SUPREME CONVOLUTION:

GREGG V. GEORGIA AND THE NATURE OF SUPREME COURT DECISION MAKING

by

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Abstract

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Few issues evoke more impassioned debate than capital punishment. While death penalty supporters view it as a just and even necessary sanction, opponents see a profound symbol of American barbarism. The 1976 Supreme Court case of *Gregg v. Georgia*, 428 US 153, which authorized the modern death penalty, is one of the most controversial decisions in the Court's history. Not only did *Gregg* contain a variety of conflicting opinions, but it failed to fully clarify how the death penalty should be properly readministered. While *Gregg*'s consequences have been subject to extensive analysis, surprisingly few scholars have explored the case itself at any length. This project analyzes *Gregg* through both archival research and oral history. It then situates this decision within the controversial discourse on what factors motivate judicial opinions. The study concludes that justices decide according to a variety of criteria, and therefore offers support for a mixed theory of judicial decision making.

To Mom, Dad, and Jason

Table of Contents

List of Tables

Section I:

Introduction, Importance, and Context

I. Importance and Layout

In the landmark (and still controversial) 5 to 4 decision of *Furman v. Georgia,* 408 U.S. 238 (1972), the Supreme Court found the death penalty unconstitutional due to its arbitrary and capricious practice. Confronted with thirty-five revised state statutes only four years later, the Court sought to re-review capital punishment's constitutionality. The resulting decision in *Gregg v. Georgia,* 428 U.S. 153, reinstated the death penalty after a ten-year hiatus, and established guidelines for all subsequent executions. This was clearly the most influential Supreme Court case on capital punishment in the last fifty years, and arguably the Court's most important death penalty decision ever.

Despite its importance *Gregg* has rarely been studied, and (almost) always to criticize the legal and procedural difficulties it generated for capital sentencing (Steiker and Steiker, 1995; Weisberg, 1995; Haney, 2005; Haines, 1996; Lain, 2006, 2007; Ely, 1980). Yet this case can also offer valuable insight into the nature of judicial behavior. *Gregg* presents a host of judicial motivations for scholars of jurisprudence to explore and analyze. *Furman v. Georgia* generated nine separate opinions, which the *Gregg* Court had to both respond to and adequately reconcile. *Gregg* was also decided long enough ago to have amassed a good deal of archival documentation, but recently enough that many of its key players remain available to interview. Further, many of these documents have only recently been released, and were therefore unavailable to previous scholars. A case study of *Gregg v. Georgia* not only offers an important test for the most popular theories of Supreme Court decision making, but presents novel information on this critical decision.

A. The Art of Judicial Decision Making

Scholars have long argued over what factors motivate justices' opinions. In the vast majority of cases, such studies have been theoretically or quantitatively based, and ignored the potential richness of qualitative empirical research (see Section I, Models of Judicial Decision Making). A case study of *Gregg v. Georgia* both complements and improves upon the existing literature on judicial decision making, bringing a new methodological technique to this multifaceted discourse.

Understanding judicial decision making is important for a variety of reasons. First, such studies illuminate how the law is formulated and its role in a democratic society (Posner, 2008). Even the more legalistic scholars admit that justices do not robotically interpret text, but actively shape and construct legal provisions (Tamanaha, 2010). This authority also has profound political implications, from setting the limits of individual autonomy to (even) deciding who shall be president. This study analyzes justices' decisions regarding the criteria for execution, and therefore literally deals in matters of life and death. Second, studies of judicial decision making provide potential guidance for lawyers and other legal actors. If these parties better understand how justices think, they will likely shape the arguments before them accordingly. This may not only affect the Court's decisions, but also determine the very issues that appear before it. Third, understanding judicial decision making may aid policymakers in both approaching and potentially improving legal institutions. For example, if justices simply impose their own political will on individual cases, as some theorists contend (Segal and Spaeth, 2002), this is important for legislators to acknowledge and potentially address. Finally, studies of judicial decision making may even affect how judges decide future cases. As

Judge Alex Kozinski (2000) has remarked, "the way in which academics affect the work of the judiciary is by fostering a grand idea that changes our fundamental approach to law in general, not merely in one particular area" (p. 101).

B. What Is to Follow

This project follows a standard linear-analytic structure, beginning with the issue being studied and reviewing the relevant literature (Yin, 2003). Specific methods are then discussed, the findings detailed and analyzed, and the resulting conclusions and implications presented. The following section, "Background Context", places the history of the U.S. Supreme Court and capital punishment in context, and then provides a brief analysis of *Gregg v. Georgia*. Section II explores the prevailing theories of judicial decision making, focusing in particular on the legalist, attitudinal, and institutional models of jurisprudence. The few studies of judicial decision making specifically on *Gregg* are surveyed, and the unique comprehensiveness of the present study detailed. Section III specifies this project's methodology. Eight testable hypotheses are analyzed in order to explain the Court's decision in *Gregg*. Section IV reviews the findings, using both the justices' public and private records and information gained from interviews with former law clerks and others involved in the *Furman* and *Gregg* proceedings. A direct content analysis of this project's findings is then presented, which largely supports the preceding conclusions. This study finishes with recommendations for future research, and an exploration of judging's contextual nature.

II. Background Context: The Supreme Court and Capital Punishment

A. The Road to *Gregg*

Before analyzing *Gregg v. Georgia*, it is important to first place the constitutionality of capital punishment in context, reviewing the Supreme Court's historical struggles with this issue. The purpose and morality of capital punishment have been politically challenged in the United States since at least the 1780s. From the late eighteenth century until the early 1950s, three discrete American abolitionist movements arose, primarily focused on convincing state legislatures to modify capital sentencing. The first movement, which gained popularity in the mid-1820s, viewed the sheer breadth of capital crimes as excessive, and successfully restricted its usage to offenses of murder, treason, and rape (Banner, 2002).[1] The second movement, from around 1907 to 1910, questioned capital punishment's deterrence effect, leading to the penalty's abolition in six Northern states.[2] The final movement, beginning in the 1940s, challenged capital punishment across the nation, and influenced nine additional Northern legislatures to abolish the death penalty altogether.

Until relatively recently the Supreme Court never questioned the constitutionality of capital punishment. Mentioned explicitly in the Fifth Amendment, the state's right to kill was generally considered a purely legislative concern (Banner, 2002). When death penalty cases were brought to the High Court, they generally involved right to counsel questions or controversies over the admission of improper evidence, rather than any

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[1] From a list that often included robbery, burglary, arson, counterfeiting, theft, and buggery.
[2] Though it was eventually restored in all but two of these.

substantive challenge to the penalty itself[3] (Foley, 2003). This was perhaps best reflected in a 1946 memo by Justice Robert Jackson, which declared the death penalty politically troubling but undoubtedly constitutional. As late as 1958 Chief Justice Earl Warren similarly remarked

> Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. (Burt, 1987, p. 1744)

Although their cause gained little momentum with the Supreme Court in the 1950s, a number of abolitionist organizations successfully garnered the influential attention of the American Law Institute in 1959. This organization, tasked with reviewing and refining the nation's legal structure, became deeply disturbed by juries' complete discretion in capital sentencing and the arbitrary, often racially motivated outcomes this seemingly resulted in (Epstein and Kobylka, 1992). Led by Professor Herbert Wechsler, the ALI recommended that states adopt two pivotal reforms in order to avoid such capricious verdicts. The first, known as bifurcated trials, recommended breaking capital trials into two distinct phases—one for guilt determination and the other for sentencing. The second suggested that jurors consider mitigating and aggravating circumstances, and sought to individualize defendants by highlighting the degree and nature of their culpability.

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[3] Notable exceptions include the 1879 case of *Wilkerson v. Utah,* where a unanimous Court upheld capital punishment for premeditated murder (Epstein and Kobylka, 1992); the 1890 *Kemmler* decision, where the Court specifically declared use of the electric chair to be constitutional; *Powell v. Alabama* (1932), where the Court decided capital defendants had the right to an attorney; and the (infamous) *Francis* decision of 1946, where the Court ruled that an initial botched execution did not disallow a second execution attempt (Tushnet, 1994).

While (temporarily) ignoring the ALI's recommendations, states nevertheless experienced another movement toward abolition in the late 1950s and 1960s. Alaska and Hawaii abolished the death penalty in 1957, followed by Oregon in 1964, West Virginia and Iowa in 1965, and New Mexico in 1969. New York and Vermont, while still choosing to keep the death penalty in place, severely limited its imposition in the mid-1960s. Further, many states began switching from mandatory to discretionary sentencing, and by decade's end capital punishment for crimes other than rape and murder was almost unheard of. Even in the (the more retributive) South, executions fell from 1940 to 1960 by 50 percent, actually declining more sharply than throughout the rest of the nation. This was also complemented by a notable rise in "hanging juries", whom in 10 to 20 percent of relevant cases refused to return death sentences. For the first time in the nation's history almost half of the public actually espoused the penalty's abolition, including nearly every major religious organization.[4]

Ironically, the foundation of the argument that capital punishment was unconstitutional ultimately rested on a case that had nothing to do with the death penalty. In the landmark 5 to 4 decision of *Trop v. Dulles*, 356 U.S. 86 (1958), the Supreme Court reversed the punishment of hard labor, "forfeiture of all pay and allowances", dishonorable discharge, and the revocation of citizenship for a World War II deserter (p.

[4] The reason for capital punishment's (seemingly) dwindling support during this period lies well outside the scope of this project. In brief, however, four explanations have generally been offered. First, the combined effectiveness of the NAACP and the ACLU likely bolstered public opinion, as capital punishment's racial abuses came more prominently to light. For example, the National Crime Commission's 1967 report suggested that capital punishment be abolished entirely unless it could be more fairly administered, and a variety of other nations had already ended it for this reason (Banner, 2002). Second, the Warren Court's criminal procedure "revolution" made death row litigation easier, flooding the Court's calendar and better exposing the convolution of capital sentencing. Third, as sociological theories of crime became more widespread, people began to see crime more as a disease than a choice, and consequently viewed capital punishment as unnecessarily cruel. Finally, the 1950s and (early) 1960s were an era of historically low crime, and as criminologists have demonstrated, less criminogenic periods generally result in lower levels of public punitiveness (Lain, 2006).

40). Writing for the majority, Chief Justice Warren penned a decision that would have an unexpected impact on future jurisprudence. Declaring the defendant's punishment "cruel and unusual", the Court explicitly recognized the Eighth Amendment as inherently ambiguous.[5] Further, in what would become a key passage, Warren remarked that "the Amendment must draw its meaning from *the evolving standards of decency* that mark the progress of a maturing society" (p. 41) (emphasis mine).

