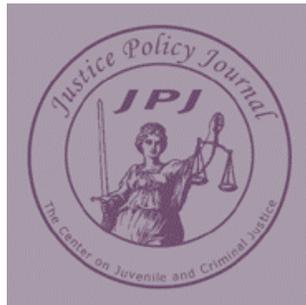


# Logical and Consistent? An Analysis of Supreme Court Opinions Regarding the Death Penalty

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## Abstract

*This paper examines opinions by Supreme Court justices of the most significant death penalty cases of the 1970s and 1980s [i.e., *Furman v. Georgia* (1972), *Gregg v. Georgia* (1976), *Woodson v. North Carolina* (1976), and *McCleskey v. Kemp* (1987)]. We seek to determine: 1) what main justifications were used by justices to support their own opinions; 2) how inconsistent over these cases were justices in issuing their opinions; and 3) what factors led to changes in opinions across time. We examine three types of inconsistency: First, issuing an opinion that is contradictory to opinions issued in earlier cases (e.g., a justice rules in favor of capital punishment in one case and then against it in another, or vice versa); Second, issuing an opinion that appears to be contradictory to statements made in written opinions in earlier cases (e.g., a justice votes in a way opposite to the principles he or she has put forth in previous cases); and Third, ruling in a way that appears to violate a precedent or rule of law. We seek to explain such inconsistencies to illuminate why capital punishment is still legal despite numerous problems with its application. It is these cases that best illustrate why capital punishment persists.*

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## **Logical and Consistent? An Analysis of Supreme Court Opinions Regarding the Death Penalty**

### **Introduction**

According to Merriam Webster's Unabridged Dictionary (2002), the term *inconsistent* means "lacking consistency; as not compatible with another fact or claim; containing incompatible elements; incoherent or illogical in thought or actions." The term inconsistent can be applied to Supreme Court activity. For example, insider accounts of Court operations (e.g., see Lazarus, 1999; Woodward and Armstrong, 1979) and analyses of private papers of Supreme Court justices (e.g., see Epstein and Knight, 1998) show wide inconsistencies across all stages of Court activity. Inconsistencies appear in Court decisions to grant or deny certiorari (cert.) in conference discussions among justices, in circulated drafts of preliminary opinions, in the final written opinions of the justices, and in opinions across time.

Inconsistency also shows up when considering stays of executions. One example is that of Alpha Otis O'Daniel Stephens, a poor, African American death row inmate in Georgia who was granted a stay by five justices on the Court (including Brennan, White, Marshall, Blackmun, and Stevens) in 1986. When Stephens filed his petition, the same five justices originally agreed to accept the case. Yet, at conference, only three justices voted to hear the case because White and Blackmun changed their minds without explanation. As a result of a dissent prepared by Justice Brennan, the *New York Times* ran an editorial that was highly critical of the Court and its inconsistency. The Court even split 4-4 on whether to grant stays of executions when Justice Powell was away because he was ill with cancer. The *New York Times* again wrote a scathing editorial of the Court as it allowed an inmate to be executed on a tie vote (Lazarus, 1999: 155-157).

One might wonder how Supreme Court activity could be "lacking [in] consistency; as not

compatible with another fact or claim; containing incompatible elements; incoherent or illogical in thought or actions” especially when lives hang in the balance as they do with the death penalty cases.

Apparently, even among Supreme Court justices, capital punishment is a contentious issue. It seems to breed inconsistency. Lazarus (1999: 13) explains that

the issue of the death penalty provides an especially revealing view into the Court’s work as a whole. Death penalty cases, both now and in the past, cut to the root of the Court’s ideological divisions. In the terrible context of a choice between life and death, these cases raise many of the issues that have divided the legal world since the Civil War, including issues about the Court’s own role and authority.

This paper is aimed at providing some understanding of Supreme Court activity on four major cases pertaining to the death penalty in the United States. Specifically, we examine: 1) what main justifications were used by justices to support their own opinions; 2) how inconsistent over these cases were individual justices in issuing his/her opinions; and 3) what factors led to changes in opinions across time. Our analysis is limited to the cases that had the largest influence on the administration of capital punishment in the United States, including *Furman v. Georgia* (1972), *Gregg v. Georgia* (1976), *Woodson v. North Carolina* (1976), and *McCleskey v. Kemp* (1987). The paper begins with a brief justification for the selection of these particular cases.

### **Justification for Selection of the Cases**

Of the many important cases decided by the U.S. Supreme Court with regard to capital punishment, four cases stand out as the most important because they determined how capital punishment is actually carried out in America (*Furman v. Georgia*, *Gregg v. Georgia*, *Woodson v. North Carolina*, and *McCleskey v. Kemp*). The Court invalidated all capital punishment statutes in effect in *Furman v. Georgia*, 408 U.S. 228 (1972), but failed to abolish it once and for all. By outlining the problems with the way that American jurisdictions practiced the death penalty, the Court set the stage for changes to state laws that would be accepted by the Court in *Gregg v.*

*Georgia*, 428 U.S. 153 (1976), and others that would be rejected by the Court in *Woodson v. North Carolina*, 428 U.S. 280 (1976).

These three cases are included primarily because as a group they determined first, whether capital punishment itself was constitutional, and second, under which conditions for first-degree murderers would or would not the death penalty be tolerated. Finally, the case of *McCleskey v. Kemp*, 481 U.S. 279 (1987) is included because many capital punishment experts view this case as the last real challenge to America's death penalty experience (Bohm, 2003). There are dozens of cases that could have been selected for analysis, including some before and after the time period under study here. Future analyses might well examine such cases along the lines of this analysis.

We discuss some of these other cases in this article, but we do not examine any additional cases in great detail or attempt to draw conclusions about the universe of death penalty cases for one main reason: a careful analysis of the issues addressed in these cases allows one to understand why capital punishment is currently legal in the United States despite the numerous and glaring problems in its application. Our belief is that although these cases have been addressed at length elsewhere, never before has any other author addressed the very important issue of consistency / inconsistency across time in these important death penalty cases. An analysis of these inconsistencies, we contend, is critical to understanding why the death penalty is still legal in the United States. In fact, our experience teaching death penalty courses has shown us that it is these four cases that help our students best understand why the Supreme Court has not invalidated death penalty statutes in spite of the clear problems that plague the practice of capital punishment in America (Bohm, 2003).

Between 1972 and 1987, a total of 12 justices were involved in deciding the constitutionality of capital punishment in the United States. These justices not only decided that the death penalty is not unconstitutional per se, thereby assuring its continued practice, but also determined under which

conditions it could or could not be used. The next section of the paper provides a brief summary of each case and then examines the main justifications for each justice in his/her opinion.

### **The Cases and the Main Justifications of Justices in Each Case**

Table 1 lists the justices involved in the cases analyzed in this article. The main justifications for each opinion are listed in the table. Below, we summarize the opinions of each justice in these four cases.

Table 1: Main Justifications Offered for Decisions of Justices in Major Supreme Court Cases Regarding the Death Penalty

<u>Justice</u>	<u>Furman</u>	<u>Woodson</u>	<u>Case</u>	<u>Gregg</u>	<u>McCleskey</u>
<b>Douglas</b>	arbitrary sentences violation of equal protection	-----	-----	-----	
<b>Brennan</b>	arbitrary sentences degrading to human beings not acceptable to public	see Gregg	degrading to human beings not acceptable to public	arbitrary sentences (racial disparity)	decision abandons stare decisis
<b>Stewart</b>	arbitrary sentences excessive	not acceptable to public arbitrary sentences possible violates human dignity	arbitrary sentences not possible supported by public	-----	
<b>White</b>	arbitrary sentences	acceptable to public	arbitrary sentences not possible supported by public		disparity is not discrimination intentional discrimination required is not a Court issue
<b>Marshall</b>	arbitrary sentences excessive not acceptable to informed public wrongful convictions	see Gregg	excessive not acceptable to informed public		arbitrary sentences (racial disparity) decision abandons stare decisis
<b>Burger</b>	is not a Court issue supported by public arbitrary sentences not relevant	acceptable to public	arbitrary sentences not possible supported by public	-----	
<b>Blackmun</b>	is not a Court issue	see Furman	offers concurring opinion		arbitrary sentences (racial disparity) decision abandons stare decisis
<b>Rehnquist</b>	decision violates separation of powers (checks & balances) of Constitution	acceptable to public	arbitrary sentences not possible acceptable to public		disparity is not discrimination intentional discrimination required is not a Court issue
<b>Powell</b>	decision abandons stare decisis, federalism, judicial restraint	not acceptable to public arbitrary sentences possible violates human dignity	arbitrary sentences not possible acceptable to public		disparity is not discrimination intentional discrimination required is not a Court issue
<b>Stevens</b>	-----	not acceptable to public arbitrary sentences possible violates human dignity	arbitrary sentences not possible acceptable to public		arbitrary sentences (racial disparity) decision abandons stare decisis
<b>O'Connor</b>	-----	-----	-----	disparity is not discrimination	intentional discrimination required is not a Court issue
<b>Scalia</b>	-----	-----	-----	disparity is not discrimination	intentional discrimination required is not a Court issue

*Furman v. Georgia*, 408 U.S. 228 (1972)

William Henry Furman was convicted of the murder of a Coast Guard petty officer – the father of 4 children and the stepfather of 6 others. Furman was a 25 year old African American with an IQ of only 65 who killed his victim in a failed burglary attempt (Bohm, 2003). This case was unusual because it did not fit the stereotypical killing in America. Because Furman was an African American and a stranger, and his victim was a Caucasian and a family man who served in the military, Furman's chance of *not* receiving the death penalty was slim, especially in a southern state with a history of racial unrest.

Furman's attorneys argued to the Supreme Court that capital punishment in Georgia was unfair because capital trials essentially gave the jury unbridled discretion about whether to impose a death sentence on convicted defendants. Consolidated with *Furman* were two cases (*Jackson v. Georgia*, No. 69-5030 and *Branch v. Texas*, No. 69-5031) that dealt with death sentences imposed against African American men for rapes of Caucasian women, a crime which has been a primary source of discriminatory punishment in American history.

