id=191&men\\_tab=srchresults](https://heinonline-org.proxy.library.umkc.edu/HOL/Page?collection=journals&handle=hein.journals/richlapin19&id=191&men_tab=srchresults)

Carey, G.W. (2003). America's founding and limited government. *Intercollegiate Review*, 39(1/2), 14-22. Retrieved from <http://search.ebscohost.com.proxy.library.umkc.edu/login.aspx?direct=true&db=aph&AN=12598473&site=ehost-live&scope=site>

Dieter, R.C. (2013). The 2% death penalty: How a minority of counties produce most death cases at enormous costs to all. *Death Penalty Information Center*, pp. iii-26. Retrieved from <https://files.deathpenaltyinfo.org/legacy/documents/TwoPercentReport.pdf>

Denno, D. W. (2002). When legislatures delegate death: The troubling paradox behind state uses of electrocution and lethal injection and what it says about us. *Ohio State Law Journal*, 63(1), 63-262. Retrieved from [https://heinonline-org.proxy.library.umkc.edu/HOL/Page?collection=journals&handle=hein.journals/ohslj63&id=81&men\\_tab=srchresults#](https://heinonline-org.proxy.library.umkc.edu/HOL/Page?collection=journals&handle=hein.journals/ohslj63&id=81&men_tab=srchresults#)

DPIC. (2020A). Executions by state and region since 1977. *Death Penalty Information Center*. Retrieved May 15, 2020, from <https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976>

DPIC. (2020B). Death sentences in the United States since 1977. *Death Penalty Information Center*. Retrieved May 15, 2020, from

<https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976>

Dow, D. R. (2008). The last execution: Rethinking the fundamentals of death penalty law. *Houston Law Review*, 45(3), 963-990.

Dunn, J. (1982). *The political thought of John Locke: A historical account of the argument of the 'Two Treatises of Government*. London: Cambridge University Press.

Francis v. Resweber, 329 U.S.459 (1947).

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

Gee, H. (2011). Eighth amendment challenges after *Baze v. Rees*: Lethal injection, civil rights lawsuits, and the death penalty. *Boston College Third World Law Journal*, 31(2), 217-244. Retrieved from [https://heinonline-org.proxy.library.umkc.edu/HOL/Page?handle=hein.journals/bctw31&div=20&g\\_sent=1&casa\\_token=&collection=journals&t=1557694696](https://heinonline-org.proxy.library.umkc.edu/HOL/Page?handle=hein.journals/bctw31&div=20&g_sent=1&casa_token=&collection=journals&t=1557694696)

Gilreath, S. D. (2003). Cruel and unusual punishment and the Eighth Amendment as a mandate for human dignity: another look at original intent. *Thomas Jefferson Law Review*, 25(3), 559-592. Retrieved from <http://proxy.library.umkc.edu/login?url=https://search-proquest-com.proxy.library.umkc.edu/docview/198205759?accountid=14589>

Goldberg, A. J. (1973). The death penalty and the Supreme Court. *Arizona Law Review*, 15(2), 355-368.

Goldberg, A., & Dershowitz, A. (1970). Declaring the Death Penalty Unconstitutional. *Harvard Law Review*, 83(8), 1773-1819. doi:10.2307/1339687

Gregg v. Georgia, 429 U.S. 1301 (1976).

Hood, G. E. (1994). *Campbell v. Wood*: The death penalty in Washington state: Hanging on to a method of execution. *Gonzaga Law Review*, 30(1), 163-182. Retrieved from

<https://heinonline->

[org.proxy.library.umkc.edu/HOL/Page?handle=hein.journals/gonlr30&div=13&g\\_sent=1](https://heinonline-org.proxy.library.umkc.edu/HOL/Page?handle=hein.journals/gonlr30&div=13&g_sent=1)

[&casa\\_token=&collection=journals&t=1557694661](https://heinonline-org.proxy.library.umkc.edu/HOL/Page?handle=hein.journals/gonlr30&div=13&g_sent=1&casa_token=&collection=journals&t=1557694661)

Hurwitz, M. S. (2008). Given him a fair trial, then hang him: The Supreme Court's modern death penalty jurisprudence\*. *Justice System Journal*, 29(3), 243-VIII. Retrieved from

<http://proxy.library.umkc.edu/login?url=https://search-proquest->

[com.proxy.library.umkc.edu/docview/194778623?accountid=14589](http://proxy.library.umkc.edu/login?url=https://search-proquest-com.proxy.library.umkc.edu/docview/194778623?accountid=14589)

In re Kemmler, 136 U.S. 436 (1890).

Jefferson, T. (1904-5). Letter to Samuel Kercheval. In P.L. Ford (Ed.), *The works of Thomas Jefferson*. (Federal ed., Vol 12). G.P. Putnam's Sons. (Original work published 1816).