The potential impact of Warren's statement went relatively unrecognized for the next few years. In 1962, however, John F. Kennedy appointed his secretary of labor, Arthur Goldberg, to the Supreme Court. A short time later Justice Goldberg and his law clerk, Alan Dershowitz, highlighted six capital cases, writing a controversial memorandum on the constitutional issues engendered in each (Tushnet, 1994). Dissenting especially with the Court's refusal to grant certiorari in the case of *Rudolph v. Alabama* (1963) (where the defendant was sentenced to death for rape), Justice Goldberg not only questioned the disproportionality of the sentence, but also used Warren's earlier words to challenge the death penalty itself. According to the justice, "evolving standards of decency…now condemn as barbaric and inhuman the deliberate institutionalized taking of human life by the state" (Banner, 2002, p. 249).

Justice Goldberg's attack on the death penalty was largely rejected by the other justices, with only Justices Douglas and Brennan voting to hear the six capital cases he sought to review. These justices' actions nevertheless proved a wake-up call to abolitionist organizations everywhere. Most prominent among these was the NAACP's

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[5] Although rarely invoked, this was not the first Supreme Court case that considered the meaning of the Eighth Amendment. Indeed, the precedent for *Trop* was undoubtedly lain in the 1910 case of *Weems v. United States,* where the Court found a defendant's sentence of imprisonment and hard labor "cruel and unusual" in proportion to his "mere" crime of falsifying a government record (Banner, 2002).

Legal Defense Fund, which had long decried capital punishment's disproportionate imposition on African-American males (Meltsner, 1973). Among the LDF's staff were Anthony Amsterdam, a University of Pennsylvania law professor, and Jack Himmelstein, a twenty-six-year-old Harvard Law School graduate. Perhaps the organization's most clever ploy was to construct and issue a "Last Aid Kit", containing a variety of materials meant to assist attorneys defending death row convicts. These packages became exceedingly popular, and lawyers successfully petitioned U.S. courts to consider the variety of concerns they raised. The LDF further drafted a number of legal strategies to keep uninformed or unprepared attorneys from appearing in court, either replacing them with more experienced attorneys, or providing them with suitable briefs and other relevant materials.

Ironically, the abolitionists' first major legal "triumph" was a case the LDF initially opposed, that of *Witherspoon v. Illinois* (1968). The LDF had wanted time to present its own case and provided few resources to Witherspoon's legal team. In this case, William Witherspoon was sentenced to death by a jury that purposely excluded any possible opponents of capital punishment (Banner, 2002, p. 254). According to the Court, while potential jurors who objected unequivocally to the death penalty and would therefore invariably vote against its imposition could be excluded from capital cases, those personally against it but willing to at least consider its usage could not be.

Upon hearing the Court's decision, the LDF, aided by the increasingly influential American Civil Liberties Union, decided to accelerate a process already in place; they would challenge every capital punishment case in the nation, asserting that certain jurors had been improperly excluded. Further, instead of representing only certain death row

inmates, the organization would represent them all, using its considerable resources to challenge the exact circumstances of each and every capital case (Epstein and Kobylka, 2002). This would enmesh the death penalty in continuous litigation, and eventually force the issue back onto the Supreme Court's docket. As the LDF's Michael Meltsner observed afterward,

> The politics of abolition boiled down to this: For each year the United States went without executions, the more hollow would ring claims that the American people could not do without them; the longer death-row inmates waited, the greater their numbers, the more difficult it would be for the courts to permit the first execution. A successful moratorium would create a death-row logjam (Meltsner, 1973, p. 107).

The moratorium strategy[6] worked masterfully, and not a single American was executed for nearly a decade, from 1968 to 1976.

While the Court had never previously questioned the death penalty's constitutionality, the justices decided to review issues of standards and unitary trials in capital cases. This was most deeply reflected in *Maxwell v. Bishop* (1969), where the Court was asked whether the ALI's notion of bifurcated trials (with a separate guilt and sentencing phase) was constitutionally required by the Fourteenth Amendment's "due process" clause. The LDF immediately took up this case, appointing Anthony Amsterdam to argue that such standards' absence not only resulted in arbitrary outcomes, but promoted systemic racial prejudice. Although the Supreme Court initially sided 6 to 3 with Amsterdam, this agreement broke down shortly thereafter: Justice Goldberg left the Court for an ambassadorship, Justice Fortas stepped down after facing potential impeachment, and Justice Harlan, the Court's swing voter, simply could not make up his

[6] Greatly aided by the Warren Court's allowance of more expansive reasons for capital appeals.

mind. Since no majority position seemed likely to emerge, the Court decided to reargue the case the following year.

This eventually occurred in *McGautha v. California* (1971), where the Court summarily dismissed capital standards as both constitutionally unnecessary and logically incoherent, or in the sweeping words of Justice Harlan, "beyond present human ability" (Epstein and Kobylka, 2002). Harlan's ruling in *McGautha* essentially made two central claims: (1) capital sentencing could not "be described in or reduced to precise legal language", and (2) such decisions were not for this "reason alone arbitrary or irrational" (Weisberg, 1983, p. 312). As the justice declared,

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution (p. 207).

Instead of demoralizing the LDF, however, *McGautha* convinced the organization to challenge the constitutionality of capital punishment itself as "cruel and unusual". Especially encouraging were the opinions of Justices Douglas, Brennan, and Marshall, who doubted that capital sentencing standards would be possible to formulate. Perhaps most intriguing was a lone footnote by Justice Stewart in *Witherspoon,* often the Court's swing voter, who suggested that capital punishment could be convincingly challenged on Eighth rather than Fourteenth Amendment grounds. Quoting the philosopher Arthur Koestler, Stewart called supporters of the death penalty "without charity", and asked its supporters to consider whether "here but for the grace of God, drop I"[7] (391 U.S. at

[7] Interestingly, only Justice Stewart's future ally in *Furman,* Justice White, seems to have noticed this footnote, remarking that while the Court may desire "Mr. Koestler's standards of charity", they fell far short of any "reasoned analysis" (*Id*. at 542).

Footnote 17). The organization thus believed abolition was not only conceivable but entirely plausible, and directly challenged the penalty as "cruel and unusual".

In January 1971 the Court finally decided to address capital punishment's constitutionality, hoping to conclusively resolve what had become a time-consuming and increasingly controversial issue. Led by Justices Black, Douglas, Brennan, and White, the Court agreed to hear four separate capital cases: *Furman v. Georgia, Jackson v. Georgia, Branch v. Texas,* and *Aikens v. California*. The California Supreme Court found capital punishment unconstitutional in *People v. Anderson,* and *Aikens* was consequently rendered irrelevant. *Jackson* and *Branch* were then consolidated under *Furman*. In this case Willie Furman had been breaking into a house, when the owner awoke and confronted him in the stairwell. Apparently startled, Furman fired his weapon and killed the homeowner. He was sentenced to death in the state of Georgia, and his fate, along with that of 655 other men and women, now lay with the highest Court in the land (Epstein and Kobylka, 1992; Tushnet, 1994).

Sponsored by the LDF and argued by Anthony Amsterdam, *Furman v. Georgia* was the first case to challenge capital punishment strictly on Eighth Amendment grounds. As Amsterdam argued before the Court, the death penalty (which had been virtually suspended due to the LDF's constant challenges) was "cruel and unusual" in four distinct ways (Epstein and Kobylka, 1992; Jeffries, 1994): First, capital punishment was opposed by a great deal of the American public and therefore violated "evolving standards of decency"; second, the death penalty was disproportionately inflicted on minority groups and cruelly impinged on such individuals' rights; third, the death penalty had no proven deterrent value or deeper penological justification, making its imposition philosophically

baseless; and finally, juries were given no proper sentencing guidance, so the decision to impose death was often entirely arbitrary.

The Court's eventual decision was both the longest in Supreme Court history and contained a nearly unprecedented nine separate opinions. As scholar Robert Weisberg (1983) has poetically remarked, *Furman* "is not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias" (p. 315). The *Furman* majority did not supply instructive pronouncements so much as consolidate a variety of "unifying themes", generally focused around the "dangers of arbitrariness and discrimination" (p. 317). Although the opinion began with that of Justice Douglas's, the most important voices were those of Potter Stewart and Byron White. These two "swing" justices essentially agreed with Amsterdam's final contention, or that the lack of sentencing standards led to an unacceptable degree of arbitrariness. Not only was sentencing guidance now declared possible, but also constitutionally mandatory. According to Stewart and White, as long as juries were given no standards for deciding a defendant's fate, the death penalty would inevitably remain "wanton and freakish" in application (408 U.S. at 310).

The justices' individual opinions varied dramatically; while Justice Blackmun admitted that he was personally against capital punishment, he could find no constitutional reason against its imposition (*Id*. at 420). Justices Burger, Powell, and Rehnquist agreed with Blackmun's conclusion, accusing the Court of violating judicial restraint (*Id*. at 396, *Id*. at 122). Justices Marshall and Brennan (consistent with their positions in *McGautha*) criticized the decision from the opposite end, arguing that capital punishment was inherently cruel and unusual and plainly against contemporary standards

of decency (*Id*. at 297-298). More mercurial was Justice Douglas, who, while not declaring the death penalty unconstitutional per se, lamented its disproportionate infliction on the poor and members of minority groups (*Id*. at 249-250). Most important were the opinions of Justices White and Stewart, neither of whom (openly) questioned capital punishment's constitutionality nor its ethical nature, but rather focused on its seeming randomness.

According to Justice White, the purpose of capital punishment lay solely in principles of retribution and deterrence (*Id*. at 311). The death penalty's current arbitrariness prevented it from being both a proper deterrent and duly retributive, and therefore was both excessive and unnecessarily cruel (since incapacitation could also be achieved through life imprisonment). Death sentences needed to either be banned or increased, and legislatures could only accomplish this through properly channeling jury discretion. Justice Stewart reached the same conclusion but for somewhat different reasons. By giving juries unlimited discretion, their decisions could vary dramatically, resulting in entirely different verdicts for identical offenses. This violated basic notions of fairness, and as Stewart remarked, effectively made capital punishment as "cruel and unusual…as being struck by lightning" (*Id*. At 310).