The *Furman* case led to nine separate opinions by each of the justices of the Supreme Court, the longest ever opinion and the ruling was 5-4 that the death penalty statutes in question were "cruel and unusual" because they violated the Eighth and Fourteenth Amendments to the U.S. Constitution. Justices Douglas, Brennan, Stewart, White, and Marshall wrote concurring opinions and Justices Burger, Blackmun, Powell, and Rehnquist filed dissenting opinions. In essence, the Supreme Court found that capital punishment was being imposed "arbitrarily, infrequently, and often selectively against minorities" (Bohm, 1999: 23). So, it was not the method of death that was at issue, it was how the method was being applied arbitrarily and disproportionately to some groups of people.

Bohm writes: "A practical effect of *Furman* was the Supreme Court's voiding of 40 death

penalty statutes and the sentences of 629 death row inmates.” The Supreme Court, however, did not conclude that the death penalty, per se, was unconstitutional. It was only unconstitutional to the degree that it was imposed arbitrarily and unfairly. Thus, “36 states proceeded to adopt new death penalty statutes designed to meet the Court’s objections” (p. 24). States grappled to quickly pass death penalty laws that would be considered constitutional by the Supreme Court.

Nearly one-third of states enacted mandatory death sentences for some crimes (Acker and Lanier, 1998), taking the issue of discretion of judges and juries out of the picture. Most states passed “guided discretion” statutes that would give juries and sentencing judges some guidelines to follow when considering death sentences. The validity of mandatory sentencing and guided sentencing approaches would be decided by the Court only 4 years later with the cases of *Woodson v. North Carolina* (1976) and *Gregg v. Georgia* (1976), respectively.

Justice Douglas defined punishment as cruel and unusual when it is discriminatory or selective in its application. He said that even though unfettered discretion was originally viewed as acceptable by the Supreme Court, even as recently as one year prior in *McGautha v. California*, 402 U.S. 183 (1971), that once a punishment is arbitrarily applied, it can be considered cruel and unusual. The death penalty as applied without juror guidance is arbitrary, which Douglas suggested was a violation of equal protection (see Table 1). Douglas wrote that providing no guidelines for a juror to decide who lives and who dies is unacceptable, especially given that it will assure biases against the lower class, those with inferior attorneys, and so forth. Douglas suggested that the “discriminatory statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments” (pp. 257-258).

Justice Brennan suggested that although what is cruel and unusual is not clearly defined, to

him it is something that does not comport with human dignity (see Table 1). Brennan developed four tests to assess whether a punishment comports with human dignity. First, any punishment that degrades human beings is offensive. Brennan wrote that the reason we outlawed brutal forms of punishment is that they violate human dignity because they treat humans as nonhumans. Second, he suggested that any arbitrary punishment, especially a severe one, is unusual: “When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied ... the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system” (p. 292). Third, any punishment that is not acceptable to the public is cruel and unusual. Finally, a punishment is unnecessary if it is excessive. Brennan suggested that the death penalty is no more effective a deterrent than other punishments such as life imprisonment and thus it is unusual. Because the death penalty meets all these conditions, it is violation of human dignity according to Brennan.

Justice Stewart also grappled with the issue of what is cruel and unusual punishment. He suggested that capital punishment is excessive because it goes beyond what states deem to be necessary and because it is arbitrarily applied (see Table 1). He wrote: “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual ... [they are] so wantonly and so freakishly applied” (p. 310).

Justice White noted at the outset to his opinion that the death penalty is not unconstitutional per se and suggests that it is possible for a system of capital punishment to comport with the Eighth Amendment. He wrote that even though death is in theory a valid form of retribution and incapacitation, it does not serve either of these goals when it is used so infrequently. His main problem with the death penalty, it appears, is arbitrariness (see Table 1). White wrote “that the death

penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not” (p. 313).

Marshall, the final justice in the majority, examined the issue of what is cruel and unusual punishment and related it to the evolving standards of decency in a maturing society. He suggested that a punishment can be cruel and unusual if it meets any of four conditions (see Table 1). First, a punishment is cruel and unusual if it causes too much physical pain or is excessive. Second, it is cruel and unusual if it has not been practiced prior. Third, it is cruel and unusual if it serves no valid purpose or it is unnecessary. Finally, it is cruel and unusual if popular sentiment is against it or it is immoral. Marshall attempted to shoot down all justifications for capital punishment by suggesting that the death penalty as practiced does not actually serve retribution, deterrence, or incapacitation. He also added that it is more expensive than life imprisonment.

The most significant part of the Marshall opinion is the statement of what has now been called the Marshall hypothesis. He stated “the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it so in the light of all information presently available” (p. 361). Marshall put forth what he views as the reality of capital punishment and suggests that people would not support it if they knew this reality. He concluded by writing:

I believe the following facts would serve to convince even the most hesitant of citizens to condemn death as a sanction: capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaks havoc with out entire criminal justice system (pp. 263-264).

In his dissent, Chief Justice Burger suggested that what is cruel and unusual is not clearly defined, but noted that what is unacceptable is not up to the Court but is up to legislatures of the states and to the U.S. Congress (see Table 1). He went on to show that the death penalty is widely supported in public opinion polls and that it is practiced in 42 jurisdictions, meaning it is not against our evolving standards of decency. Burger conceded that the death penalty is rarely applied but wrote that it would “be unrealistic to assume that juries have been perfectly consistent in choosing the cases where the death penalty is to be imposed, for no human institution performs with perfect consistency” (p. 389). He appears to be saying that even though the death penalty is arbitrarily applied, this is acceptable since consistency is not humanly possible. Burger concluded the “claim of arbitrariness is not only lacking in empirical support, but also it manifestly fails to establish that the death penalty is a ‘cruel and unusual’ punishment” (pp. 398-399). Furthermore, Burger stated that it is not up to courts to decide the efficacy of punishment and that the U.S. Constitution does not demand that we follow informed principles of penology. He suggested that deterrence is simply not relevant to the Constitution.

He stated that the facts of majority are not supported and claims that the Court has exceeded its power in its ruling. Finally, it should be pointed out that Burger noted that decisions by a jury of our peers is crucial to our democracy and has been viewed by the Court as an advance from mandatory punishments, so to take away discretion of jurors in capital cases is a setback. Mandatory sentencing, according to Burger, gives too much power to the legislature to determine who lives and who dies.

Justice Blackmun began his dissent by noting that he is opposed to death penalty personally but that what is right or wrong is not a Court issue (see Table 1). He wrote: “I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of

physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated” (p. 405).

Despite these feelings, Blackmun conclusively demonstrated that society has not evolved, especially in the short time since previous cases have been decided by the Court. Blackmun suggested that the argument that society has evolved is “a good argument and it makes sense only in a legislative and executive way and not as a judicial expedient” (p. 410). It is not a Court issue, then, but is an issue for the people to decide through its representatives. He concluded that the Court has simply exceeded its power.

Justice Powell wrote that the decision departs from the principles of *stare decisis*, federalism, judicial restraint, and separation of powers (see Table 1). He noted that the Constitution specifically says capital punishment is acceptable, that the Supreme Court repeatedly has said capital punishment is acceptable, and that legislative activity in the states refutes the evolution argument. Powell also set the stage for future challenges based on race by writing: “If a Negro defendant ... could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established” (p. 449). Finally, Powell predicted that only a constitutional amendment will change this ruling and says that the decision is undemocratic.

Finally, Justice Rehnquist succinctly argued that the majority’s lack of judicial restraint in striking down the state statutes violates the checks and balances of the U.S. Constitution (see Table 1). Rehnquist offered little in the way of explanation for his dissenting opinion.

As explained earlier, after the *Furman* decision was handed down, states changed their laws in one of two ways. Some states passed mandatory death sentencing laws and some established

guided discretion for jurors using bifurcated trials and a system of aggravating and mitigating circumstances to help determine which convicted murderers should be sentenced to death and which should not. The validity of these laws was decided in *Woodson v. North Carolina* 428 U.S. 280 (1976) and *Gregg v. Georgia* 428 U.S. 153 (1976).

*Woodson v. North Carolina*, 428 U.S. 280 (1976)

Four men were convicted of first-degree murder of a cashier as the result of their participation in an armed robbery of a convenience food store. James Tyrone Woodson, one of the participants in the crime, remained in the car with a rifle as a lookout during the robbery. He did not enter the store nor did he fire any shots. Further, Woodson claimed that he was coerced into participating in the robbery by Luby Waxton, the man who actually fired the fatal shot. Woodson, who had been drinking heavily on the day of the robbery, said that Waxton struck him in the face and threatened to kill him in an effort to make him sober up and come along on the robbery.

The two other robbery participants agreed to plead guilty to lesser charges and to testify for the prosecution and thus did not face the death penalty. During the trial, Waxton asked to be allowed to plead guilty to the same lesser offenses to which the others pleaded guilty, but he was not allowed to. Woodson maintained throughout the trial that he had been coerced by Waxton, that he was therefore innocent, and that he would not plead guilty. After his trial, Woodson was found guilty on all charges and sentenced to death under North Carolina's mandatory death penalty law.

Woodson's attorneys argued to the Supreme Court that mandatory death sentences upon conviction for murder are unconstitutional. The ruling was 5-4 that the death penalty statutes in question were "cruel and unusual" because they violated the Eighth and Fourteenth Amendments to the U.S. Constitution. Justices Stewart, Powell, Stevens, Brennan, and Marshall were in the majority and Justices White, Burger, Rehnquist and Blackmun filed dissenting opinions. In essence, the

Supreme Court found that mandatory death sentences violated the evolving standards of respect for human life implicit in the Eighth Amendment to the Constitution.

Justices Stewart, Powell, and Stevens, in a plurality opinion by Stewart, held that “two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society - jury determinations and legislative enactments - conclusively point to the repudiation of automatic death sentences” (p. 280). That is, society has evolved away from mandatory sentences.

As shown in Table 1, the majority suggested that mandatory sentences do not take away arbitrariness because they do not give juries any guidance about which murderers should live and which should die (which offenders should be convicted of capital crimes and which should be convicted of lesser sentences). They also suggested that the respect for human dignity implicit in the Eighth Amendment requires

consideration of aspects of the character of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of imposing the ultimate punishment of death [and that the statute in question] impermissibly treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty (p. 281).

Justices Stewart, Powell, and Stevens found that juries often “find the death penalty inappropriate in a significant number of first-degree murder cases and refuse[] to return guilty verdicts for that crime” (p. 291). They wrote:

The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid ... At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict (p. 293).

Furthermore, using only the actual decisions of death-qualified jurors, where most convicted

murderers do not actually get sentenced to death, “suggest that under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers” (pp. 295-296).

