Chapter Twelve

CAPITAL PUNISHMENT AND THE CONSTITUTION

> [T]he death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. … Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.
>
> Justice Blackmun, *Callins v. Collins*[1]

CONSTITUTIONAL TEXTS

The United States Constitution is justly heralded as a ***written*** document. The rules of the game of national government, and the rights of the citizens are laid out in a beautiful legal text. Scholars, editorial writers, and Supreme Court Justices often find themselves debating what this text means, and usually what it means in a specific and controversial context. In these cases, the simple model from the previous chapter immediately encounters predictable problems. Yes, there is a written text, but this text is maddeningly vague, ambiguous, and unclear, at precisely those places where the scholarly, political, or legal debates are occurring in the first place. What does it mean to talk of "due process of law," "equal protection of the law," "cruel and unusual punishments," or "respecting an establishment of religion"? And, yes, this text had an

author, but in this case that author was a collective comprised of the "founders," including, but not limited to, those at the Constitutional Convention (surely Jefferson counts), as well as those who authored its Amendments. And what of those responsible for voting each time ratification was required? So, what do we do about cases where the authors disagreed? Their words were at times (to say the least) unclear, they are all dead now, we're not really sure who to count, or not, in the collective, and there must have been cases where they disagreed with one another (think of slavery).

This doesn't, at least in my mind, mean that the model of textual interpretation must be abandoned for the Constitution. But it does mean the model is far from simple, and will likely result in many controversial interpretations for even the most fair and conscientious user.

PRECEDENT

It's easy enough to imagine a system where every time an issue comes before a judge, she would simply exercise her professional knowledge, and render the opinion that she believed is correct. We are lucky, though, that that is not our system. Consider what it would be like to never really have an idea about how a tricky case in torts or contracts would be decided. How could you conduct business, or decide on what kind of insurance to have? After all, in our imagined system, each case would be decided afresh, and depend on that judge's view of the law and justice.

The English and American common law system puts a high premium on previous decisions by other courts and judges. The doctrine of ***precedent*** says the earlier decisions help to define what the current state of the law is. There are many complications with this simple model. For one thing, there is a hierarchy of courts in our state and federal system. And precedent is only binding on lower courts following the

decisions of higher courts. In addition, precedent only makes sense for "similar" kinds of cases, for which the same articulated "principles" apply. Obviously, there's a good deal of room for disagreement about all of this. Finally, courts, at least at the same or higher level, can ***overturn*** precedent on the grounds that the earlier court made mistake, or that circumstances had so radically changed that the earlier principles no make sense.

Now there is no higher court than our Supreme Court, but they do make it a practice to honor earlier Supreme Court precedent. This usually happens when they choose not even to hear a case because it is ***settled*** constitutional law. But even in those cases they do decide to hear, there is, and I believe there should be, great deference to earlier rulings. There are occasions, however, where the Court will, and again I believe should, explicitly overturn an earlier decision.

INFERENCE TO THE BEST CONSTITUTIONAL INTERPRETATION

The constitutional text, and what we know of its authors, provides a good deal of data that needs to be explained.

e_1. The United States Constitution says ..."
e_2. This text has many authors.
e_3. We know, or can infer, many things about the concrete attitudes and beliefs of these authors.
e_4. We know many things about the abstract meanings of many important constitutional principles that are articulated in the text.
e_5. There is often relevant constitutional precedent for the case at hand.

The Supreme Court does not have the luxury of sitting around and asking themselves what does the Constitution mean. Their business is mainly deciding whether a particular

happening -- a decision in a lower court, an action on the part of a legal official, or generally what they call a ***state action*** -- offends a specific part of the Constitution. So, in addition to all the textual data, there is also data about the occurrence that is claimed to be unconstitutional.

> e_6. It has been alleged that a particular state action violates the guarantees to citizens within the Constitution.

So, what's the best explanation of all of this? Those of you who know anything about our Supreme Court no doubt are well aware of this, but it should be acknowledged up front. The best interpretation will usually be very controversial, for everyday citizens, for scholars and pundits, but also for the Justices themselves. Furthermore, there seems to be a pretty clear correlation between how many of the Justices interpret the Constitution, and who that Justice is as a person -- his or her politics and legal philosophy. Some become very cynical about all of this and see constitutional law as simply one more political game. I prefer the view that constitutional issues are incredibly difficult, and that it is inevitable that they be, not only intrinsically controversial, but that equally smart and dedicated professionals, as virtually every Justice is and has been, can hardly avoid bringing their backgrounds and beliefs into the process.