Yet how could Stewart and White justify their positions in light of *McGautha*? According to Anthony Amsterdam, the cases actually concerned two separate issues (*Landmark Supreme Court Cases and Briefs,* p. 630). *McGautha* revolved around the due process clause of the Fourteenth Amendment, and thus focused entirely on the jury process. Justices Stewart and White found no prima facie problem here, concluding that unlimited discretion was constitutionally valid. While the process was constitutional,

however, the outcome could still be "cruel and unusual". As Amsterdam eventually remarked in *Gregg,*

> *Furman* is not inconsistent with *McGautha* because *Furman* is an Eighth Amendment decision which looks to the consequences of jury discretion, rather than simply whether the procedure is good or not. (p. 630)

Justices Stewart and White seemingly agreed. Unwilling to (formally) overturn precedent in *McGautha,* they essentially separated process from outcome (Woodward and Armstrong, 2002). While jury discretion was acknowledged as inviolable, any capricious decisions resulting from this were declared constitutionally unacceptable.

The Court's 5 to 4 decision surprised politicians and the public alike, and led many commentators to proclaim capital punishment effectively finished (Woodward and Armstrong, 1979). Yet such conclusions proved entirely premature. President Nixon held a press conference immediately in *Furman*'s wake, and announced that he would drastically remodel the federal government's death penalty statute. The administration chose to implement the ALI's recommendations: All defendants would face a bifurcated trial, and be allowed to present both aggravating and mitigating circumstances. This proposal received almost unanimous approval from the Senate's Judiciary Committee, which also declared capital punishment "a valid and necessary social remedy against dangerous types of criminal offenders" (Epstein and Kobylka, p. 84). The movement to restore capital punishment gained further momentum when the National Association of Attorneys Generals, seeking to influence Congress and state legislatures, voted 32-1 for the adoption of new capital statutes (Lain, 2007).

The death penalty's popularity also heightened among the general public, from slightly over 50 percent in 1971 to around 65 percent by the end of 1977 (Jeffries, 1994;

Epstein, Segal, Spaeth, and Walker, 1994, p. 591). Within the following months thirty-five states revised their statutes and reimposed capital punishment. The vast majority of state legislatures implemented some derivative of the ALI model, although others chose a (seemingly) simpler solution: mandatory execution for certain specific offenses. This (theoretically) eliminated the possibility of arbitrariness, thereby guaranteeing identical punishments for the same type of crime.

The reasons for capital punishment's renewed popularity and quick revision is undoubtedly attributable to the prevailing political atmosphere. Richard Nixon had been elected on a "tough on crime" platform and decrying Warren-era judicial activism. Further, prior to *Furman*, the death penalty went relatively ignored by the American public, which only narrowly supported its imposition (Lain, 2006). Seizing upon the Court's controversial decision, opportunistic politicians successfully rallied the public against an unelected "judicial elite", demanding that legislatures reevaluate and restore capital punishment (Zimring, 1986). As Epstein and Kobylka concisely summarize, "What the Court's opinion (in *Furman*) and the attendant press coverage did was to focus the issue and to move it up on the agenda of the day" (p. 84). Prior to 1972, it was one of many issues; following *Furman* it was placed front and center in the public eye.

It was not only political opportunists, but also the convolution of the *Furman* decision itself that undoubtedly angered and stirred public sentiment. As Corinna Barrett Lain remarks, the Court's decision in *Furman* utterly lacked "moral leadership", and consequently allowed other authorities to shape and manipulate it (p. 44). Chief Justice Burger even approved of such conduct in his written opinion, urging legislatures to revise and restore their capital punishment statutes.

Although undoubtedly taken aback by the public's newfound support for capital punishment, the LDF adopted its previous strategy and attempted to provide representation to every prisoner affected by the new statutes. Anthony Amsterdam once again chose to represent the organization in court, simply reaffirming his previous arguments and hoping the Court would this time opt for complete abolition. The justices wanted to especially consider the constitutionality of mandatory sentencing, and subsequently agreed to hear the case of *Fowler v. North Carolina,* which mandated death for a fixed list of felonies. The morning after orals, Justice Douglas became seriously ill, however, and, following a deadlock of 4-4, the Court decided to reschedule arguments for the next term. When Ford appointee John Paul Stevens replaced Douglas the following year, the Court chose five novel cases it believed best reflected the revised death penalty statutes, consolidated under the lead case of *Gregg v. Georgia*.

B. *Gregg v. Georgia*

In deciding to reappraise the constitutionality of capital punishment, the Supreme Court chose to review five distinct statutes. Georgia mandated a bifurcated trial and required juries to consider mitigating and aggravating circumstances. *Jurek v. Texas* also established a bifurcated trial, but allowed far fewer aggravating and mitigating factors to be considered. Florida was strikingly similar to Georgia, with fewer circumstantial considerations to be weighed. Finally, Louisiana and North Carolina collectively took the place of *Fowler,* mandating the penalty of death for first-degree murder (Epstein and Kobylka, 1992).

Table I-1. The Five Death Penalty Statutes

Case	Provisions of State Statute
Gregg v. Georgia, 428 U.S. 153	1) Bifurcated trial 2) Jury weighs mitigators and aggravators 3) 10 aggravating circumstances 4) Mitigating circumstances unspecified 5) Automatic appeal to Georgia Supreme Court
Jurek v. Texas, 428 U.S. 262	1) Bifurcated trial 2) Unspecified aggravating circumstances 3) Unspecified mitigating circumstances 4) Judge presents jury with a list of questions; if the jury responds affirmatively and unanimously to each, the defendent is automatically sentenced to death
Proffitt v. Florida, 428 U.S. 242	1) Bifurcated trial 2) Jury weighs mitigators and aggravators 3) 8 aggravating circumstances 4) 7 mitigating circumstances 5) Automatic appeal to Florida Supreme Court
Roberts v. Louisiana, 428 U.S. 325	Mandatory death sentence for first-degree murder, although juries must be instructed regarding the circumstances for finding the defendant guilty of second-degree murder, and are therefore implicitly encouraged to decide whether the defendant should be sentenced to death or life imprisonment.
Woodson and Waxton v. North Carolina, 428 U.S. 28	Mandatory death sentence for first-degree murder

Oral arguments began on March 30, 1976. The Legal Defense Fund's Anthony Amsterdam, again representing the petitioners, made two primary points. First, despite the states' revised statutes Amsterdam argued that capital punishment continued to be arbitrarily and capriciously imposed (Brief for the Petitioner, pp. 6-9; *Landmark Briefs*

and Arguments of the Supreme Court of the United States, vols. 89, 90, p. 9). While jury discretion had been effectively revised, prosecutorial discretion remained; equally reprehensible defendants could be given entirely different plea options, and one's fate now hinged on the particular whims of district attorneys rather than juries. Second, although the Court had denied it in *Furman,* Amsterdam believed the death penalty remained unconstitutional per se. The lawyer acknowledged the popularity of capital punishment, but argued that this was based more on ignorance than enlightenment. According to Amsterdam, if the public actually knew how the death penalty was imposed, they would surely oppose it (*Id*.)

Although a variety of lawyers argued for the individual states, most prominent among them was Solicitor General Robert Bork. While only recently appointed, Bork proved a more than adequate opponent to the LDF litigator (Epstein and Kobylka, 1992). According to the solicitor general, criticizing capital punishment's arbitrariness resulted in a reductio ad absurdum: Capriciousness was endemic within the entire criminal justice system, from traffic citations to life imprisonment. Death had to be *constitutionally* different in order to merit special consideration. Nowhere in the founding document, however, is death given particular notice; in the Fifth and Fourteenth Amendments (the only time capital punishment is alluded to at all), it is indistinctly grouped with liberty and property. Second, Bork pointed to state legislatures as the only reliable indicator of contemporary standards of decency, the majority of which unequivocally supported the death penalty. While Anthony Amsterdam may have reached greater "enlightenment", Bork argued that the public's "failure" to do so was the only thing that constitutionally mattered.

As scholar Robert Weisberg noted, the resulting decision of *Gregg v. Georgia* essentially established two central positions: (1) a clear and unequivocal rejection of the categorical claim that capital punishment violated the Eighth Amendment, and (2) a formal ban on mandatory death penalty statutes. According to the plurality opinion, written by Justices Stewart, Powell, and Stevens, by mandating (1) a bifurcated trial (separating the guilt and sentencing phases), (2) the consideration of mitigating and aggravating circumstances, and (3) automatic State Supreme Court review, Georgia, Florida, and Texas adequately addressed the concerns of arbitrariness raised in *Furman*. While the plurality legitimated capital punishment in these three states, they declared North Carolina and Louisiana's systems unconstitutional (Banner, 2002). According to the plurality, not only had mandatory sentences been historically rejected by the vast majority of states (thereby violating "contemporary standards of decency"), they would likely result in widespread jury nullification.

Justices Marshall and Brennan held the same positions as in *Furman,* advocating capital punishment's immediate abolition. Blackmun, Rehnquist, and Burger again argued to the contrary, even supporting capital punishment in North Carolina and Louisiana. Perhaps most surprisingly (at least on the surface) was Justice White's opinion, which wholeheartedly supported the more conservative justices' decisions. According to White, all five states had effectively eliminated the deficiencies found in *Furman,* and would now allow capital punishment to be a successful deterrent. Further, the justice contended that forcing juries to consider individual circumstances would create an undue and unnecessary burden on the sentencing process.

C. The Trouble with *Gregg*

While it lies outside this project's scope to extensively critique the *Gregg* plurality, it seems worth highlighting some of the decision's more troubling aspects. Of the many scholars that have analyzed the *Gregg* decision, none have found it either logically or legally sound (Steiker and Steiker, 1995; Weisberg, 1995; Haney, 2005; Haines, 1996; Lain, 2006, 2007; Ely, 1980; Black, 1976; Burt, 1987).

First, and perhaps most obvious, is *Gregg*'s utter failure to truly ameliorate the central concerns raised in *Furman*. The Georgia statute alone demonstrates the impossibility of avoiding (or perhaps even reducing) arbitrariness. For example, juries are instructed to impose death if one of ten "aggravating circumstances" is met. These circumstances are inherently ambiguous, however, and ultimately require considerable jury discretion to determine both whether they are present and what each means. For example, the *Gregg* statute asks jurors to decide whether murder involving "depravity of mind" or "aggravated battery to the victim" was present. Yet nearly all murders will involve these two factors, and no larger explanation is provided.[8]

The Texas statute is rife with even greater problems. This statute requires juries "to answer three questions" about the defendant, and if each answer is "yes" to impose a death sentence (Black, 1976, p. 3) These are:

(1) "Whether the conduct of the defendant…was committed deliberately and with the reasonable expectation that the death of the deceased or another would result,

[8] The Florida statute suffers from almost identical ambiguities.