With regard to the issue of whether there is an evolution in societal standards against capital punishment, these justices concluded that mandatory sentencing laws “reflect attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing” (p. 298). They went so far as to claim that these mandatory sentencing laws “have simply papered over the problem of unguided and unchecked jury discretion” (p. 302).

Justice Marshall concurred in the judgment for the reasons stated in his dissent in *Gregg*, discussed later in the paper. Justice Brennan also concurred in the judgment for his reasons stated in his dissent in *Gregg*.

Justices White, Burger, Rehnquist, and Blackmun dissented in this case for reasons stated in other cases (see Table 1). Rehnquist’s dissent is the longest and is the only one that offers any details as to the rationale for the dissent. Rehnquist suggested that the plurality of Stewart, Powell, and Stevens is simply mistaken in their assertion that society has evolved away from mandatory sentences for first-degree murderers. Rehnquist attacks the plurality by writing that the states’

willingness to enact statutes providing that penalty is utterly inconsistent with the notion that they regarded mandatory capital sentencing as beyond “evolving standards of decency.” The plurality’s glib rejection of these legislative decisions as having little weight on the scale which it finds in the Eighth Amendment seems to me more an instance of its desire to save the people from themselves than a conscientious effort to ascertain the content of any “evolving standard of decency” (p. 313).

Rehnquist also reaffirmed his belief that appellate review of sentences will remove any arbitrariness in jury decisions, and again asserted that the plurality is ignoring previous decisions such as

*McGautha* which approved of unbridled jury discretion in 1971.

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

Tony Gregg was convicted of armed robbery and murder after killing two men who had picked up Gregg and fellow hitchhiker Floyd Allen. Gregg and Allen had been picked up in Florida and rode north toward Atlanta when the car broke down. Simmons was in possession of enough cash to purchase a new car. After purchasing this new car, the group picked up another hitchhiker who was let out in Atlanta. Apparently, Gregg and Allen decided to rob and kill the men after the other hitchhiker got out of the car. This hitchhiker, Dennis Weaver, contacted the police after reading about the murders in the newspaper. The next day, Gregg and Allen were arrested in North Carolina driving the victim's car and were in possession of the murder weapon.

Gregg's attorneys argued to the Supreme Court that the new guided discretion law was still unconstitutional and asked the Court to overturn the death sentence. The ruling was handed down on the same day as *Woodson*, and was 7-2 that the death penalty statute in question was not unconstitutional because it provided guidance to jurors in deciding the fate of convicted murderers. Justices Stewart, Powell, Stevens, Burger, Rehnquist, White, and Blackmun were in the majority and Justices Brennan and Marshall filed dissenting opinions. In essence, the Supreme Court found that the death penalty per se was not unconstitutional and the application of death penalty under guided discretion laws was constitutional. In upholding the revised statute, the Court gave approval to the use of bifurcated trials where guilt or innocence would be decided in the first phase and sentencing would be decided in the second, as well as automatic appellate review of convictions and sentences, and finally, proportionality reviews to compare sentences of particular cases against similar cases to assure just sentencing practices. Thus, suggestions made by the American Law Institute's Model Penal Code (in 1959), aimed at making the death penalty fairer, and were finally put into place.

The Court actually decided five cases this day, *Gregg* (concerning Georgia's guided discretion law and use of bifurcated trials), *Woodson* (discussed above), *Roberts v. Louisiana*, 428 U.S. 325 (1976) (concerning the state's mandatory death penalty law that also allowed for lesser sentences when defendants were convicted of lesser crimes), *Jurek v. Texas*, 428, U.S., 262 (1976) (concerning the state's mandatory death penalty law which allowed jury consideration of future dangerousness of offenders), and *Proffitt v. Florida*, 428 U.S. 242 (1976) (concerning the state's guided discretion law and use of bifurcated trials). *Gregg* is discussed here because the Court issued the most specific opinion for this case.

Justices Stewart and White turned out to be the key votes in the *Gregg* decision, as each had voted to void capital punishment as practiced under *Furman* only four years earlier. Each of these justices changed his mind in this short period of time, concluding that Georgia's new sentencing laws would eliminate the arbitrary sentencing that gave them cause for concern in *Furman*.

Justices Stewart, Powell, and Stevens found that juries under the new laws were given guidance (see Table 1). They wrote:

The concerns ... that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance, concerns best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of that information (p. 155).

Further efforts to eliminate arbitrariness under the new laws include a state Supreme Court mandated review of the sentence, as noted by Justices White, Burger, and Rehnquist. The seven justice majority also pointed out that juries are given the option of a lesser sentence and that the death sentences under review were found not be influenced by prejudice, suggesting the absence of arbitrariness.

The majority found that capital punishment is valid given that it is a democratically elected punishment, that it has a long accepted use in the history of the United States, that there is no evidence of an evolution of standards away from the death penalty in society, and that newly passed statutes show it does not upset Americans. They explain that even though the evidence of deterrence is unclear, retribution is a valid measure of outrage over murder and thus capital punishment is justifiable.

In summary, the majority of justices quote Justice White's dissent in *Furman* by stating that with the new guidance given to jurors: "No longer should there be 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not'" (p. 198). A similar sentence boldly claims: "No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines" (pp. 206-207).

Justice White, joined by Justices Burger and Rehnquist, discussed that life imprisonment is a possible option for juries, that juries must be unanimous in recommending the death penalty, and that the state Supreme Court provides a careful review to assure that arbitrariness does not play a role in sentencing (see Table 1). Further, these justices claimed that any potential bias of prosecutors is not relevant for arbitrariness. They wrote that the

argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts ... [the argument] that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion ... is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts (p. 225).

Justice Blackmun simply concurred in the judgment.

Justices Brennan and Marshall each dissented from the majority (see Table 1). Justice Brennan asserted again that standards of decency have changed. He wrote:

This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, “moral concepts” require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society. My opinion in [*Furman*] concluded that our civilization and the law had progressed to this point and that therefore the punishment of death, for whatever crime and under all circumstances, is “cruel and unusual” in violation of the Eighth and Fourteenth Amendments of the Constitution. I shall not again canvass the reasons that led to that conclusion. I emphasize only that foremost among the “moral concepts” recognized in our cases and inherent in the Clause is the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings - a punishment must not be so severe as to be degrading to human dignity. A judicial determination whether the punishment of death comports with human dignity is therefore not only permitted but compelled by the Clause (p. 229).

In essence, Brennan concluded that it is a Court duty to regulate morality.

Justice Marshall claimed that new statutes are not informed by public opinion that is aware of the facts of capital punishment, and he even provided evidence from a study in support of his Marshall hypothesis from *Furman*. Marshall boldly claimed that the Court is wrong in concluding that death penalty is not excessive, that the Court accepts a flawed study by Professor Isaac Ehrlich which claims a deterrent effect of the death penalty. He went on to refute the notion that the death penalty stops families of murder victims from taking the law into their own hands: “It simply defies belief to suggest that the death penalty is necessary to prevent the American people from taking the law into their own hands” (p. 238). Marshall asserted that the death penalty is not necessary to stop killing and thus is excessive.

After the *Gregg* decision, capital punishment states passed new laws similar to Georgia's and began sentencing more people to death. In Georgia, the last serious challenge to the death penalty would be decided eleven years later in *McCleskey v. Kemp* 481 U.S. 279 (1987).

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

Warren McCleskey joined three accomplices to rob a furniture store. McCleskey, an African American man, secured the front of the store by rounding up customers and the manager, while his accomplices entered the store from the rear. A silent alarm was tripped and a white police officer entered the front of the store. The officer was hit with two shots, killing him. McCleskey, while under arrest for an unrelated offense, admitted to the robbery but denied the shooting. Two witnesses testified at trial that McCleskey admitted to the shooting and evidence suggested that at least one of the bullets came from the type of gun that McCleskey carried during the robbery. Thus, two aggravating factors were determined beyond a reasonable doubt, that McCleskey committed a murder during the commission of an armed robbery and that he killed a peace officer engaged in the performance of his duties. No mitigating factors were offered for evidence so the sentencing jury recommended death and McCleskey was sentenced to die by the judge.

McCleskey's attorneys argued to the Supreme Court that the administration of capital punishment in Georgia was racially biased against African Americans. The Court heard testimony from Professor David Baldus and others who showed in a statistical study that the death penalty was applied disproportionately to African Americans in Georgia. The study utilized a multiple regression analysis including 230 variables likely to affect the outcome of death penalty cases in order to test the hypothesis that race of defendant and race of victim played a role in death penalty sentences. This study found that 11% of people charged with killing whites received the death penalty, but only 1% of those charged with killing African Americans received the death penalty. Furthermore, the death penalty was assessed in 22% of the cases involving African American defendants and white victims, versus only 3% of cases involving white defendants and African American victims. Prosecutors sought the death penalty in 70% of cases involving African American defendants and white victims, versus only 9% of cases involving white defendants and African American defendants.

After controlling for legally relevant variables, the Baldus study found that defendants charged with killing whites were 4.3 times more likely to receive a death sentence than defendants charged with killing blacks, or a disparity based on the race of the victim. The Court recognized the validity of these findings and even acknowledged a general pattern of discrimination in the application of death sentences in Georgia. Yet, the Court held that an individual defendant must demonstrate discrimination in his or her specific case in order for the case to be considered unconstitutional. That is, he or she must be able to demonstrate that the prosecutor acted in a discriminatory fashion in the individual case or that the legislature intended to make discriminatory law.

The ruling was 5-4 that statistical evidence of racial discrimination is not enough to

demonstrate unconstitutional discrimination in violation of the Fourteenth Amendment's Equal Protection Clause or irrational, arbitrary, capricious sentencing under the Eighth Amendment. For capital punishment to be unconstitutional, a person must prove either that he or she was discriminated against as an individual and/or that the legislature intended for law to be discriminatory. Justices Powell, Rehnquist, White, O'Connor, and Scalia were in the majority and Justices Brennan, Marshall, Blackmun, and Stevens filed dissenting opinions.

The evidence of racial bias presented in the Baldus study, discussed earlier, was dismissed by the five justice majority (see Table 1): "The statistics do not prove that race enters into any capital sentencing decisions or that race was a factor in petitioner's case. The likelihood of racial prejudice allegedly shown by the study does not constitute the constitutional measure of an unacceptable risk of racial prejudice' (p. 281); "At most, the Baldus study indicates a discrepancy that appears to correlate with race, but this discrepancy does not constitute a major systemic defect" (p. 281).

