

McCleskey v. Kemp

Arbitrary Administration

- Procedural cruelty
- Lightning analogy
- Class grades thought experiment
- Isn't this true of all punishment?
- Is there a higher responsibility for justice and fairness when the stakes are higher?
- Aren't they all guilty, so where's the injustice?

WHY IT'S STILL ARBITRARY

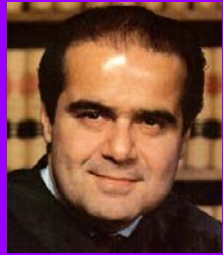
- **Presupposition in *Furman* – It's the jury**
- **Post-*Furman* corrections**
 - Better define aggravated murder
 - Two stage trials
- **Where the real power lies**
- **O. J. Simpson trial**
- **Lynne Abraham**
- **Robert Colville**
- **Justice Blackmun's conversion**

BACKGROUND

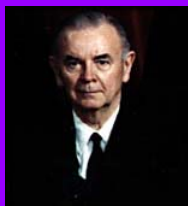


- **The crime**
- **New Georgia homicide statute**
- **Jury**
- **Conviction**
- **Appeal**
- **Makeup of the Court -- 1987**

THE CONSERVATIVES



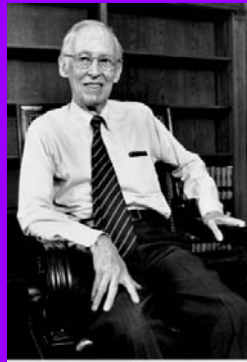
THE LIBERALS



Brennan
(Courtesy of the U.S. Supreme Court)



THE SWING VOTE



EIGHTH AMENDMENT



Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT



Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. **No state shall** make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor **deny to any person within its jurisdiction the equal protection of the laws.**

BALDUS STUDY



Race Killer/Victim	Death Sentence	Percentage
Black/White	50 of 223	22%
White/White	58 of 748	8%
Black/Black	18 of 1443	1%
White/Black	2 of 60	3%
Total by Victim		
White	108 of 981	11%
Black	20 of 1503	1%

ITTBE



- e₁. Georgia homicides 1974-9**
 - e₂. Murderers of white victims -- 108 of 981 received the death penalty**
 - e₃. Murderers of black victims -- 20 of 1503 received the death penalty**
- =====
- t₀. Statistically significant correlation between the race of the victim and death sentence for murderer in the Georgia sample**
- =====
- t*₀. Correlation between the race of the victim and death sentence for murderer in the U.S.**

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JUSTICE POWELL'S OPINION



- **Equal Protection challenge**
- **“Purposeful discrimination”**
- **Eighth Amendment challenge**
- **Slippery slope argument**

DISSENTING OPINIONS



- **Justice Brennan**
 - **General opposition to death penalty**
 - **Baldus study demonstrates racial bias**
 - **Eighth Amendment consideration**
- **Implications for other constitutional issues**

ITTBE



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ITTBE



Rival Explanations:

- t'₁. Sample is biased: correlation only holds true in the deep South.
- t''₀. Sample is biased: correlation only held true in the late 1970s.

FOLLOW UP



- **McCleskey's execution 1991**
- **Powell's retirement and autobiography**
- **GAO Report 1990**
 - 28 studies
 - 82% race was relevant
- e₄. **Many other studies confirm the relevance of race.**