(2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and

(3) Whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased" (pp. 3-4).

As Charles Black recognizes, the answers to questions 1 and 3 have already been predetermined: If the answer were "no" to either, the person would have been found guilty of manslaughter rather than murder one. It is therefore the second question alone that juries must answer. Unfortunately, this query catapults discretion back into the sentencing process, as the meaning of *probability,* as well as any prediction of future violence, will undoubtedly be an arbitrary decision for nine laypeople to make.

Second, and perhaps even more troublingly, Stewart, Stevens, and Powell's middle ground made very little constitutional sense. Contrary to Bork's argument, the three justices affirmed that death was constitutionally different than other penalties, yet gave no indication how this squared with the Fifth and Fourteenth Amendments' lack of distinction between the "taking of life, liberty, and property". This effectively pitted the Constitution against itself, a position Solicitor General Bork rightly decried as intellectually incoherent (*Landmark Briefs and Arguments of the Supreme Court,* pp. 680-681).

Perhaps just as disingenuously, *Furman* and *Gregg* reversed *McGautha* without explicitly saying so. Although prima facie reasonable, the Court's attempt to separate process and outcome was an incoherent exercise (Liebman, 2007; Lain, 2007). The two concepts are intimately connected;[9] the ideas of process and outcome only make sense in

[9] Or, as Wittgenstein would say, bear an "internal relationship" (1973, #44).

relation to one another. As one scholar asserts, Stewart and White had simply "changed their minds" without saying so from the time between *McGautha* and *Gregg* (Jeffries, 1994, p. 208).

Third, such a convoluted middle ground ensured death penalty cases well into the future. While this may seem obvious in retrospect, it was also quite apparent at the time. As Corinna Barrett Lain (2008) remarks

> It was common knowledge by 1976 that discretion and discrimination in the imposition of death remained. The popular press reported on it, the law reviews wrote about it, and prominent studies confirmed it (pp. 51-53).

Such claims have proven entirely valid; the Court almost immediately faced a torrent of new cases, striking down state law in nearly all of them (Banner, 2002). The death penalty continues to occupy precious Court time, and even eventually influenced Justice Blackmun to constitutionally oppose capital punishment (Greenhouse, 2005).

Fourth, Charles Black (1982) has persuasively demonstrated that arbitrariness will undoubtedly suffuse the entire capital sentencing process. Prosecutors can still decide what to charge and whom, juries may continue to find people guilty or not guilty of lesser offenses, and governors retain the authority to grant clemency. Further, the statutes under review did little to eliminate racial or class bias, as jurors can pick and choose what aggravating circumstance to apply in each case. The Court failed to explain why uncontrolled discretion is "cruel and unusual" for juries, but somehow perfectly constitutional throughout the rest of the sentencing process.[10]

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[10] And their single footnote (see *Gregg v. Georgia,* Footnote 50) on the matter provides little insight into this.

Finally, the Supreme Court (with the exception of Justice White) never specified whether *Furman* was principally concerned with over- or under-inclusion, or whether too many or too few individuals were being executed (Steiker and Steiker, 1995). By failing to make this distinction, the Court made it empirically impossible to evaluate *Gregg's* subsequent success (as researchers would have little idea what factor to analyze). The *Gregg* decision was a judicial "black box", the results of which had to be accepted on faith alone.

Section II:

Literature Review

I. Models of Judicial Decision Making

The question remains: What motivated the Court's decision in *Gregg*? Instead of abolishing the death penalty altogether (as Amsterdam advocated), again rejecting its imposition as arbitrary, or allowing its practice to go on unfettered (as Bork advocated and *McGautha* had established), why choose to have it limp along on such convoluted grounds?

Exploring why the justices decided as they did in *Gregg v. Georgia* first requires a foray into the nature of judicial decision making. Only by establishing a criterion for how justices decide can we analyze and understand this particular case. This chapter consequently focuses on the dominant theories of jurisprudential behavior, or the legalist, attitudinal, and institutional models of judicial decision making. It then presents the wealth of quantitative studies on this topic, and argues that while such research is necessary, it is also inherently limited. It concludes with those few studies of judicial making focused particularly on *Gregg v. Georgia,* highlighting their methodological deficiencies and how the present study improves upon these.

A. The Dominant Theories of Judicial Decision Making (and Their Discontents)

The most conventional view of judicial decision making—legalism—argues that judges merely interpret the law as written (Posner, 2008; Wechsler, 1959). Encouraged by such figures as Alexander Hamilton, judicial "legalists"[11] construe judges as virtual automatons who neutrally read a text and then apply its content to a given situation (Posner, 2008). In this view, justices rotely clarify the rules at hand, and leave any greater

[11] Also known as "formalists".

issues of policy to the legislature(s). Scholars generally differentiate between two types of legalism: (1) "textualists", who focus exclusively on the words themselves, and (2) "originalists", who interpret constitutional provisions according to the Founding Fathers' (supposed) intent (Stinneford, 2008). The two are not mutually exclusive; legalists generally consider original intent only if the words themselves are considered vague or ambiguous.[12] Both philosophies also emphasize the importance of stare decisis, or the binding nature of previous Court decisions[13] (Farber and Sherry, 2002).

Although the legalist view continues to dominate law school classrooms and serve as a template for justices' written opinions, legalism has faced growing skepticism since the beginning of the twentieth century and the birth of the so-called legal realist movement.[14] According to early legal realists, such as Jerome Frank, judges are situated actors whose personal viewpoints will intrinsically affect their decisions (Frank, 1973). This can range from a judge's political ideology to his or her emotions regarding an individual case (Llewellyn, 1962). While some realists contend that judges should strive to be as neutral as possible, they also recognize that human decision making is inherently subjective. Led by a variety of prominent justices and legal scholars, early realists subsequently contended that legalism is not only intellectually naïve, but often logically incoherent (Holmes, Jr., 1997; Pound, 2008).

According to more contemporary realists, such as Richard Posner (2008) and Stanley Fish (1987), the legalist viewpoint not only misunderstands how individuals act

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[12] Whereas vague phrases resist interpretation altogether, ambiguous ones can be interpreted in a number of discrete ways (Farber and Sherry, 2002).

[13] In the rare occasions where Court precedent, originalism, and textualism are in opposition, a legalist will naturally skew to whichever principle he or she finds most sacred. How justices determine such sacredness is undoubtedly important, but lies well beyond the scope of this project.

[14] Interestingly, Brian Tamanaha (2010) argues that many judges and legal scholars actually viewed legalism as incoherent and unrealistic long before the legal realists, perhaps as far back as Jeremy Bentham.

but the very notion of rule following: Rules do not simply stand alone, but must be interpreted to carry meaning. Interpretation naturally involves cognitive preconceptions, and rules can never be neutrally deciphered and mechanically applied. Further, rules will vary in meaning according to the situation at hand, and necessitate judicial discretion. Perhaps most importantly, Posner and Fish contend that modern linguists have proven language to be an inherently vague enterprise, a fact that both inspires and even demands semantic creativity and multiple interpretive frameworks.[15]

The notion of originalism has faced similar criticisms. First, the intention of the Constitution's authors is rarely laid out, and consulting the historical record rarely yields any useful information (Ely, 1980). Second, the Founders themselves argued over the provisions in place, dispelling any notion of some clear and unified purpose for each proposition. Finally, conditions have changed dramatically since the late eighteenth century, and it can be both archaic and nonsensical to impose past norms on present events.

The Eighth Amendment holds particular relevance here. As scholar John Ely has remarked, the Eighth Amendment's prohibition of "cruel and unusual punishments" especially calls "for a reference to sources beyond the document itself" (p. 13). The words themselves give no indication of how *unusual* is to be read, nor some threshold for what constitutes a *cruel* punishment. Further, the Founding Fathers only mentioned this provision in passing, and hence offered no valuable insight into its deeper meaning. Chief Justice Warren's "evolving standards of decency" test, even if accepted, also fails to

[15] Although these are the three most dominant critiques, the concept of legalism has been attacked from a number of other distinctive perspectives, which I have neither the space nor expertise to explore here (if interested, see Kennedy [1997] and especially Tamanaha [2010], who claims pure legalism is not only absurd but has been viewed as such for centuries).

provide us with any concrete answer: Who, after all, can definitively determine what fulfills "contemporary standards of decency"[16] (Ely, 1980)? As Justice Frank Murphy once declared, more "than any other provision in the Constitution", the Eighth Amendment subsequently risks being guided from the Court's "own conscience" (Banner, 2002, p. 237).

Cognizant of legalism's deep inadequacy and the growing influence of legal realism, the attitudinal model increasingly gained in prominence (Segal and Spaeth, 2002, 1993). According to this view, while judges may profess to be pure legalists and leave politics outside the courtroom, their decisions contradict this claim. Originally proposed by Glendon Schubert (1965) and popularized by scholars such as Jeffrey Segal and Harold J. Spaeth (2002, 1993) in the early 1990s, attitudinalists conducted a wealth of empirical research to prove that political preferences alone motivate judicial decision making (Carp, Stidham, and Manning, 2007). As Segal and Spaeth (1993) boldly summarized in one study's conclusion, "Rehnquist votes the way he does because he is extremely conservative, Marshall voted the way he did because he is extremely liberal" (p. 65).

Attitudinalism, like legalism before it, has faced a barrage of criticism (Posner, 2008; Friedman, 2006; Baum, 2006). Judges may differ in ideological intensity from one another, and it remains entirely unclear where moderates lie on Segal and Spaeth's attitudinal scale. These scholars assume that political conservatives will be judicial conservatives on nearly every issue, and ignore the subtlety and complexity of individual actors' political philosophies. This model also fails to explain justices who vote against

[16] Further, this test explicitly expects standards of decency to evolve. Yet criminal justice does not always progress, but (as we saw with mandatory sentencing) may actually devolve.

their own political inclinations, such as the economically conservative Oliver Wendell Holmes in his famously liberal dissent in *Lochner v. New York*[17] (White, 1993). Finally, attitudinalism has been disparaged as a (potentially) tautological position: justices' political stances are (generally) only determinable through their voting record, yet their voting record is only based upon their political stance (Posner, 2008).

Although the attitudinal model continues to garner a modicum of academic support, it has been eclipsed by the institutionalist paradigm of jurisprudence[18] (Clayton and Gillman, 1999). Argued most forcefully by legal theorists such as Ronald Dworkin (1986, 1978), institutionalists acknowledge that justices are political actors, but also contend that laws and legal institutions deeply affect judicial decisions. According to Dworkin, judicial interpretation only makes sense against a larger structural background. Justices cannot read whatever they desire into the law, but must frame their opinions according to those principles the law itself seeks to promote. As Stanley Fish (1987) similarly recognizes, the very role of judging inherently involves certain institutional constraints and norms of practice that prevent justices from acting purely politically.