Justice Powell, joined by Rehnquist, White, O'Connor, and Scalia, suggested that the burden rests on the defendant to show purposeful discrimination by the prosecution. The Court assumed the validity of Baldus study but dismissed the findings as inconsequential and suggested that disparities "are an inevitable part of our criminal justice system" (p. 312). It concluded that: "In light of the safeguards designed to minimize racial bias in the process, the fundamental value of a jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process" (p. 213). After discussing the numerous efforts to minimize bias in the system, and claiming that discrimination is an issue left for the legislature not the courts, the majority compared race to other possible disparities that could be demonstrated such as one based on different facial characteristics or attractiveness.

Justice Brennan, joined by Marshall, Blackmun, and Stevens, disagreed (see Table 1). They wrote: “Nothing could convey more powerfully the intractable reality of the death penalty: ‘that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it - and the death penalty - must be abandoned altogether’,” quoting an earlier decision by Justice Marshall (p. 320). The dissent suggested that a demonstrated pattern of disparity based on race violates *Furman*, which said that even a *substantial risk* of arbitrary punishment is unconstitutional, and *Gregg*, which suggested a *pattern of arbitrary sentencing*, would be unconstitutional. The dissent discussed the racial make-up of victims and those subjected to capital punishment since the *Gregg* decision and concluded that there is clear evidence of discrimination by prosecutors in Georgia. They concluded that McCleskey’s sentence was likely based on race and thus he cannot be put to death.

The dissent also pointed out numerous times when the Court has previously ruled that evidence of race discrimination is not acceptable and that racial discrimination is a problem in other areas of the criminal justice system. They claimed that if juries consider race, their discretion should be taken away: “Reliance on race in imposing capital punishment, however, is antithetical to the very rationale for granting sentencing discretion” (p. 336). The dissent concluded by asserting that the Court, by finding that disparities are meaningless given all the safeguards, relies on safeguards that obviously do not work. Justice Blackmun, joined by Justices Marshall, Stevens, and Brennan also asserted that the Court issues an opinion that is inconsistent with previous rulings that have set aside convictions when racial discrimination is illustrated and that have required the prosecution to prove that it is not race but some other relevant factor that can explain away the discrimination. That disparities were most prevalent in the mid-range murder cases – where prosecutors and juries actually had discretion to decide which cases were or were not capital cases and which convicted

defendants would live or die – seemed to illustrate clearly that prosecutors and juries were abusing their discretion. This argument, however, did not convince the Court.

### **Degree of Inconsistency Across *Furman*, *Woodson*, *Gregg*, and *McCleskey***

From the analysis of the opinions in these four cases, it is clear that some justices were inconsistent in their opinions. For the purposes of this article, we seek three forms of *inconsistency*: 1) issuing an opinion that is contradictory to opinions issued in earlier cases (e.g., a justice rules in favor of capital punishment in one case and then against it in another, or vice versa); issuing an opinion that appears to be contradictory to statements made in written opinions in earlier cases (e.g., a justice votes in a way opposite to the principles he or she has put forth in previous cases); and 3) ruling in a way that appears to violate a precedent or rule of law.

Table 2 illustrates the degree of inconsistency among justices across the cases of study. We have classified opinions into those that favor abolition of capital punishment as practiced or those that favor retention of the death penalty. These terms are misleading because the rulings in these cases only apply to the cases themselves and the laws to which they relate, not to the issue of capital punishment itself. Thus, we have labeled in Table 2 decisions as either “favoring abolition in the case” or “favoring retention in the case.” As you can see, some justices did change their minds about the administration of capital punishment over time, depending on the specific issue being decided (a change in position is indicated with the \* symbol). The most important of these were justices White and Stewart, who opposed capital punishment in *Furman*, but who gained confidence in capital punishment after states passed laws to remove arbitrariness in death penalty sentencing (by passing mandatory sentencing laws, giving jurors guidance in death penalty sentencing, using bifurcated trials, and providing post-conviction review). White voted to reinstate capital punishment in *Woodson* and *Gregg* while Stewart only voted to reinstate capital punishment in *Gregg*.

**Table 2: Consistency of Justices in Major Supreme Court Cases Regarding the Death Penalty**

**Favoring Abolition in the Case**

<u>Furman</u>	<u>Woodson</u>	<u>Gregg</u>	<u>McCleskey</u>
Douglas	Stevens (new)		*Stevens
Brennan	Brennan	Brennan	Brennan
Stewart	Stewart		
Marshall	Marshall	Marshall	Marshall
White	*Powell		*Blackmun

**Favoring Retention in the Case**

Burger	Burger	Burger	
Blackmun	Blackmun	Blackmun	
Rehnquist	Rehnquist	Rehnquist	Rehnquist
Powell	*White	White	White
		*Stewart	O'Connor (new)
		*Powell	Powell
		*Stevens	Scalia (new)

\* indicates a switch of position from the earlier decision

Table 3 shows under which conditions each justice involved in these four cases determined that capital punishment is acceptable. The number in the last column of the table reflects the number of cases, out of the four cases analyzed here, that each justice ruled in favor of retaining capital punishment.

**Table 3: Specifying When Capital Punishment is Acceptable in Four Major Supreme Court Cases (Furman, Woodson, Gregg, McCleskey)**

<u>Justice</u>	<u>When is capital punishment acceptable?</u>	<u># Cases Ruled</u>
Rehnquist	under all conditions	4/4
Burger	under all conditions	3/3
*O'Connor	under all conditions	1/1
*Scalia	under all conditions	1/1
Blackmun	all except a pattern of racial disparity	3/4
Powell	all except mandatory death sentences	3/4
White	all except evidence of arbitrary sentences	3/4

Stewart	only with juror guidance, bifurcated trials, post conviction review	1/3
Stevens	only with juror guidance, bifurcated trials, post conviction review	1/3
*Douglas	never	0/1
Brennan	never	0/4
Marshall	never	0/4

\* only involved in one decision in the analysis

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This review of all opinions of the justices in these cases seems to support the following findings:

- 1) Rehnquist and Burger are the Court's strongest proponents of capital punishment in these cases;
- 2) Brennan and Marshall are the Court's strongest opponents of capital punishment in these cases;
- 3) Only four justices who ruled in at least three of the cases issued opinions on the same side of the issue every time, either for retention of capital punishment or for its abolition (Rehnquist and Burger for retention, Brennan and Marshall for abolition); and
- 4) There is evidence of what can be called inconsistency in the opinions of individual justices in these cases that can only be detected with careful review of opinions across time.

As noted earlier, specific examples of inconsistencies in opinions of justices could take three forms. First, there are those opinions that are contradictory to opinions issued in earlier cases (we will call this TYPE I inconsistency). Second, there are those opinions that appear to be contradictory to statements made in written opinions in earlier cases (we will call this TYPE II inconsistency). Third, the Court rules in way that appears to violate a precedent or rule of law (we will refer to this as TYPE III inconsistency). Here are some examples of each type of inconsistency:

- 1) The decision in *Furman* violated the precedent set only one year earlier in *McGautha* which approved of unbridled jury discretion (TYPE III inconsistency);
- 2) White and Stewart opposed capital punishment in *Furman* in part because of the theoretical possibility of arbitrary sentencing but gained enough confidence in capital punishment to vote to reinstate capital punishment in *Gregg* after states passed laws to remove arbitrariness in death penalty sentencing (given the lack of evidence of a lack of arbitrariness, this change

- in opinion is a TYPE I inconsistency);
- 3) Stewart left the Court prior to *McCleskey* but White voted in *McCleskey* to retain capital punishment even after evidence showed a pattern of disparity based on race of victim, which is suggestive of arbitrary sentencing (Since White's opinion in *McCleskey* contradicts his concerns expressed in *Furman* and *Gregg*, this is a TYPE II inconsistency);
  - 4) Justices Stevens and Blackmun, who both voted to reinstate capital punishment in *Gregg*, each voted to end capital punishment in *McCleskey* based on the evidence of racial disparity. Blackmun had voted in each of the previous three cases to retain or reinstate capital punishment, and Stevens voted to reinstate capital punishment in *Gregg* (TYPE I inconsistency). It could be argued that social scientific evidence of disparities in the sentences convinced two justices to change their minds, but this evidence was seen as insufficient to provide proof of individual discrimination by the other justices;
  - 5) Blackmun accepted the Baldus study in *McCleskey* despite having rejected statistical evidence of racial discrimination in rape cases in *Maxwell v. Bishop*, 398 U.S. 262 (1970) (TYPE II inconsistency);
  - 6) Powell ruled to retain or reinstate capital punishment in all cases except for mandatory sentencing (TYPE I inconsistency). To Powell, juror discretion is fundamental to the American justice system, so removing it through mandatory sentencing is not acceptable even if it removes disparities. At the same time, disparities emerging from juror discretion are apparently acceptable because he voted to retain capital punishment in *McCleskey*;
  - 7) Powell in *Furman* claimed that a pattern of race discrimination could lead to a valid Eighth Amendment challenge, but he ruled against the validity of this very challenge in *McCleskey* (TYPE II inconsistency);
  - 8) Burger in *Furman* noted how jury discretion was superior to mandatory sentencing but then voted to uphold mandatory sentencing in *Woodson* (TYPE II inconsistency);
  - 9) The standard from *McCleskey*, which places the burden on individual defendants to prove purposeful discrimination, is a different standard than in other situations such as the use of peremptory challenges to exclude minorities from juries (TYPE III inconsistency). For example, under *Batson v. Kentucky*, 476 U.S. 79 (1986), prosecutors are required to prove that race did not play a role in dismissal of potential jurors if the defendant alleges that race played a role in decisions for peremptory challenges. Peremptory challenges and the death penalty are two separate issues, but it is hard to justify different standards to prove racial discrimination;
  - 10) Strangely, Justice Powell authored the Court's opinion for the seven justice majority in *Batson*. Had he stayed consistent in his reasoning, Powell would have seen the legitimacy of *McCleskey*'s claims; yet, Powell voted against *McCleskey* with the five justice majority (TYPE II inconsistency).