With all that then, we can simplify the explanatory candidates to two.

> t_c. The state action does not violate the Constitution -- it is ***constitutional***.
> t_{uc}. The state action does violate the Constitution -- it is ***unconstitutional***.

A CASE STUDY

Bear with me please. It is dangerous business to introduce deeply controversial issues into a book like this. The risk is that readers who disagree with the author will be so put off that they will tune out the discussion altogether. I want to run that risk, nevertheless, and tell you a bit about a constitutional issue for which I have a good deal of passion. As long as I have been able to really think about moral, political, and now legal issues, I have been an opponent of the death penalty. A majority of my fellow citizens disagree with me, of course. And as things stand right now, capital punishment is recognized as constitutional by our Supreme Court. In spite of all of that, however, I think a persuasive argument can be made that the death penalty, at least as it is currently administered, is patently unconstitutional. A major part of my argument depends on interpreting the constitutional text, and so is a fitting way to continue the themes of the last two chapters.

Let me remind you of some interesting things that our Constitution says.

e_1. From the Fifth & Fourteenth Amendments: "[No person shall be] ***deprived of life***, liberty, or property, without ***due process of law***."

e_2. From the Eighth Amendment: "[C]ruel and unusual punishment [shall not be] inflicted."

e_3. From the Fourteenth Amendment: "[No State shall] deny to any person within its jurisdiction the ***equal protection of the laws***.

Just the words used here tell us a couple of things, things that historical analysis backs up, about the intentions of the authors.

e_4. The authors of the Fifth, Eighth, and Fourteen amendments concretely intended that capital punishment did not violate the Constitution. [Two amendments say that a state, or Congress, may deny a person his (or rarely her) life.]

e_5. The authors of the Fifth, Eighth, and Fourteen amendments abstractly intended that the entire criminal justice system, including capital punishment adhere to the abstract standards of avoiding cruel and unusual punishments, and administering them with due process of law, and equal protection of the law.

The past forty years are replete with important constitutional precedent on the death penalty. In these four decades we have gone from a period in our history where, though constitutional and with defendants being sentenced to death, virtually no one was being executed (1968-72); where capital punishment as it was then administered was ruled to be unconstitutional (1972-76), where newer laws for the administration of capital punishment were deemed to be constitutional (1976); where there was a pretty steady ascendance in executions (1981-1999); to a recent decline in executions (2000-2008). Here are some of the highlights of this tumultuous constitutional history.

E_6. *McGAUTHA v. CALIFORNIA* 402 U.S. 183 (1971)

The constitutional issues are succinctly stated in the case syllabus.

> Petitioner in No. 203 was convicted of first-degree murder in California, and was sentenced to death. The penalty was left to the jury's absolute discretion, and punishment was determined in a separate proceeding following the

> trial on the issue of guilt. Petitioner in No. 204 was convicted of first-degree murder, and was sentenced to death in Ohio, where the jury, which also had absolute penalty discretion, determined guilt and penalty after a single trial and in a single verdict. Certiorari was granted to consider whether petitioners' rights were infringed by permitting the death penalty without standards to govern its imposition, and in No. 204, to consider the constitutionality of a single guilt and punishment proceeding.

The defendants' attorneys argued that such systems inevitably resulted in ***arbitrary and capricious*** administration of the death penalty. Justice Brennan in an unchallenged characterization of the then common standards for capital sentences characterized the situation as follows.

> [C]apital sentencing procedures ... are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice. [Justice Brennan, dissenting]

In spite of this, however, Justice Harlan writing for the Court ruled that:

> petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless, and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law. Despite the undeniable surface appeal of the proposition, we conclude that the courts below correctly rejected it

E7. *FURMAN V. GEORGIA* 408 U.S. 238 (1972)

The case of *Furman v. Georgia* was unusual in many respects. It initiated the one and only time in our nation's history when the death penalty was determined to be unconstitutional. It was an exceedingly close, 5 to 4, ruling, with the five Justice

majority so at odds about why capital punishment was **cruel and unusual punishment** that the Court issued a rare ***pur curium*** (by the court), instead of the standard opinion of the Court authored by one or more of the Justices. Still, most legal analysts see the case as raising the same issues as *McGautha*, only phrased as an Eight Amendment concern, rather than the Fourteenth Amendment Due Process Clause. Mr. Justice Stewart's reasoning is the most often seen as the relevant precedent.