While the content of these principles may temporally vary, institutionalists generally believe the dominant principle at any time is upheld through a historical "chain" of judicial decisions (Dworkin 1986, p. 228). This chain both constitutes and perpetuates the law, and grants legal institutions meaning beyond mechanical interpretation and simple judicial politics. Legalists, legal realists, and attitudinalists

[17] Supporting a law limiting workers' hours.

[18] This is not to say that both theories have been quantitatively tested and institutionalism has proven triumphant (see p. 7), but rather that the vast majority of contemporary literature on judicial behavior now focuses more upon institutional than attitudinal concerns (Clayton and Gillman, 1999).

supposedly miss this fundamental point, and in doing so ignore the importance of stare decisis in both maintaining and perpetuating the law's foundational "integrity"[19] (p. 401).

While institutionalists certainly recognize the importance of personal politics in judicial decision making, they highlight the "distinctive characteristics of the court as an institution" (Clayton and Gillman, 1999, p. 3). Far from embodying a single position, the institutionalist viewpoint is strongly divided between two distinct and even contentious camps. The first is generally known as the strategic (or "thin") approach, and argues that judges largely decide based upon two major factors: (1) the preferences of their colleagues, and (2) how they expect other governmental bodies (such as the president and Congress) to respond to their opinions (Hammond, Bonneau, and Sheenan, 2005; Epstein and Knight, 1998; Maltzman, Spriggs II, and Wahlbeck, 2000; Geyh, 2006; Flemming and Wood, 1997; McGuire and Stimson, 2004 Richard and Kritzer, 2002; Ferejhon and Shipan, 1990; Perry Jr., H.W., 1994; Spiller and Spitzer, 1995; Giles, Blackstone, and Vining, 2008). In this view, justices seek to promote their own political opinions, but must adapt to a variety of internal and external constraints. For example, if justices believe a particular opinion will be reversed by Congress or potentially alienate collegial allies, they may temper or even abandon it.

According to the so-called interpretive (or "thick") institutionalists,[20] while the strategists correctly recognize the importance of institutional factors, they are hindered by too rigid an adherence to rational-choice theory (Rowland and Carp, 1996; Clayton and Gillman, 1999; Shapiro, 1978). Deeply influenced by Dworkin and Fish, interpretive

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[19] Of course, the very notion of the law's foundational "integrity" (and what exactly constitutes it) is an ideologically contested point (Dworkin, 1986).

[20] Also occasionally referred to as the "new" institutionalists (Clayton and Gillman, 1999).

institutionalists argue that legal institutions do not merely restrain behavior but also strongly affect it. In this paradigm judges are not merely game theorists, constantly asking how they can best impose their particular viewpoint, but are actively engaged in a process of "judicial role-playing" (Baum, 2006, 1997). By forcing judges to consider their proper roles as judges, institutional affiliations thus forge judicial identities unaccounted for by simple rational choice models of human behavior[21] (Fish, 1987). Instead of simply pursuing their own individual agenda, justices may seek to legitimate the Court through adhering to precedent and/or avoiding overly partisan decisions[22] (Weisberg, 1983; Hansford and Spriggs II, 2006).

The effect of public opinion on the Supreme Court has proven an especially contentious issue within the interpretive institutionalist camp (Giles, Blackstone, and Vining, 2008; Flemming and Wood, 1997; Devins, 2004; Mishler and Sheehan, 1996). Since justices are neither elected nor easily impeachable, they would seem to be relatively immune from majoritarianism (Marshall, 1989). Yet, as Lawrence Baum (2006) has persuasively argued, although the Court need not simply follow the election returns, unpopular decisions can potentially endanger its institutional legitimacy. According to some scholars, the Court seeks to maintain a specific "zone of acquiescence" based upon the public mood (Casillas, Enns, and Wohlfarth, 2009, p. 1). Although they acknowledge that the boundaries of this zone will vary, such

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[21] Although unmentioned in the literature, interpretive institutionalism seems to represent an ironic return to the earliest theories of judicial decision making. After all, justices often claim that their proper role is to apply rather than make the law, a stance generally supported and encouraged by the American public (Posner, 2008; Weber, 2009). Yet this is simply legalism from another perspective, and carries all the practical and conceptual difficulties inherent in that judicial philosophy.

[22] Here Hansford and Spriggs II discuss and analyze in particular the relationship between "ideological distance" (justices' political positions) and "precedent vitality" (the amount of legal authority a specific precedent can be said to possess). According to the authors, precedents ultimately both constrain and legitimate justices' ideological preferences.

institutionalists believe public opinion constrains "and directly affects the court's decision making behavior"[23] (Casillas, Enns, and Wohlfarth, 2009, p. 1; Baum, 2006). Or, as scholar Barry Friedman (2009) neatly delineates, "the Court rules. The public responds. Over time…public opinion jells, and the court comes into line with the considered views of the American public"[24] (p. 383).

While legalism, attitudinalism, and strategic and interpretive institutionalism have proven the most enduring theories of judicial behavior, a number of social scientists have conceptualized various alternative models. Baum's latest work (2006) focuses on the many diverse and often competing audiences that potentially affect judicial decision making. These range from the obvious (fellow judges/justices, the general public, and the other branches of government) to groups generally believed to be entirely absent from the judicial process (such as the news media and social and professional organizations). Richard Posner's theory of "legal pragmatism" (2008) takes an entirely different perspective, contending that judges' decisions are motivated by three internal factors: (1) their intuitive, emotional, and often unconscious preconceptions, (2) a variety of personal attributes, and (3) their larger legislative ambitions.[25] In Posner's view, the major

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[23] Attitudinalists such as Jeffrey Segal and Harold Spaeth (2002) have countered that, while an "association" may exist between public opinion and Supreme Court decision making, the existence of any sort of "zone of acquiescence" is empirically impossible to prove. After all, the same social forces affect justices as the general public; how can scholars ever conclusively establish whether the public or these social forces are influencing the Court?

[24] Ely has been one of the most consistent critics of this position, and (as always) seems worth quoting at some length. According to Ely, the notion that public opinion somehow restrains justices' decisions has been empirically refuted again and again. As he argues,

> This isn't the way it works, and the justices know it isn't. Throughout its history the Court has been told it had better stick to its knitting or risk destruction, yet somehow the possibility of judicial emasculation by way of popular reaction against constitutional review by the courts has not in fact materialized in more than a century and a half of American experience. The warnings probably reached their peak during the Warren years; they were not notably heeded; yet nothing resembling destruction materialized (p. 48).

[25] Tamahana's (2010) theory of "balanced realism" resembles Posner's pragmatic theory of judicial decision making, but is focused on lower court judges rather than the Supreme Court.

question is not what external factors shape judicial opinion making, but "what is it about the judicial labor market that determines the balance" among a particular judge's personal, political, and legalist inclinations[26] (p. 370). Yet Baum and Posner's models are best understood as mixed rather than truly novel theories of judicial behavior; the former incorporates and expands upon the strategic nature of judicial decision making, and the latter synthesizes and then problematizes legalist and attitudinal accounts.[27]

In his book *Deciding to Decide: Agenda Setting in the United States Supreme Court* (1994), constitutional scholar H.W. Perry, Jr. complicates even Baum and Posner's elaborate schemas through a detailed study of justices' decisions to grant certiorari. Agreeing with Posner that justices are motivated by a variety of discrete factors, Perry also stresses that justices may have fundamentally different interests toward discrete cases. In the author's so-called "outcome model", justices will be more prone to act attitudinally depending on an issue's individual appeal to them. If they care deeply about a case's policy outcome, personal political preferences will likely hold greater sway. Like Baum and Posner, Perry thus dismisses the plausibility of any single theory of judicial decision making. Or as Charles Gibson summarized, "judges decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do" (Baum, 1997, p. 18).

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[26] Which Posner summarizes as their "judicial utility function".

[27] Whereas Baum and Posner are pure theorists, certain scholars have actually attempted to quantitatively test mixed models of jurisprudence, (generally) combining the amount of precedence behind a particular issue and justices' ideological positions on it.

Table II-1. The Dominant Models of Judicial Decision Making

Model	Leading Scholar(s)	Idea(s)
Legalism	Alexander Hamilton Simeon Eben Baldwin Justice Antonin Scalia	When making decisions, justices read the text before them and simply apply the law as written. If the words are somehow unclear, justices try to discern the writers' intent. If this is still unclear, justices hew to precedent as closely as possible.
Attitudinalism	Glendon Schubert Jeffrey Segal Harold J. Spaeth	Justices decide based purely upon their own personal political beliefs. For example, if a justice is against the death penalty he or she will vote to strike it down regardless of capital punishment's explicit or implicit support in the text/Constitution.
Institutionalism I: Strategic ("thin") Institutionalism	Lee Epstein Jack Knight	Justices' personal political philosophies are constrained by the preferences of their colleagues and other governmental bodies (the president, Congress, state legislatures, etc.). For example, if a justice knows his or her decision will alienate their colleagues or another government branch, he or she will temper or even suppress his or her own personal inclinations.

Institutionalism II: Interpretive ("thick") Institutionalism	Ronald Dworkin Cornell W. Clayton Howard Gillman	Justices' personal political philosophies are constrained by their perceived institutional role. For example, a justice may personally oppose the death penalty, but be unwilling to strike it down since he or she believes the ideal justice should be a legalist (i.e. follow the text and not his or her own personal convictions). Legalists and thick institutionalists ultimately differ regarding public opinion's proper role on judicial decision making. Whereas the former treat public opinion as entirely irrelevant to judging, the latter fear that disregarding public opinion could potentially undermine the Court's institutional legitimacy, and therefore take this into account when judging.
Mixed	Richard Posner Lawrence Baum H. W. Perry, Jr.	*Legal Pragmatism:* Justices are affected by a combination of legalist, attitudinal, and institutional beliefs, the importance of which vary depending on the case at hand. *Outcome Model:* Justices will act attitudinally if the case is personally important to them; otherwise, they will act legalistically or institutionally (depending on the case at hand).