- 11) Similarly, Justice White had written in his *Gregg* opinion that: “Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts” (p. 225). When the facts were presented to the Court in *McCleskey* that suggested race of victim played a role in capital sentencing, it did not change his mind as to the guided discretion statutes (TYPE II inconsistency). Lazarus (1999: 199) points out that White was “persistently skeptical of claimants seeking to prove discrimination by showing unequal racial outcomes as opposed to more direct proof of intentional discrimination.” White reasoned that the findings of the Baldus study might be explained by some other factor, even though Baldus controlled for more than 230 other variables including all legally relevant ones; and
- 12) The ruling in *McCleskey*, which suggested that racial disparities could possibly be explained away by other factors, also was inconsistent with the ruling in *Bazemore v. Friday*, 478 U.S. 79 (1986) where “the Court had specifically stated that a statistical study need not take into account every conceivable variable to qualify as meaningful evidence of discrimination” (Lazarus, 1999: 208) (The different standard for proving discrimination is again a form of TYPE III inconsistency).

These examples show that justices do change their minds over time and do not remain consistent in their interpretations even when confronted with seemingly identical issues. Although each case reviewed here is a unique case with facts specific to each case, ideally the Supreme Court will not ignore its own precedents, nor should individual justices ignore their previous opinions or the reasoning used to arrive at previous decisions.

### **Factors That May Lead to Changes in Opinions Across Time: Explaining Type I, II, and III Inconsistencies**

One might wonder how the Court and its justices could be so inconsistent over time with respect to capital punishment or any given issue. It seems to the layperson that once a punishment is declared unconstitutional or constitutional, the issue is decided. In fact: “every issue is always open for reargument in later cases; changed parties, changed circumstances, and changed courts often lead to changed conclusions” (Lieberman, 1992: 21). This is apt description for the Supreme Court decisions in the death penalty cases examined here.

According to the literature, potential explanations for inconsistencies in Court activity include: 1) the ambiguous nature of the Constitution; 2) ideology/attitudes and political party affiliation of individual justices; 3) approach to interpreting the Constitution; 4) strategic rationality and bargaining, 5) changing justices over time; 6) evolving human standards; and 7) public opinion and state legislative activity (e.g., see Epstein and Knight, 1998; Segal and Spaeth, 1993). Each of these explanations is briefly addressed below.

### *Ambiguous Nature of the Constitution*

Part of the inconsistency problem seems to stem from the very nature of the Constitution itself. Lieberman (1992: 12) describes it as “elusive, ambiguous, murky, sometimes quite opaque ...” such that its meaning could be known “only through some human, and fallible, means of interpretation.” As explained by Epstein and Walker (1998), justices can make decisions by: interpreting the Constitution literally; attempting to interpret the meaning of individual words in the Constitution; making logical inferences; and enforcing stare decisis. In the case of capital punishment, a literal interpretation of the Constitution would suggest that it is acceptable: “In both Due Process Clauses, the Constitution itself recognizes the death penalty, in saying that a person may be deprived of life as long as in so doing the government acts with due process of law” (Lieberman, 1992: 149). Justices in the cases analyzed here did generally acknowledge that capital punishment is permissible according to the Constitution.

When the justices used the approach of determining the meaning of key words (such as “cruel” and “unusual”), they disagreed about the meaning of these words and this affected their decisions. For example, in *Furman*, Justice Douglas said capital punishment would be cruel and unusual if it was discriminatory or selective in its application. Justice Brennan suggested that although what is cruel and unusual is not clearly defined, to him it is something that does not

comport with human dignity, either because it degrades human beings, it is arbitrary, it is acceptable to the public, or it is unnecessary. To Justice Stewart, a punishment is cruel and unusual if it is excessive and/or arbitrary. To Justice White, a cruel and unusual punishment is arbitrarily applied. To Justice Marshall, a cruel and unusual punishment is one that violates the evolving standards of decency in a maturing society, either because it causes too much physical pain or is excessive, it has not been practiced prior, it serves no valid purpose or it is unnecessary, or if popular sentiment is against it or it is immoral.

Finally, justices in these cases also attempted to make logical inferences based on their reasoning abilities and referred to previous decisions of the Court to justify their opinions, but different justices reached different conclusions. For example, some justices inferred discrimination from clear disparities in *McCleskey* as they thought previous Court decisions called for. Others justices either refused to make such inferences or disagreed that such inferences were appropriate, despite the fact that such inferences had been encouraged in previous cases.

The ambiguous nature of the Constitution might account for TYPE I inconsistencies (issuing an opinion that is contradictory to opinions issued in earlier cases) or TYPE II inconsistencies (issuing an opinion that appears to be contradictory to statements made in written opinions in earlier cases). Justices may very well interpret the Constitution differently at different stages of their careers, based on their variable understanding of the Constitution, even when dealing with the same basic issues such as those that are common in death penalty cases. However, we believe the ambiguous nature of the Constitution would appear to best account for TYPE III inconsistencies (ruling in a way that violates a precedent or rule of law), for as the Court is more conservative or more liberal, the approach to interpreting the Constitution would be significantly different. Thus, precedents might be more likely to be overturned when they were established by Courts with

different political persuasions.

*Ideology / Attitudes and Political Party Affiliation of Justices*

The importance of ideology or personal attitudes of justices cannot be understated (Epstein and Knight, 1998; Segal, 1984; Segal and Cover, 1989; Segal and Spaeth, 1993; Tate, 1981). As shown in Table 1 of this analysis, justices in these cases simply disagreed about the proper role of the Courts in dealing with issues such as arbitrary sentencing and demonstrated disparities in punishment. Opposing ideologies led to opposing opinions even when justices agreed about the relevant facts in the cases reviewed.

Ideology logically affects one's political party affiliation and one's approach to interpreting the Constitution, so it is difficult to separate out the effects of these influences. It is clear in these cases that these factors played a role. Political party affiliation appears to have played a role in the opinions of justices in these four cases. In these cases, 12 justices wrote 36 opinions, 20 to retain capital punishment and 16 to halt its use. Justices identified as Democrats issued 10 opinions to halt capital punishment and only three to retain it; all three to retain it were by the same justice (White). Justices identified as Republicans issued 17 opinions to retain capital punishment and only six to halt it (five of these by Stevens and Stewart). Two of the four cases most clearly provide evidence of a relationship between political party affiliation and the opinion issued in the case: in Furman, four out of five Republican justices voted to retain capital punishment, all four of which were nominated by President Nixon; and in *Gregg*, all six Republican justices voted to reinstate capital punishment.

Justice Burger was chosen by Nixon because Burger opposed many of the advances made in the areas of individual rights and liberties during the Warren Court years. Justice Blackmun, a boyhood friend of Burger, was chosen to achieve Nixon's promise of turning the Court around (Lazarus, 1999; Wagman, 1993). Interestingly, Wagman (1993) noted many inconsistencies in

Burger's record:

But quite possibly no Chief Justice has come to the Court with a background so filled with contradictions. As a young lawyer in Minneapolis, Burger was known as a defender of individual rights, and at one time served as co-chairman of the Minnesota Commission on Human Rights. In his thirteen years on the court of appeals, he had developed a reputation as an expert in the area of court administration, and had exhibited a moderately conservative voting record. But he was also a sharp critic of the activism of the Warren Court. During his Senate confirmation, Burger put on his most moderate face and was easily confirmed. But it was clear he was Nixon's choice because the president believed Burger would move the Court back to the right (p. 114).

He did so in the death penalty cases reviewed here, voting all three times in the decisions he was involved with to retain or reinstate the death penalty.

We cannot make firm conclusions about the role of political party affiliation in death penalty cases for we have only examined four cases here. But, in these cases, there is evidence of an association between political party affiliation of the justices and the opinions issued. We suspect that political party affiliation best accounts for TYPE III inconsistencies because conservative Courts tend to be more likely to overturn precedents established by liberal Courts, and vice versa (Epstein et al., 1996).

#### *Approach to Interpreting the Constitution*

Why would political party affect the decisions of the justices in these cases? Here is where basic beliefs about the proper role of the Supreme Court in American government come into play (George and Epstein, 1992; Segal and Cover, 1989; Tate, 1981).

Disagreements among justices about capital punishment often come down to disparate views of the proper role of the government in settling disputes among people and their government, and the appropriate role of the courts in resolving constitutional issues. The most important of these issues include federalism, the separation of powers, and individual rights and liberties versus government

power (Epstein and Walker, 1998: 7; Lieberman, 1992: 7).

*Federalism* refers to the distribution of power between the United States federal government and its states. Certain powers are granted to the federal government by the Constitution, whereas others are reserved for the states, and some are denied to both the federal government and to the states (Peltason, 1997). The *separation of powers* refers to the endowment of different powers to different branches of American government (legislative, judicial, and executive branches), as well as constraints on those powers that can be exercised by other branches of government through a system of checks and balances (Epstein and Walker, 1998; Lieberman, 1992; Walker and Epstein, 1993). Certain *individual rights and liberties* are guaranteed by the Constitution. Because of the Bill of Rights and the Fourteenth Amendment to the Constitution, neither the federal government nor the states are permitted to violate these rights and liberties without serious consequences (Robinson, 2002). The issues of federalism, the separation of powers, and individual rights and liberties versus government power affected rulings of justices in major cases dealing with capital punishment.

Republicans tend to favor less involvement of the federal government in state issues (federalism). In the cases reviewed here, Republican justices were more likely to temper their opinions by concerns of separation of power issues and judicial restraint. Democrat justices in the cases reviewed here were more inclined to extend the power of the Court and to engage in so-called “judicial activism.” Interestingly, justices on both sides cited case law to support their opinions while freely ignoring or violating precedents that could have or should have changed their own opinions (TYPE III inconsistency); thus *stare decisis* appears to be a matter of choice over which precedents should take precedence. This may be why Epstein and Walker (1998: 30) claimed: “Many allege that judicial appeal to precedent often is mere window dressing, used to hide ideologies and values, rather than a substantive form of analysis.”

Data from Epstein et al. (1996) show that of the Warren, Burger, and Rehnquist Courts through 1995, the Rehnquist Court was the least “liberal” Court in the areas of civil liberties and federalism. In civil liberties, nearly 79% of the Warren Court decisions were liberal, versus approximately 30% for the Burger Court and only about 21% for the Rehnquist Court. In federalism cases, more than 73% of the Warren Court decisions were liberal, versus nearly 68% of Burger Court decisions but just over 39% of Rehnquist decisions. This means the Rehnquist Court was the least likely to decide cases in favor of individual defendants and most likely to decide cases in favor of state governments, respectively. Instead, decisions of the Rehnquist Court tend to uphold the rights of states above all else. In fact, Woodward and Armstrong (1979: 181) asserted that to Rehnquist

the human error of wrongfully depriving a man of his constitutional rights was less severe than mistakenly striking down an otherwise constitutional statute. For the Court to thwart the will of the legislature was, in Rehnquist’s view, to violate the rights of every individual in that state. That was a far greater wrong than allowing one man to die.