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously ... selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. ... But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

E_8. *GREGG V. GEORGIA* 428 U.S. 153 (1976)

The *Gregg v. Georgia* case did three things, two of which were to the dismay of death penalty abolitionists like your author. Perhaps most significantly, it ruled that capital punishment was not, ***per se***, cruel and unusual punishment under the Eighth Amendment. It also ruled that new sentencing procedures initiated after *Furman* had successfully eliminated the problem of arbitrary and capricious administration of the death penalty in Georgia. But, and this is crucial to my argument, it reinforced the basic finding of *Furman* (in many respects this is unsurprising, since the opinion was written by

Justice Stewart who was quoted just above). Justice Stewart quotes both himself and Justice White.

> While Furman did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. MR. JUSTICE WHITE concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." ... Indeed, the death sentences examined by the Court in Furman were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in Furman were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." ...

E_9. *McCleskey v. Kemp* 481 U.S. 279 (1987)

Warren McCleskey was a young black man who murdered a white police officer in the course of an armed robbery. At his appeal evidence was introduced showing that

> the Georgia capital sentencing process is administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution

Justice Powell sees the racial disparities in Georgia's death sentences (since the new law following Furman) as falling exclusively under the Equal Protection Clause. He then finds

it relatively easy to dismiss the Fourteenth Amendment challenges to capital punishment.

> Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." *Whitus v. Georgia,* 385 U.S. 545, 550 (1967). A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. *Wayte v. United States,* 470 U.S. 598, 608 (1985). Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decision makers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence.

We shall have occasion to look at the data the Court was considering in a later chapter, but notice at this point how differently this case was decided compared to *Furman*. In *McGautha* the Court had ruled that potentially arbitrary and capricious sentences did not, in and of themselves, constitute a denial of Due Process under the Fourteenth Amendment, but in *Furman* they ruled that these same worries about procedural unfairness did constitute a kind of cruel and unusual punishment under the Eighth Amendment. One might have thought, therefore, that even if Equal Protection precedent required purposeful and particularized discrimination, the Court could have found that discriminatory sentencing is even worse than arbitrary and capricious sentencing, and therefore counted as a very serious form of procedural cruelty under the Eighth Amendment. This was not their reasoning, though. And it's hard for this author not to concluded that the real reason had to do with Justice Powell's recognition that racial prejudice infects all of the criminal justice system.

> McCleskey's claim, taken to its logical conclusion, [p315] throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment

> is not limited in application to capital punishment, but applies to all penalties. Solem v. Helm, 463 U.S. 277, 289-290 (1983); see Rummel v. Estelle, 445 U.S. 263, 293 (1980) (POWELL, J., dissenting). Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.

E_{10}. *CALLINS V. COLLINS* No. 93-7054 (1994)

I want to conclude this lengthy, and far from neutral, review of death penalty jurisprudence with one final case. Justice Blackmun, a moral opponent of capital punishment, but an early supporter of its constitutionality, finally decided at the very end of his career that no amount of procedural tinkering could ever elevate capital sentences to the high standards imposed by the Eighth Amendment.

> It is virtually self evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?—cannot be answered in the affirmative.

His eloquent and impassioned dissent from the Court's denial of ***certiorari*** is doomed to be just a footnote in the history of capital punishment. But he does state a succinct and clear explanation of the Constitution's language, and the Court's precedent.

> t_0. The death penalty must be imposed fairly, and with reasonable consistency, or not at all.

I am claiming that t_0 is the best explanation of the abstract intentions of the authors of the Bill of Rights, the authors of the Fourteenth Amendment, and the emerging body of constitutional law developed over the past two hundred years.

Those of you who disagree with me – and I certainly realize that many of you will -- have an obligation to articulate an interpretive theory you believe better explains all of this. It is a challenge that I invite you to undertake. I remain hopeful once you have tried to find a better rival you will come to agree with me that t_0 is the most plausible. Unfortunately, we may end up disagreeing, but that is hardly surprising given the controversial nature of the constitutional text with which we have been dealing.

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[1] *Callins v. Collins*, 510 U.S. 1141 (1994). Justice Blackmun, dissenting.