B. Testing the Models

Attitudinal, institutional, and mixed models of jurisprudence have been analyzed from a number of quantitative perspectives (Posner, 2008; Sunstein, Schkade, Ellman, and Sawicki, 2006; Bailey and Chang, 2002; Segal, Epstein, Cameron, and Spaeth, 1995; Brace, Langer, and Hall, 2000; Eskridge, Jr. and Baer, 2007; Hansford and Spriggs II,

2006; Lim, 2000; Songer and Lindquist, 1996; Richards and Kritzer, 2002; Gibson, 1978). Whereas attitudinal scholars have generally sought to measure the correlation between justices' political positions and their voting records (Segal and Spaeth, 1993, 2002), institutionalists have taken into account a variety of distinct variables, including how often justices vote together, public approval for certain case outcomes, and congressional or executive reversals and judicial voting patterns (Casillas, 2009; Richards and Kritzer, 2002). Perhaps unsurprisingly, these factors vary considerably in strength and correlation, depending upon the study at hand[28] and (as mentioned earlier) no single study has so far dominated the debate (Sisk, 2008).

The next section explores the most important quantitative studies of Supreme Court decision making. Although many accounts are mentioned, others are undoubtedly neglected. The point is to highlight the methods and findings underlying each model, rather than to construct a definitive list.

Attitudinal Studies

The most influential attitudinal studies of Supreme Court decision making are Jeffrey A. Segal and Harold J. Spaeth's *The Supreme Court and the Attitudinal Model* (1993) and *The Supreme Court and the Attitudinal Model Revisited* (2002). The authors first determined justices' political preferences based upon the president they were appointed by, that justice's political history, and any stated comments or relevant lower court decisions. These findings were then correlated with their votes in hundreds of opinions. Using multivariate regression, the authors found a largely positive correlation

[28] And the model/regression/logistic equation(s) used.

between political values and individual votes, and consequently concluded that the Court was driven by political interests alone.

A number of studies have replicated and expanded upon Segal and Spaeth's pioneering work. In *Crafting Law on the Supreme Court: The Collegial Game* (2000) Forrest Maltzman, James F. Spriggs II, and Paul J. Walbeck use econometric tests to find a positive correlation between justices' political preferences and votes. Ward Farnsworth (2005) restricts his analysis to criminal court cases, finding a positive correlation between justices' values and their support of prosecutors' or defendants' positions. In "Building New Measures of Supreme Court Ideology: Clerk Selection as an Indicator of Preferences" (2005) Corey A. Ditslear analyzes justices' clerk selections, and determines that the more conservative or liberal the clerks they choose, the more likely justices will be to support right-wing or left-wing outcomes.

Table II-2. Attitudinal Studies

Study	Findings
"Building New Measures of Supreme Court Ideology: Clerk Selection as an Indicator of Preferences" Ditslear, 2005	The author found a positive correlation between justices' political preferences (judged by their clerk selection) and their votes.
"Signatures of Ideology: The Case of the Supreme Court Criminal Docket" Farnsworth, 2005	The author found a positive correlation (Pearson Correlation Coefficient=.97) between justices' ideological support for governmental interests and their votes protecting those interests in criminal cases.
"Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model" Gibson, 1978	The author found a positive correlation (Squared Multiple Correlation Coefficient=.64) between justices' political preferences (judged by their party affiliation and stated ideology, if available) and their votes.
Crafting Law on the Supreme Court: The Collegial Game Maltzman, Spriggs II, and Walbeck, 2000	The authors found a positive correlation between the ideology of a particular Court and their votes in each case.
The Supreme Court and the Attitudinal Model and *The Supreme Court and the Attitudinal Model Revisited* Segal and Spaeth, 2002, 1993	The authors found a positive correlation between justices' political preferences (judged by their party affiliation and stated ideology, if available) and their votes.

Institutional Studies

A number of institutional studies have challenged Segal and Spaeth's attitudinal schema. Most of these projects have studied the role of public opinion on Supreme Court decision making, and found a statistically significant positive correlation between these

two variables. In *Public Opinion and the Supreme Court* (1989), Thomas R. Marshall analyzes public opinion in 130 cases, finding this to be a better indicator of both overall and individual votes than political preferences alone. In "External Pressure and the Supreme Court's Agenda" (1999). Charles R. Epp studies the amount of state-level support for particular issues, finding this to be highly determinative of U.S. Supreme Court verdicts. Christopher Casillas, Peter K. Enns, and Patrick C. Wohlfarth (2009) replicate Marshall's findings by using more recent cases, and argue that public opinion does not merely determine but also restrains Supreme Court decision making. Michael W. Giles, Bethany Blackstone, and Richard L. Vining (2008) have also found a statistically significant positive correlation between public opinion and the Court's overall and individual decisions.

The institutional paradigm has been further supported through the study of precedent. In "Jurisprudential Regimes in Supreme Court Decision Making" (2002), Mark J. Richards and Herbert M. Krtizer find a positive correlation between the amount of case law an issue has generated and the Court's support for it. Thomas Hansford and James Sprigg's *The Politics of Precedent on the U.S. Supreme Court* (2006) find cases' outcomes largely determinable through their amount of previous precedent and those precedents' age. Other institutional scholars have found a positive correlation between justices' voting patterns and support from the legislative (Ferejohn and Shipan, 1990; Spiller 1995; Bergara, Richman, and Spiller, 2003) and/or executive (Epstein and Knight, 1999) branch. By using logistic regression, these two studies correlate Supreme Court decisions with both branches' explicit preference for a particular outcome.

Table II-3. Institutional Studies

Study	Findings
"Modeling Supreme Court Strategic Decision Making: The Congressional Constraint" Bergara, Richman, and Spiller 2003	The authors found a positive correlation between congressional support for issues and justices' votes on those issues.
"How Public Opinion Constrains the Supreme Court" Cassillas, Enns, and Wohlfarth, 2009	The authors found a positive correlation between the level of public opinion for issues and justices' votes on those issues.
External Pressure and the Supreme Court's Agenda Epp, 1999	The author found a positive correlation between the amount of state-level support for issues and justices' votes on those issues.
Mapping Out the Strategic Terrain: The Informational Role of Amica Curiae Epstein and Knight, 1999	The authors found a positive correlation between the executive and legislative levels of support for issues and justice' votes on those issues.
"Congressional Influence on Bureaucracy" Ferejohn and Shipan, 1990	The authors found a positive correlation between the amount of congressional support for issues and justices' votes on those issues.
"The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making" Giles, Blackstone, and Vining, 2008	The authors found a positive correlation between the level of public opinion for issues and individual justices' votes on those issues.
The Politics of Precedent on the U.S. Supreme Court Hansford and Spriggs, 2006	The authors found a positive correlation between the years of precedent supporting particular issues and justices' votes on those issues.

Public Opinion and the Supreme Court Marshall, 1989	The author found a positive correlation between the level of public opinion for issues and justices' votes on those issues.
"Jurisprudential Regimes in Supreme Court Decision Making" Richards and Kritzer, 2002	The authors found a positive correlation (between the amount of case law an issue had generated and justices' votes on that issue.
"Where Is the Sin in Sincere? Sophisticated Manipulation of Sincere Judicial Votes" Spiller, 1995	The author found a positive correlation between the amount of congressional support for issues and justices' votes on those issues.

Mixed Studies

Although considerably rarer, a number of quantitative studies have also focused on mixed models of judicial decision making. Youngsik Lim (2000) combines justices' ideological preferences with the amount of precedent a particular issue has accrued, finding it difficult to predict justices' decisions when the two conflict. According to the author, the importance of precedent will vary depending upon the strength of each justice's attitudinal preference. This is further supported by Donald R. Songer and Stefanie A. Lindquist (1996), who find that while justices' political preferences undoubtedly influence their votes, the years of precedent backing a particular issue also matters. Kevin T. McGuire and James A. Stimson (2004) and William Mishler and Reginald S. Sheehan (1996) also argue that justices are influenced by both personal political preferences and the prevailing public mood.

Table II-4. Mixed Studies

Study	Findings
"An Empirical Analysis of Supreme Court Justices' Decision Making" Lim, 2000	The author found a positive correlation between the years of precedent supporting issues and justices' political preferences (judged by their party affiliation and stated ideology, if available) and justices' votes on those issues.
"The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences" McGuire and Stimson, 2004	The authors found a positive correlation between both justices' political preferences and public opinion and their votes in a particular case.
"Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective" Mishler and Sheehan, 1996	The authors found a positive correlation between both justices' political preferences and public opinion and their votes in a particular case.
Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making Songer and Lindquist, 1996	The authors found a positive correlation between the years of precedent supporting an issue and justices' political preferences (judged by their party affiliation and stated ideology, if available) and justices' votes on that issue.

Theoretical Deficiencies

While quantitative models of judicial decision making undoubtedly shed light on jurisprudential behavior, they also contain a number of significant deficiencies. Perhaps most troubling is their problematic attempt to break legal reasoning into simple numerical patterns. As scholar Gregory Sisk (2008) has remarked, "legal reasoning", and human

behavior in general, "is not formulaic in nature: the reasonable parameters for debate on the determinate nature of text and doctrine cannot" simply "be described by number" (p. 884). Reducing the complexity of justices' political positions to simple formulas may be intellectually appealing, but overlooks the complexity of human behavior. Justices (and people in general) may lean more left or right, but many of their individual positions will lie on various points along the ideological spectrum. Quantitative studies cannot account for such situational complexity, and will therefore have significantly skewed results. As Sisk pointedly summarizes,

> The translation of judicial decisions into mathematical constructs can never fully convey the richness of the legal analysis contained in the written decisions of…diverse legal disputes. Statistical analysis simply cannot capture the full dimension of that unique and important human enterprise known as judging (pp. 886-887).

Qualitative Studies

Despite the limitations of quantitative accounts, very few qualitative studies have been conducted on judicial decision making. Maxwell L. Stearns (2002) has studied a number of plurality decisions, charting the varying influences of precedent, ideological preference, and intercollegial politics on justices' votes. And, as mentioned previously, Baum (Baum), Posner (2008), and Perry (1994) utilize anecdotal evidence to craft their rich theoretical accounts.

Table II-5. Multiple Case Study Accounts

Study	Findings
Constitutional Process: A Social Choice Model of Supreme Court Decision Making Stearns, 2002	The author used a multiple case study to highlight the importance of collegial strategy.

Table II-6. Purely Theoretical Accounts

Study	Findings
Judges and their Audiences Baum, 2006	The author considered the importance of justices' audiences, from congress to the media.
Deciding to Decide: Agenda Setting in the United States Supreme Court H.W. Perry, 1994	The author found that justices' votes in cases often depend upon an issue's ideological importance to them.
How Judges Think Posner, 2008	The author considered the multiplicity of factors (whether legal, institutional, or attitudinal) that affect judicial decision making, and concluded that all play some role in this process.