This is why Rehnquist supposedly voted in *Furman* to uphold the death penalty as practiced (and in every case since).

The Rehnquist Court is associated, at least in part, with the strongly conservative nature of the Chief Justice himself. Rehnquist’s successful efforts to limit federal habeas corpus appeals stems from his disgust over what he saw as abuses of such appeals by criminal defendants over his life. On the other side of the Court decisions reviewed here are Brennan and Marshall, who in virtually every appeal to the Court, granted cert. to review the case and voted to overturn or stay an execution (Lazarus, 1999).

The data from Epstein et al. also show that Democrat justices were more likely to be activists (defined as declaring, with the majority, a law to be unconstitutional). For Democrat justices, the

percentages of votes with the majority to declare laws unconstitutional were 97% (Brennan), 94% (Marshall), 94% (Douglas), and 78% (White). For Republican justices, the percentages were 89% (Powell), 85% (Stevens), 83% (Stewart), 76% (Blackmun), 73% (O'Connor), 69% (Burger), 69% (Scalia), and 39% (Rehnquist). Epstein and Walker (1998: 36) define activists as justices who

believe that the proper role of the Court is to assert independent positions in deciding cases, to review the actions of the other branches vigorously, to strike down unconstitutional acts willingly, and to impose far-reaching remedies for legal wrongs whenever necessary. Restraint-oriented justices take the opposite position. Courts should not become involved in the questions of other branches unless absolutely necessary. The benefit of the doubt should be given to actions taken by elected officials. Courts should impose remedies that are narrowly tailored to correct a specific legal wrong.

There is much debate among legal scholars as to whether judicial activism is appropriate (Cox, 1987; Jones, 2001), and this is a highly controversial topic among justices (Bellacosa, 1992). This debate is informed by the actions of individual conservative and liberal justices (Gates and Phelps, 1991). In the death penalty cases reviewed here, it appears that Republican nominated justices voted to restrain the Court's power while Democrat justices voted to extend it. Yet, scholars rightly point out that conservative justices are also activists (Shane, 2000; Sunstein, 1999), in part by their refusal to accept changing standards of the law. Epstein and Walker (1998: 37) note: "An activist judge need not be liberal, and a judge who practices restraint need not be conservative." For example, the U.S. Supreme Court's refusal to hear all but a handful of cases as witnessed by the Rehnquist Court's "shrinking docket" can be seen both as evidence of restraint (Chemerinsky, 1996) and as a form of activism because Rehnquist is moving the Court farther to the right of the political spectrum. In fact, the shifting make-up of the Court to the right can be considered a form of activism (Howard, 1993).

In the four death penalty cases reviewed here, it seems as if both sides were less interested in

making good decisions than in assuring the outcomes they decided. Lazarus (1999: 420) claimed that in many decisions in important cases

narrow Court majorities transformed constitutional law on the basis of opinions the Justices knew to be wholly inadequate and unconvincing [which could explain TYPE I inconsistency]. Individual Justices sought to advance their political agendas by employing legal arguments in which they themselves did not believe or methods of interpretation they had uniformly rejected in the past [which could explain TYPE II inconsistency]. Neither side respected precedent, except when convenient; both sides tried to twist the Court's internal rules to attain narrow advantage [which could explain TYPE III inconsistency].

In other words, politics intervened in a way that affected the decisions of the justices. We suspect that political party affiliation, which for Supreme Court justices roughly equates to their approach to interpreting the Constitution, best explains TYPE III inconsistency. Again, conservative and liberal justices appear to have a different approach to interpreting the Constitution, as witnessed in the analysis of the four major death penalty cases here.

#### *Strategic Rationality and Bargaining*

From the literature, it is also clear that justices bargain with one another before writing their final opinions, that they change their minds often as they bargain, and that their changing opinions sometimes are merely to please senior members of the Court (Lazarus, 1999). Stearns (1999) showed that justices sometimes change votes on some issue before the Court in order to achieve their desired outcome. It appears that the justices bargain with one another through verbal and written exchanges to assure that the outcome of the law will match their own preferred positions rather than to be consistent with the principle of stare decisis (Epstein and Knight, 1998: 57). In fact, abandonment of precedent is common in the Supreme Court. For example, Segal and Spaeth (1993) illustrate that the past three Courts (with Warren, Burger, and Rehnquist as Chief Justices) have overturned an average of 2.7 precedents per term, with a range of between 2.6 and 2.9 precedents per

term. Other studies show how little *stare decisis* really matters (Segal and Spaeth, 1996). A study of 64 death penalty cases between since 1972 found that outcomes could be accurately predicted using precedents in 75% of the cases (George and Epstein, 1992). This means 25% of such cases could not be accurately predicted using *stare decisis*. Given the conflicting precedents from different Courts and the changing justices, this is not surprising.

Much of the bargaining that goes on behind closed doors at the U.S. Supreme Court occurs with freshman justices. The “freshman effect” suggests that veteran justices may try to sway the new justice to their side in order to assure a particular outcome (Melone, 1990; Scheb and Ailshie, 1985). This effect cannot be documented absolutely in the cases reviewed here, but it may partially account for why Court opinions in death penalty cases are in some ways not consistent.

In the book, *The Brethren* (1979), called the first ever inside view of the U.S. Supreme Court, Woodward and Armstrong examined the inner workings of the Court between 1969 and 1976. They discussed three of the key cases discussed here, *Furman*, *Woodson*, and *Gregg*. According to their account, Stewart voted in *Furman* with the majority mainly because of the horror of thinking that his one vote could send hundreds of people to their deaths through capital punishment. If true, Stewart's votes were not based on precedent or law but rather on his own rejection of capital punishment.

According to Woodward and Armstrong, freshman Justice Powell determined to do as much research into the death penalty as he possibly could to inform his vote in *Furman*; he also thought he could sway other justices on the Court such as White and Stewart, who in conference discussions voted with the majority to outlaw capital punishment as practiced, but who had both voted in *McGautha* to uphold unguided jury discretion in capital cases (TYPE I inconsistency). According to Woodward and Armstrong, “Powell discovered an unbroken line of precedents to uphold the death penalty” and thus was determined to make sure it was upheld in line with the principle of *stare*

decisis (p. 213). Of course, Powell was unsuccessful but Powell did learn that White and Stewart voted not based on the Constitution but on other grounds (their own philosophies about capital punishment). This led Lazarus (1999) to call the *Furman* decision a horrible mistake.

Strangely, Woodward and Armstrong claimed that Powell privately feared that the *Furman* decision would lead to mandatory death sentencing laws – something he did not favor. As noted above, Powell voted in *Woodson* to abolish North Carolina’s mandatory death sentencing laws. At the same time, during *Furman*, White told his clerks he preferred mandatory death laws to unguided discretion, at least for heinous murders, and he voted in *Woodson* to uphold North Carolina’s mandatory law.

Woodward and Armstrong discussed the very strange occurrences in the Court in considering *Woodson*, *Gregg*, and the other cases announced on the same day. Chief Justice Burger, even though he was not in the majority, assigned the writing of the opinion of the Court to Justice White, supposedly to stop his wavering and assure his vote for the justices who wanted to vote to uphold the death penalty statutes in question. Because of their agreement, a “troika” of justices emerged, consisting of Powell, Stevens, and Stewart. These justices met and worked out a rationale to strike some of the death penalty laws and to uphold others, trying their best to come up with a logical and consistent argument across cases. White, learning of the invincibility of this plurality, sent the cases back for reassignment, and the three justices would work out a way to vote together. These justices took the law into their own hands, refused to overrule the ruling in *McGautha* which held that jury guidance and bifurcated trials were not required in death penalty cases, and simply pieced together rulings that would overcome *Furman* but seem to be inconsistent with *McGautha*. As described by Woodward and Armstrong (1979: 440), these justices “were acting like a superlegislature,” seemingly violating the separation of powers.

In another inside look at the Court in the book, *Closed Chambers* (1999), Lazarus, a former clerk for Justice Powell, agreed with the analysis of Woodward and Armstrong. Lazarus asserted that after hearing arguments in *Gregg*, Powell wrote in his conference notes that “I accept *Furman* as precedent.” Lazarus thought that Powell would likely vote to reject the new death penalty statutes that provided guidance to juries (Lazarus, 1999: 116). During the hearing of *Woodson*, *Gregg*, and the other three cases, Powell approached Stewart and the freshman Justice Stevens to have lunch and to formulate a “centrist ‘troika’” for these capital cases, meaning that these three justices controlled the Court and the direction of its decisions. Indeed, these three justices wrote with the majority in both *Woodson* and *Gregg*: “Stewart, Powell, and Stevens set a new death penalty agenda for the Court ... the centrists had in effect appointed themselves overseers of the newly approved yet highly regulated business of capital punishment” (Lazarus, 1999: 117).

Another telling example of bargaining comes from the case of *Tompkins v. Texas*, 490 U.S. 754 (1989), disposed of by the Court in 1988 by a 4-4 vote. According to the account by Lazarus (1999), Phillip Tompkins was an African American male with an IQ of around 70 who abducted a young, white woman after rear-ending her car while smoking dope. After abducting her he tied her to a tree and gagged her with a bed sheet while he took her ATM card and went to the bank to withdraw \$1,000 from her account. Despite the fact that Tompkins confession to the crime clearly indicated that he did not intend to kill his victim, he was convicted of felony murder and sentenced to death by a Houston jury. Tompkins appealed to the Texas Court of Criminal Appeals and ultimately the U.S. Supreme Court after being convicted by an all-white jury. Of the 13 potential African American jurors at his trial, eight were struck for cause and five were dismissed by the prosecutor using peremptory challenges. Tompkins alleged a *Batson* violation, suggesting that the prosecutor illegally used race to dismiss potential jurors, and a violation of the Court’s ruling in *Beck*

v. *Alabama*, 447 U.S. 625 (1980) because the trial judge did not allow the jury to consider a lesser offense of unintentional murder.