Retrieved 3/27/2020 from <https://oll.libertyfund.org/titles/jefferson-the-works-vol-12-correspondence-and-papers-1816-1826>

Kaplan, P. (2012). Cruel and unusual: The American death penalty and the founders' Eighth Amendment. *Law & Society Review*, 46(4), 938-940. Retrieved from

<http://proxy.library.umkc.edu/login?url=https://search-proquest->

[com.proxy.library.umkc.edu/docview/1331093902?accountid=14589](http://proxy.library.umkc.edu/login?url=https://search-proquest-com.proxy.library.umkc.edu/docview/1331093902?accountid=14589)

Kind, M. (2019). History of the American death penalty: Executions in the colonies. [PowerPoint slides].

Lain, C. (2015). The politics of botched executions. *University of Richmond Law Review*, 49(3),

825-844. Retrieved from <https://heinonline->

org.proxy.library.umkc.edu/HOL/Page?handle=hein.journals/urich49&div=35&g\_sent=1  
&casa\_token=&collection=journals&t=1557643730

- Machado, M. (2020). Mobilizing Roe: The political life of a decision, beyond abortion and beyond the courts. *Tulsa Law Review*, 55(2), 231-239. Retrieved from <https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=3193&context=tlr>
- Medoff, M., & Dennis, C. (2014). A Critical Reexamination of the Effect of Antiabortion Legislation in the Post-Casey Era. *State Politics & Policy Quarterly*, 14(3), 207-227. Retrieved April 26, 2020, from [www.jstor.org/stable/24711149](http://www.jstor.org/stable/24711149)
- Merrill, J. (2008). The past, present, & (and) future of lethal injection: *Baze v. Rees'* effect on the death penalty. *UMKC Law Review*, 77(1), 161-196. Retrieved from [https://heinonline-org.proxy.library.umkc.edu/HOL/Page?collection=journals&handle=hein.journals/umkc77&id=172&men\\_tab=srchresults](https://heinonline-org.proxy.library.umkc.edu/HOL/Page?collection=journals&handle=hein.journals/umkc77&id=172&men_tab=srchresults)
- Miller, A. S.; Bowman, J. H. (1982). Slow dance on the killing ground: The Willie Francis case revisited. *DePaul Law Review*, 32(1), 1-76.
- O'Connor, S. D. & Supreme Court Of The United States. (1985) *U.S. Reports: Whitley v. Albers*, 475 U.S. 312. [Periodical] Retrieved from the Library of Congress, <https://www.loc.gov/item/usrep475312/>.
- Oeding, J.M. (2020). State legislatures have the courage to pass antiabortion laws and test the ideology of the “new” United States Supreme Court. *Asian Journal of Interdisciplinary Research*, 3(1), 136-150. <https://doi.org/10.34256/ajir20110>
- Pritchard, A., & Parsons, S.K. (1999). The effects of state abortion policies on states' abortion rates. *State & Local Government Review*, 31(1), 43-52. Retrieved April 26, 2020, from [www.jstor.org/stable/4355222](http://www.jstor.org/stable/4355222)

- Reiman, J. (1985). The social contract and the police use of deadly force. Pp 237-249 in Eliston, J. A. and Feldberg, M. (eds.), *Moral Issues in Police Work*. Rowman and Allanheld: Totowa, NJ.
- Roe v. Wade, 410 U.S. 113 (1973).
- Rousseau, J.J. (2001). *The social contract or principles of political right* (G.D.H Cole, Trans.). (Original work published 1762). Retrieved from <http://reasoned.org/dir/lit/soccon.pdf>.
- Roth Heilman, K. (2009). Contemplating cruel and unusual: critical analysis of *Baze v. Rees* in the context of the supreme court's eighth amendment proportionality jurisprudence.
- Sarat, A. (2014). *Gruesome spectacles: Botched executions and America's death penalty*. Stanford, CA: Stanford University Press.
- Trop v. Dulles, 356 U.S. 86 (1958).
- U.S. Const. amend. V.
- U.S. Const. amend. VIII.
- Weems v. United States, 217 U.S. 349 (1910).
- Warden, R., & Lennard, D. (2018). Death in America under color of law: Our long, inglorious experience with capital punishment. *Northwestern Journal of Law and Social Policy*, 13(4), 194-306. Retrieved from <http://proxy.library.umkc.edu/login?url=https://search-proquest-com.proxy.library.umkc.edu/docview/2069490871?accountid=14589>
- Waters, T. (2007). *When Killing is a Crime*. Lynne Rienner Publishers, Inc.
- Wilkerson v. Utah, 99 U.S. 130 (1879).