II. Studies of Judicial Decision Making and *Gregg v. Georgia*

While few qualitative studies have analyzed Supreme Court decision making, even fewer have focused upon a specific case. *Gregg v. Georgia* would seem a natural fit: Not only did this critical case engender a variety of conflicting opinions over a politically contentious issue, but it remains recent enough to hold contemporary relevance. This section explores the three qualitative studies specifically on *Gregg*,[29] and then outlines their theoretical and methodological inadequacies.

A. The Studies

Disorder in the Court: The Death Penalty and the Constitution (1986)

In *Disorder in the Court,* Robert A. Burt details the *Gregg* opinion through the lenses of each individual justice. Although Burt ignores specific theories of judicial decision making, he contends that Justices Brennan, Marshall, and White acted politically, while Stewart's primary concern lay in maintaining the Court's institutional legitimacy. The author concludes that *Gregg*'s plurality opinion effectively attempted to carve a middle ground between the blanket liberalism of Marshall and Brennan, and the strict conservatism of Burger and Rehnquist. As Burt admits, his theses are not based upon any insider accounts or interviews, but are speculatory interpretations of the justices' individual opinions.

[29] While others (see Zimring and Hawkins, 1986; Bedau, 1987) have speculated on the Court's motivations in *Gregg,* these accounts have offered little comprehensive explanation, and certainly nothing resembling a case study.

Furman Fundamentals (2006)

Corinna Barrett Lain's *Furman Fundamentals* offers a more detailed account of both the *Furman* and *Gregg* decisions. Rather than simply focusing on these cases, the author grounds her points within a larger thesis: that the Supreme Court, often seen as a protector of minority rights and a promoter of counter-majority change, is actually profoundly affected by public opinion. According to Lain, the case of *Gregg* especially underscores this contention: Shaken by the public backlash inspired in *Furman*'s wake, the plurality chose to cautiously reinstate capital punishment rather than risk losing its political legitimacy. As Lain concludes, "remaining true to the principles of *Furman* would have been risky", and *Gregg* was therefore a "judicial surrender to the perceived wisdom of the public" (p. 55). While she offers a provocative thesis, the author's explanation of *Gregg* is also speculative; like Burt, she only utilizes secondary sources and the justices' written opinions, and fails to present any formal models of judicial decision making.

The Supreme Court & Legal Change: Abortion and the Death Penalty (1992)

Lee Epstein and Joseph F. Kobylka's *The Supreme Court and Legal Change* offers the most extensive account of *Gregg v. Georgia* of the three studies. Although the authors primarily focus on the tortuous litigation that led to *Furman* and *Gregg,* they spend considerable time on the Supreme Court's supposed motivations in these two cases. According to Epstein and Kobylka, while deeply skeptical of capital punishment's efficacy, the plurality believed abolishing it altogether would be too radical a decision. Akin to Lain, the authors contend that the Court was deeply affected by the country's newfound support for capital punishment, and simply unwilling to bilk public opinion.

The authors especially criticize the advocacy of Anthony Amsterdam, the petitioner for the defendants. Faulting the lawyer's "all or nothing" strategy, they argue that Amsterdam trapped himself in the "tyranny of absolutes", seeking to abolish capital punishment entirely rather than push for more incremental reform. According to Epstein and Kobylka, "given the badly splintered majority in *Furman*", finding some middle ground might have more readily furthered abolitionists' goals. Yet

> the "tyranny of absolutes" led them (Amsterdam and the Liberty Defense Fund) to go for a knockout punch in *Gregg* rather than continue a series of bloody blows that would ultimately knock the legal legs out from under the states. (p. 135)

While the authors make a plausible claim, that the plurality was willing to accept a middle ground, their only evidence consists of the justices' written opinions and oral comments during arguments. As explored below and throughout the following section, using such sparse data allows only a limited picture of the Court's *Gregg* decision. Considerably more helpful would have been interviews with the relevant parties, including the justices' law clerks and (perhaps most importantly) Anthony Amsterdam himself.

Table 3-7. Case Studies on *Gregg* Specifically

Study	Findings
"Disorder and the Court: The Death Penalty and the Constitution" Burt, 1986	The author uses the justices' written opinions to argue that the *Gregg* court was affected by a variety of motives, both political and institutional.
The Supreme Court & Legal Change: Abortion and the Death Penalty Epstein and Kobylka, 1992	The authors use the justices' written opinions and comments during oral arguments to contend that the *Gregg* plurality was affected by both public opinion and an unwillingness to go "too far", abolishing capital punishment entirely rather than incrementally.
"Furman Fundamentals" Lain, 2006	The author uses the justices' written opinions to argue that the *Gregg* plurality was primarily affected by public opinion.

B. Deficiencies

While valuable contributions to the literature on *Gregg,* the preceding accounts offer insufficient explanations for the Court's decision in this case. This is for both theoretical and methodological reasons. First, none of the studies is grounded in any formal theories of judicial decision making. By ignoring the extensive research on legalist, attitudinal, institutional, or mixed models, these accounts neither scrutinize nor offer any wider understanding of jurisprudential behavior, and provide only ad hoc explanations for the justices' opinions. Further, and just as critically, many of the authors have a larger agenda, and subsume *Gregg* within this framework. While their overall theses may be accurate, scholars such as Lain, Epstein, and Kobylka are less interested in

understanding *Gregg* than proving that there is a correlation between public opinion and Supreme Court jurisprudence or discrediting a particular legal strategy.

Finally, and perhaps most troublingly, all three scholars rely almost exclusively on the Court's written opinions. While case opinions can certainly be illuminative, they are also inherently limited. As Tamanaha remarks, "the style in which" a "decision is presented is not meant to represent an indication of how it was reached" (p. 124). How justices defend an opinion may differ substantially from the actual reasons for that opinion. Written decisions rarely (if ever) contain the full range of the Court's thinking, and may therefore mask more personal motivations and intentions. According to Del Dickson (2001), justices' written statements provide clues rather than explanations of their actual intentions, "rationalizations rather than reasons, shadow rather than substance" (p. xxiv). One must always study a variety of motivational factors, including justices' "capacities, modes of selection, and professional norms" in order to adequately understand their greater reasoning for a particular decision (Posner, 2008, p. 5). Written opinions are certainly valuable data, but must not stand alone.

As the following section details, only by using a variety of discrete sources—including the justices' written opinions, archival accounts, and interviews with relevant parties—can one paint an adequate picture of *Gregg v. Georgia* and the nature of judicial decision making. As Robert Yin (2003) states,

> The most important advantage presented by using multiple sources of evidence is the development of *converging lines of inquiry*, a process of triangulation and corroboration…Any case study finding or conclusion is likely to be more convincing and accurate if it is based on several different sources of information, in a corroboratory mode (p. 116).

Section III:

Methods and Hypotheses

By lacking any theoretical background and focusing on only one or two data sources, previous studies of *Gregg v. Georgia* have failed to adequately explore the Court's motivations in this pivotal case. This section details the present project's unique methodology, and how it substantially improves upon those of previous studies. It begins with a general overview of the case study, focuses on such inquiries' (supposed) limitations, and argues for the importance of interdisciplinary research. This project's specific methodology is then explored, which involved surveying the justices' written decisions, reviewing their archives and manuscripts, and interviewing relevant parties. The section concludes with eight initial hypotheses for the Court's decision in *Gregg,* each corresponding to a specific model of judicial decision making.

I. The Case Study

As detailed by Robert Yin (2003) and Robert Stake (1995), case studies are careful examinations of particular events or incidents, undertaken to understand how or why a specific phenomenon occurred. According to Yin, when a "why question is being asked" about a "set of events, over which the investigator has little or no control", case studies are the preferred method of research (p. 14). This methodology allows researchers to understand the behavior and point of view of actors in concrete situations rather than through abstract, quantitatively driven experiments or statistical analyses alone. In the words of Friedrich Nietzsche, such studies allow us to approach the "rich ambiguities" of everyday life inherently lost in large-scale studies and quantitative models (Flyvbjerg, 2006).

A. General Background

Case studies are generally broken into five distinct steps (Yin, 2003; see Table III-I below). Case theorists first formulate their "big question(s)", or the specific problem(s) they seek to explore. Second, they present a variety of plausible hypotheses (or "potential propositions") to help ground their research. These hypotheses must be narrow enough to denote potential conclusions, yet wide enough to allow for easy revision and expansion. They should not bias the research, but guide one's overall methodology. After posing their big question(s) and its corresponding hypotheses, researchers then determine the most efficacious data collection strategy, whether archival, via interviews, or a mix of both. Fourth, researchers must systematically manage their data, being careful to categorize and demarcate each source of information. This is generally done through Microsoft Word or Excel, although qualitative analysis programs such as Nvivo or Atlas.ti can also be helpful. Finally, the findings are carefully compared with each hypothesis in order to reveal the most promising, and the results discussed and propounded upon.

Table III-1. Case Study Methodology

Step I: One's "Big Question(s)"	What model of judicial decision making drove the Supreme Court's decision in *Gregg v. Georgia*? What does this reveal about the nature of Supreme Court decision making in general?
Step II: Plausible Hypotheses	See Page 70
Step III: Data Collection	See Page 60
Step IV: Data Management	Microsoft Word
Step V: Hypotheses Testing and Conclusion(s)	See Page 130

Researchers should always take three things into account when testing thier hypotheses and conclusions (Yin, 2003). First, they must utilize all the evidence, leaving no loose ends and/or never ignoring seemingly inconsistent findings. Second, they must address all possible interpretations, carefully considering each hypothesis and arguing whether it is supported by the data. All alternative theories should be considered here, and never dismissed without adequate explanation. Finally, researchers should always stay focused, and avoid being distracted by fascinating but irrelevant side issues. As noted in Table III-2, good case studies always test for construct, internal validity, external validity, and reliability.

Table III-2. Case Study Tests and Tactics (Yin, 2003)

Case Study Tests	Case Study Tactics
Construct Validity	-Use multiple sources of evidence -Establish chain of evidence
Internal Validity	-Build Explanations -Address rival interpretations
External Validity	-Use theory
Reliability	-Use case study protocol -Develop case study database

Eric Redman's *The Dance of Legislation* (1973) is considered one of the most widely cited and methodologically rigorous case studies. The author traced the introduction and passage of the National Health Service Corps during the 91st Congress, utilizing interviews with various senators, poring over archival accounts, and observing Congress in action. The author first posed his "big question"—how bills weave their way from introduction to passage. He then constructed a number of explanatory (though not explicit) hypotheses, focused around the importance of senatorial strategy, individual influence, and/or public opinion. Redman tested these hypotheses by talking to senators, reading congressional accounts, and attending numerous legislative sessions. When findings matched a particular hypothesis, they were marked under this category. Ultimately, no particular theory garnered the most evidence, and the author concluded that the legislative process is a mix of bureaucratic strategy and individual innovation, indirectly but distinctly influenced by public opinion.