The Texas Court of Criminal Appeals, rather than following the *Batson* ruling that said a defendant would only have to raise an inference that race was used to exclude potential jurors, conducted its own inquiry into the facts of the dismissals and simply invented possible explanations that were race neutral. After the *Tompkins* oral arguments, eight of the Supreme Court justices met for a conference discussion (O'Connor excused herself because her husband worked for a law firm that had once represented Tompkins). According to Lazarus (1999), the preliminary vote among the eight participating justices was 5-2-1 in favor of Tompkins on his *Batson* claim – Justices Rehnquist and White sided with the state of Texas while Justices Brennan, Marshall, Blackmun, Stevens, and Kennedy sided with Tompkins. Justice Scalia was undecided.

Justice Stevens, the senior justice in the majority, drafted an opinion and waited for responses, where the bargaining among justices could begin. Lazarus asserted that Scalia quickly not only joined the two justices in the minority but also questioned the very formula for determining *Batson* violations (which was derived from plaintiff friendly employment law that in the view of conservatives encouraged frivolous discrimination lawsuits). After Scalia sent out his memo, Justice Kennedy, who was in his first full term on the Court, began to express skepticism about the *Batson* claim. After sitting on his decision for more than six months, Justice Kennedy formally switched his vote. Lazarus (1999: 67) claimed: "Although Kennedy still found the Texas court of appeal's *Batson* discussion 'difficult to accept', he had done his own review of the *Batson* ruling and had concluded that the Texas district court had it right all along." In other words, Kennedy accepted the invented justifications for the dismissal of potential African American jurors that were race neutral. Kennedy's revised vote, which ran counter to statements he had made to other justices about the

absurdity of excuses offered by prosecutors to dismiss potential African American jurors (TYPE II inconsistency), assured the final vote would be 4-4 and thus the case would be dismissed by the Court. “His revised vote guaranteed that the Court would split 4-4 on the *Batson* issue, strictly along political lines: Rehnquist, White, Scalia, and Kennedy on the one side; Brennan, Marshall, Blackmun, and Stevens on the other” (Lazarus, 1999: 68). Lazarus concluded that “the Justices lined up exactly as one might have predicted before the case was briefed or argued – liberals on one side, conservatives on the other, a gorge between them and no bridge across even in an easy case” (p. 72).

Strategic rationality and bargaining could explain any of the three types of inconsistency we have seen in the four major death penalty cases reviewed here. It could account for why an individual justice might issue an opinion that is contradictory to opinions issued in earlier cases (TYPE I inconsistency), or an opinion that appears to be contradictory to statements made in written opinions in earlier cases (TYPE II inconsistency). The bargaining that went on in the *Gregg* case, led by Justice Powell, is an example of this. Strategic rationality and bargaining could logically lead to a precedent being overturned by the Court, as well (TYPE III inconsistency). The significant point is that since justices bargain behind closed doors on issues unrelated to the facts of individual cases, it should not be surprising that inconsistencies arise in Court decisions. We’d expect strategic rationality and bargaining to best account for Type I and Type II inconsistencies – i.e., to best explain inconsistencies over time in various opinions of individual justices rather than in violations of precedent by different Courts.

#### *Change of Justices Over Time*

One obvious explanation of inconsistency in rulings over time is the change in the justices of the Court. One startling example is the case of *Maxwell v. Bishop*, 398 U.S. 262 (1970), heard first in 1967. According to Woodward and Armstrong (1979), the justices voted secretly 6 to 3 to strike

down the death penalty as practiced in Arkansas (with Justices Warren, Douglas, Harlan, Brennan, Fortas, and Marshall in the majority and Justices Black, Stewart, and White in the minority). Chief Justice Warren, being in the majority, assigned the writing of the majority opinion to Douglas. After reading the Douglas opinion, Harlan changed his vote, making the vote 5-4. Before the opinion was issued by the Court, Justice Fortas resigned, leaving the Court split on the case 4-4. In 1969, with Warren's vote replaced by Justice Burger, the Court now stood 5-3 to uphold the death penalty law in Arkansas. Harlan insisted that the Court not issue an opinion until the ninth justice was appointed to the Court. When Justice Blackmun arrived and voted in 1970 to uphold the death penalty without any jury guidance in *McGautha v. California*, 402 U.S. 183 (1971), it was clear that the Court now stood at 6 to 3 to uphold the Arkansas law.

Another example relevant for the cases reviewed here occurred between the ruling of *McGautha* and *Furman*. Two justices (Black and Harlan) retired and were replaced by Nixon appointees Powell and Rehnquist, both of whom had called for and/or achieved significant cutbacks in defendants' rights as attorneys prior to their arrival on the Supreme Court. *McGautha*, decided by a 5-4 majority, included Stewart and White in the majority. These two justices switched their opinions only one year later in *Furman*. Similarly, while Justice Douglas was ill and unavailable to hear arguments, cases would often split 4-4 until Douglas finally decided to retire in 1975. Douglas, who had ruled with the majority in *Furman* was replaced by Stevens in 1976. Stevens ultimately ruled with the majority in *Gregg*, something Douglas may not have done.

When Justice Stewart retired in 1981, he was replaced by Reagan nominee O'Connor, who voted with the majority in *McCleskey* saying that disparities in capital sentencing were insufficient to make the sanction unconstitutional. Recall that although Stewart voted with the majority in *Gregg*, he previously voted with the majorities in *Furman* and *Woodson* to ban unguided death sentences

and mandatory death sentences, respectively. In both of these opinions, Stewart expressed concern over arbitrary sentencing and thus would have likely been very distressed with the evidence presented in *McCleskey*. It is thus possible that the *McCleskey* case could have been decided 5-4 to the end of capital punishment if Stewart had stayed on the Court. Additionally Chief Justice Burger resigned and Rehnquist was elevated to Chief Justice and replaced by Scalia one month prior to *McCleskey*. It is possible that this affected the bargaining process and perhaps the opinions of the justices.

A final example shows how shifting justices in the Court affected outcomes. In a second appeal to the Supreme Court by McCleskey, his attorneys discovered that key evidence against him had been discovered by a prison informant eliciting incriminating information from him, a violation of *Massiah v. United States*, 377 U.S. 201 (1964). The Eleventh Circuit Court of Appeals rejected McCleskey's claim first on the basis that it was filed too late and that the error was harmless, even though the evidence was hidden by the state for years; McCleskey appealed to the Supreme Court. Four justices (Brennan, Marshall, Blackmun, and Stevens) agreed to hear the case. Upon the retirement of Brennan, Justice Souter, a Reagan appointee, joined the five justices who voted against granting cert. to deny McCleskey's *Massiah* violation claim, meaning McCleskey lost 6-3. What is alleged by some is that the justices nominated by Republicans were motivated to reject McCleskey's Massiah claim, in part, by the fact that this rule was created by the more liberal Warren Court.

Changing justices on the Court could account for all three types of inconsistency. Justices sometimes change their minds when confronted with strong justices on the other side of an issue. This could produce TYPE I or TYPE II inconsistencies over time. Yet, we believe that changing justices on the Court best explains TYPE III inconsistencies, as precedents established by previous justices are more likely to be overturned by Courts with different agendas.

### *Evolving Human Standards*

Another source of inconsistency is the evolution of human standards that effect how the Constitution is interpreted. In the words of Lieberman (1992: 11), the Supreme Court has engaged in “bending and twisting and refashioning the constitutional clauses to fit its changing circumstances.” This means that justices can interpret the meaning of constitutional clauses based on present day standards. This was the key to the majority justices in *Furman* and the dissenting justices in *Gregg*. That the justices are free to determine the meaning of words based on modern standards does not mean they can invent meaning or make it up, but these charges have been levied against so-called “activist” judges (Cox, 1987; Jones, 2001).

Under these conditions, it is understandable that a degree of inconsistency will emerge in Court activity and opinions of individual justices, even with a single issue such as the death penalty. In fact, as more and more opinions are written about any given issue, “the Court must engage in attempts to reconcile the irreconcilable, fitting together a pattern of cases decided at different times for different reasons by different justices with different agendas” (Lieberman, 1992: 19).

The death penalty is an issue that is very susceptible to changing opinions over time. American society appears to be evolving away from the use of capital punishment, although remarkable slowly. At the time of this writing, there is still great debate about capital punishment in many state legislatures and Congress. Public opinion polls (e.g., Gallup) show that support for capital punishment is at its lowest since the early 1980s. According to numerous studies reviewed by the Death Penalty Information Center, when given alternatives such as life imprisonment without the possibility of parole plus restitution to the victim’s family, roughly half of Americans now say they would not vote for capital punishment. Approximately half of Americans also now report that they would support a moratorium on capital punishment, that they believe an innocent person has

been executed, and that the death penalty is not administered fairly (Death Penalty Information Center, 2005).

Related to evolving human standards is the evolution of individual justices over time, which could easily account for either Type I or Type II inconsistency. Justice Blackmun (a supporter of capital punishment in three of the four cases reviewed here), in a dissent to deny cert. in *Callins v. James*, 000 U.S. U10343 (1994), second-guessed his previous opinions and wrote:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years, I have endeavored – indeed, I have struggled – along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere 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 and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. 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 ... The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.

Stephenson (1994) analyzed the change of heart of Justice Blackmun with regard to capital punishment and suggested that Blackmun may have been highly affected by Justices Brennan and Marshall over time, and basically worn down by the constant stream of cases which showed clearly that the administration of the death penalty was plagued by problems related to ambiguity and unfairness.

We suspect that evolving human standards of society and individual justices would best account for TYPE I and TYPE II inconsistencies. That is, justices may change their minds about previous opinions and the rationale expressed within, as evidence about society’s changing values mounts. Evolving human standards could also account for TYPE III inconsistency if enough justices

on the Court were convinced that rulings from past Courts are inconsistent with today's understanding of the Constitution.

### *Public Opinion and State Legislative Activity*

According to the literature, public opinion and state legislative activity also are likely to affect Court activity (Marshall, 1989; Mishler and Sheehan, 1993). Both of these are seen as indicators of evolving social conditions, as noted by justices on both sides of the capital punishment cases reviewed here. It is clear from both of these indicators that a majority of Americans supported capital punishment during the 1970s and 1980s. In fact, after the *Furman* decision and subsequent speeches by President Nixon about the value of the death penalty, public support for capital punishment actually grew in public opinion polls. Justices Marshall and Brennan claimed the majority of Americans really did not support capital punishment but only said they did when asked general questions.

According to Bohm (2003), death penalty opinion is important for five reasons. First, it has effects on legislators, meaning as long as they perceive that Americans want capital punishment we will have it. Second, public opinion may influence prosecutors to seek the death penalty in cases where demand is high. Third, public opinion may pressure judges to impose death sentences even when the jury recommends life. Fourth, public opinion may dissuade governors from vetoing legislation, issuing stays, and commuting sentences. Finally, as this analysis shows, public opinion is used by the Courts to justify its practice.

There are numerous surveys that assess death penalty opinion, and the findings of surveys depend on how the questions are asked. As noted earlier, people generally say they support capital punishment, but support declines to less than 50% when people are given other options such as life in prison without parole (Death Penalty Information Center, 2005). Research shows that capital

punishment is less supported by the highly educated and that support decreases with knowledge about the realities of the death penalty, especially problems with it such as racial disparities and wrongful convictions in capital cases. These results are consistent with the hypothesis stated by Justice Marshall in *Furman* and *Gregg*.

So, it is possible that Marshall and Brennan were correct when they asserted that a majority of Americans really do not support capital punishment, even though the other justices were correct when they asserted that public opinion polls at the time of these cases indicated clear support for the death penalty. Since 36 states drafted new legislation after *Furman* there was a clear message to the Court that America's legislators also perceived support for capital punishment.

Related to the issue of public opinion and state legislative activity is the "tough on crime" movement that began in the late 1960s and continues today (Robinson, 2005; Sheldon, 2001; Sheldon and Brown, 2003). Beginning in 1973, America began an incarceration boom that is unprecedented in world history. The tough on crime movement generated and supported by Presidents Nixon, Reagan, Bush (the first), Clinton, and Bush (the second) led to many harsh laws, including new death penalty legislation at the federal level. These presidents also nominated justices who tended to support capital punishment and principles of law that would interfere with a defendant's ability to raise appeals such as federal habeas corpus appeals. The Nixon nominees of Blackmun, Rehnquist, and Powell would vote together in three of the four cases reviewed here, all to retain capital punishment as practiced. Reagan appointees O'Connor and Scalia had key votes in *McCleskey* and each voted to deny McCleskey's second appeal to the Court. The inference by Lazarus (1999) that politics has invaded the Court and its decision-making may thus be true, although it is difficult to tell for sure given the secretive nature of Court deliberations.

Changes in public opinion and state legislative activity could easily lead individual justices to

change their minds about whether capital punishment is cruel and unusual punishment, for example (TYPE I inconsistency) or to back off from a rationale asserting that the public supports or does not support capital punishment (TYPE II inconsistency). It could also lead to a precedent being overturned, like we recently saw in the cases of *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper V. Simmons* (No. 03-0633). In these cases, respectively, the Court decided by a 6-3 majority that the death penalty can no longer be used against the mentally retarded and by 5-4 that it is unconstitutional to execute juvenile offenders. *Atkins* overturned *Penry v. Lynaugh*, 492 U.S. 302 (1989), which decided by a 5-4 margin that states could execute the mentally retarded. *Roper* overturned *Stanford v. Kentucky*, 492 U.S. 361 (1989), which decided by a 5-4 margin that the execution of 16- and 17-year-old offenders was constitutionally permissible.

Why the changes? Since 1989, at least 18 of the 38 death penalty states passed laws forbidding the imposition of the death penalty against mentally retarded people. Further, by 2005, at least 30 states prohibited the juvenile death penalty, including 12 that have rejected the death penalty altogether. These trends affected the decision of the Court in the *Atkins* case and the *Roper* case because the Court state legislative activity suggested that standards of decency had changed in the United States in less than two decades.

### **Discussion and a Look to the Future: The Death Penalty and the Supreme Court in the 21<sup>st</sup> Century**

From the analysis of four significant capital punishment cases – *Furman v. Georgia*, 408 U.S. 288 (1972), *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Gregg v. Georgia*, 428 U.S. 153 (1976), and *McCleskey v. Kemp*, 482 U.S. 279 (1987) – it is clear that some justices' opinions were contradictory to opinions issued in earlier cases. We called this TYPE I inconsistency. It is also clear that some justices' opinions were contradictory to statements made in written opinions in

earlier cases. We called this TYPE II inconsistency. Finally, we saw that the Court ruled in ways that violated precedents or rules of law, which we referred to as TYPE III inconsistency.

We suggested possible explanations for these inconsistencies, including 1) the ambiguous nature of the Constitution; 2) ideology/attitudes and political party affiliation of individual justices; 3) approach to interpreting the Constitution; 4) strategic rationality and bargaining, 5) changing justices over time; 6) evolving human standards; and 7) public opinion and state legislative activity. Each of these factors leads to inconsistency in Court activity, and we showed how each factor likely influenced the four major death penalty cases reviewed in this article.

Specifically, we concluded that Type I inconsistency is best explained by strategic rationality and bargaining by justices and by evolving standards of decency in society. Type II inconsistency is also best explained by strategic rationality and bargaining by justices and by evolving standards of decency in society. Type III inconsistency is best explained by the ambiguous nature of the Constitution, political party affiliation of justices, the approach to interpreting the Constitution of justices, and by changing justices on the Court.

Given the major problems with the administration of capital punishment in the United States – including ambiguous sentencing, racial disparities in death sentences based on race of the victims, and wrongful convictions and executions of innocent people (Acker, Bohm, and Lanier, 2003; Bedau and Cassell, 2005; Robinson, 2005; Sheldon and Brown, 2003; Zimring, 2004) – one might wonder why we continue to impose the sentence. In fact, many of the students in our death penalty classes wonder just this. The analysis of these four cases provides some explanation for why the sanction is still legal. The Court is not charged with reviewing the scientific evidence on a particular sanction and then deciding whether or not we should continue to impose it. Instead, it attempts to interpret the law of the Constitution in order to ascertain whether a sanction such as the death penalty as

practiced is legally permissible under the Constitution. As we have shown with our review of four of the most significant death penalty cases the Court has ever heard, the Court is unable to give clear meaning to some sections of the Constitution, and justices disagree about the meaning.

The Court also rules on issues pertaining to capital punishment that are subject to change based on which justices sit on the Court, based on their ideology/attitudes and political party affiliation, and based on their approach to interpreting the Constitution. Evolving human standards, strategic rationality and bargaining, and public opinion and state legislative activity also seem to make consistency in Court activity impossible. Even when public opinion seems clear, or state legislative activity shows an emerging trend, some justices will disagree about the meaning of the data and/or dismiss it as invalid, irrelevant, and so forth.

It should be pointed out that social scientific evidence may not sway the Court in its rulings related to disparities in sentencing, innocence, and similar issues. The justices already have shown both a lack of understanding of and a general disdain for studies such those offered in *McCleskey* as well as a lack of understanding of research methodology and advanced statistics. According to Lazarus (1999), Professor Baldus, whose study was the basis for McCleskey's first appeal, was dismayed by the Court's dismissal of the findings of his study. The Court even refused to appoint an independent special master to provide a full understanding of the meaning of the Baldus study.

In an analysis of 28 capital punishment cases decided in the late 1980s, Acker (1993) illustrated that although social science evidence did figure prominently in decisions, justices were more interested in discounting the findings from studies than using them to inform their opinions. Acker suggested that Court outcomes were decided based on principles that had little or nothing to do with the scientific evidence. Other analyses of Supreme Court decision making with regard to scientific evidence on issues such as measuring "evolving standards of decency," "fitness to be

executed,” deterrence, and discrimination, show that the Supreme Court is inconsistent in its reasoning (Diamond and Casper, 1994; Haney and Logan, 1994).

In the recent *Atkins* case, discussed earlier, Chief Justice Rehnquist dissented from the six justice majority and wrote nearly two pages questioning the validity of public opinion polls that consistently show that Americans generally do not favor executing the mentally retarded. In addition to the *Atkins* case, the Court also recently decided *Ring v. Arizona*, 536 U.S. 584 (2002), where it ruled 7-2 that it is unconstitutional to have a judge (rather than a jury) decide the critical sentencing issues in a death penalty case. Thus, a jury (rather than a judge) must find aggravating circumstances in order to impose the death penalty.

As for the likely future of capital punishment in the Court, the Death Penalty Information Center reports that, as usual, the Supreme Court is hearing and considering the outcome of numerous death penalty cases. The Court may also eventually end up hearing a case related to the issue of innocence and the death penalty based on the challenge by U.S. District Court Judge Jed Rakoff, who declared the federal death penalty unconstitutional on the ground that innocent people are being sentenced to death. This claim is now backed up by numerous studies (e.g., see Liebman, Fagan, and West, 2000; Liebman et al., 2002) and the fact that over 100 inmates have been released from death row in the United States since *Gregg*. The innocence issue has led to a strong moratorium movement in some American states, one that would likely be acknowledged and considered by the Court if it rules on this issue in the near future.

A few states have instituted moratoria on executions pending study of the process to see if it is broken, and if so, to see if it can be fixed. In Illinois, Governor George Ryan discovered that since 1977, only 12 death row inmates had been put to death while 13 had been freed from death row. The *Report of the Governor's Commission on Capital Punishment* was released in April 2002, and

contains 85 recommendations to make the death penalty process less likely to result in wrongful executions.

One might think that, if the issue of the constitutionality of executions of the innocent ever reaches the Supreme Court, the outcome would be the formal abolition of the death penalty. Perhaps the Court would acknowledge that even guided discretion statutes cannot assure that innocent people will not fall victim to the death penalty. Yet, based on the analysis of the four major death penalty cases in this article, this outcome is not assured. Although public opinion may have begun to turn against capital punishment, a majority of Americans still report being in favor of the death penalty, and it is still legal in 38 jurisdictions in the United States (including 36 states, the federal government, and the military). Two other states have death penalty statutes, but both were deemed unconstitutional in 2004 (Kansas and New York). Additionally, like it did with cases reviewed here, the Court will likely struggle with the ambiguous nature of the Constitution. The outcome may be determined based on which justices sit on the Court – according to their ideology/attitudes, political party affiliation, and approach to interpreting the Constitution. Since President Bush will have successfully placed at least two nominees on the Court by the time his second term is over, one could reasonably predict a more conservative Court with regard to death penalty cases over the next several years if not decades.

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