B. Advantages of Case Study Research

When done correctly, case studies have three distinct advantages over other methodological inquiries:

1) Their unique depth. Only case studies allow us to recognize the sheer complexity of human activity, especially when multiple players are involved within a particular environment. This is especially important when studying nine separate actors, each with his or her own individual motivation and focus (Baxter and Jack, 2008).

2) Case studies offer novel angles of exploration and innovative hypotheses. By seeing how people operate in certain situations, case studies help us to construct more grounded narratives of human behavior and potential paths of further inquiry (Hancock, 2006).

3) Case studies force larger theories to be empirically tested and potentially reevaluated or even rejected. Vast quantitative models (and their underlying regression equations) are built upon individual cases, and dismissing any single case as an outlier endangers the very foundation upon which quantitatively and theoretically driven models are predicated (Yin, 2003). If the legalist, attitudinal, or institutional models of judicial decision making cannot adequately account for the incredible diversity of opinion in *Gregg,* they are either inherently limited or conceptually flawed, and certainly not universal.

While Robert Yin cautions against using single studies to construct grand narratives of human behavior, he highlights that a single case can determine "whether a theory's propositions are correct or whether some alternative set of explanations might be more relevant" (p. 47). According to case scholar Bent Flyvbjerg, the ultimate "advantage of a case study is that it can 'close in' on real-life situations and test views

directly in relation to phenomena as they unfold in practice" (Flyvbjerg, 2001, p. 82). Theories of judicial decision making, in particular, are only comprehensible through situated actors (Supreme Court justices) within a very specific context (the case under review). *Gregg* is especially important in this regard, as it contained a variety of conflicting motivations over a particularly controversial issue. Only a case study can adequately explore the complexity of judicial decision making.

C. The (Supposed) Limits of Case Study Research

Despite their methodological advantages, case studies have frequently been criticized for their (supposedly) limited generalizability. According to critics, single case studies must always be treated cautiously, and should never be used to promote grand or overarching theories or agendas on their own (Flyvbjerg, 2001; Ragin and Becker, 1992; Baum, 1997). While such critiques are common, they (often) incorrectly equate case studies with survey research. As Robert Yin clarifies, survey research is intended to "generalize to a larger universe" (p. 43). This methodology

> relies on statistical generalization, whereas case studies (as with experiments) rely on analytical generalization. In analytical generalization, the investigator is striving to generalize a particular set of results to some broader theory.

Case studies have been successfully used to promote a variety of important analytical generalizations. Perhaps the most famous example of these can be found in the natural sciences. Galileo's theory of gravity was not based upon a wide range of observations, but rather resulted from a single ingenious experiment (Flyvbjerg, 2001). The case study also had great importance in the observations of Charles Darwin, who began his speculations on evolution by studying a solitary collection of finches. And

while only arguably scientific, both Karl Marx and Sigmund Freud used case studies to formulate their influential analyses of human nature.

The results from a single case study should not be used to construct some grand theory, but full-scale dismissals of their generalizability are historically unfounded. As Flyvbjerg astutely remarks, "small questions" can "lead to big answers" (p. 133). Nothing here discredits the many quantitative studies performed on judicial decision making. Qualitative research can and should complement quantitative studies. As Flyvbjerg again highlights: "Good social science is opposed to an either/or and stands for a both/and on the question of qualitative versus quantitative methods" (p. 133). Ultimately, both approaches must contribute to and help shape the practice of social science.

D. The Importance of Being Interdisciplinary

Judicial decisions are socially constructed, historically situated, and inherently political, and their study thus demands an interdisciplinary approach (Baum, 1997). Criminal justice is itself an interdisciplinary field, incorporating elements of law, philosophy, history, and sociology. This project is an example of "integrated interdisciplinary research", incorporating elements from a variety of different disciplines and melding them together into a coherent field of study (Klink and Taekama, 2008, p. 21).

According to Douglas Vick, interdisciplinary research allows problems to be "addressed in a wider context", and permits researchers "to engage problems whose solutions can only be found through combinations of disciplinary approaches and perspectives" (2004, p. 181). The purpose of interdisciplinary studies is to go beyond disciplinary boundaries, and weigh the contributions of various discrete but

complementary fields of study (Newell, 1983, p. 2). As Karl Popper (1963) wrote, the best scholars recognize that they are "not students of some subject matter, but students of problems. And problems may cut right across the borders of any subject matter or discipline" (p. 88).

Understanding *Gregg v. Georgia,* and placing it within the context of judicial decision making, requires forays into legal theory, Supreme Court history, and even public policy. Each field is equally useful but individually narrow. Judicial decision making is a socio-legal process, and can only be understood through an integrated study. This study does not (and cannot) restrict itself to a single discipline, but rather seeks to understand the case at hand through these complementary lenses of research.

Of course, in conducting an interdisciplinary case study, one must be careful not to misunderstand "foreign" terms and concepts, and always recognize the nuances and limitations of separate disciplines (Siems, 2009). For example, legal "positivism" and sociological "positivism" denote radically different concepts, and researchers should be careful to avoid such linguistic confusions. Further, historical research requires different techniques than sociological inquiry, and scholars must therefore find an appropriate "space of encounter" between the two (Vick, p. 164).

II. Methodology

This project is unique in utilizing four discrete yet complementary lines of inquiry:

(1) The considerable secondary literature on *Gregg v. Georgia*

(2) The justices' written opinions in this case

(3) Archival documents and accounts, including previously private/unreleased papers

and

(4) Interviews with important players in the *Furman* and *Gregg* proceedings

A. Secondary Literature Review

Cognizant of case studies' limitations and dedicated to an interdisciplinary approach, the author gathered and analyzed all the existing case studies of *Gregg v. Georgia* (presented in the previous section), alongside the broad literature on the early Burger Court. Bob Woodward and Scott Armstrong's *The Brethren* (1979), culled from interviews with a variety of law clerks and Supreme Court justices, provided particularly relevant information on the Court during this period. This allowed *Gregg* to be placed in judicial context, and led to the formation of eight hypotheses (see Hypotheses below, page 70) to explain the Court's decision in this case.

Unfortunately, secondary sources are often plagued by problems of bias or even outright inaccuracy. Many scholars have a larger point to make, and may alter or omit critical information in order to support their agenda. This is especially true of the *Brethren,* whose sources go unrevealed for reasons of confidentiality. As Howard Becker

(1986) presciently warned, "Use the literature, but don't let the literature use you" (p. 136). One must always be cognizant of an author's "master narrative", and careful not to be seduced by rhetorically compelling but empirically hollow (or incomplete) arguments (Maxwell, 1997). Further, since secondary sources are one step removed, they may be substantially inaccurate or incomplete. Much secondary literature on *Gregg* was written in the 1970s and 1980s, and numerous records (such as many of the justices' personal papers) were subsequently released. As much secondary literature as possible was collected and compared, and then checked for congruencies with the primary source material (Barry, 1979; Black, 1982; Burt, 1987; Epstein and Kobylka, 1992; Foley, 2003; Liebman, 2007).

B. Primary Literature Review

The justice's mind-sets can be gathered from a variety of primary sources. Most obvious are their written opinions, the value and weaknesses of which were detailed in the previous section. Of further help may be any books, articles, memoirs, interviews, oral histories, and speeches written by individual justices. The oral arguments from *Furman* and *Gregg* also proved insightful, casting light on each justice's particular concerns and areas of interest. Most significant were the justices' personal papers, many of which are available at the Library of Congress and other academic institutions.[30] These papers were generally composed of conference notes, early draft decisions, and internal memorandums distributed throughout the Burger Court. Especially helpful was Justice William Brennan, Jr.'s case histories, taken by his law clerks during the *Furman* period.

[30] With the exception of Justice Stevens's, Stewart's, Burger's, and White's (see References, Primary Sources, Justices' Archives).

These detailed notes reveal what was occurring inside the Court during each major decision, presumably collected for future historians. Surprisingly, these documents have generally gone unnoticed or unmentioned by previous scholars, and thus engendered a number of novel conclusions.

While primary sources provide an "inside view" of the *Gregg* decision, such information also contains a number of deficiencies. Primary literature is almost inherently biased, as authors may alter facts to cast themselves or others in a particular light (Weiss, 1995). Issues of narrative integrity may also be problematic; in an effort to tell a coherent, linear story, primary authors may play up certain issues or simplify complex events. Finally, many primary accounts have unfortunately been destroyed or remain unreleased, and certain data may have gone unrecorded for fear of personal and/or professional embarrassment.

C. The Interviewing Process

The rest of the research centered on a series of one to two-hour interviews with key players in *Gregg* (see Table III-3). This included Supreme Court clerks during the *Furman* and *Gregg* eras who personally helped craft and contributed to the justices' decisions (Lazarus, 1998; Woodward and Armstrong, 1979). Various family members of the justices were also successfully contacted, including Potter Stewart, Jr. via telephone, and Lewis F. Powell III, Sally A. Blackmun, and Charles (Byron) White through e-mail.

In total, twelve former law clerks were interviewed either in person or by phone. Seven had served during the *Furman* term (1971-1972) and four during the *Gregg* term (1975-1976). Two of these served under Justice William Brennan, Jr., one under Justice William Douglas, two under Justice Lewis Powell, one under Justice Byron White, four

under Justice Potter Stewart, one under Justice William Rehnquist, and two under Justice Thurgood Marshall. Unfortunately, Justice Burger's clerks have sworn to never speak of the chief justice's jurisprudence, and Justice Stevens's clerks were (understandably) nervous to converse before his retirement. White, Blackmun, and Rehnquist's clerks were also reluctant to talk, and provided little information regarding their justice's motivations in either *Furman* or *Gregg*.

All interviews were conducted in four phases.[31] The first round of questions revolved around the interviewee's specific memories of *Furman* or *Gregg,* and their personal involvement in these cases. The second round of questions concerned the justice's personal stance on the death penalty, and whether this may have affected their decision making process in capital cases. Interviewees were then asked to consider the influence of public opinion and internal court politics. Finally, the clerks were asked for any additional information or concluding reflections. Relevant responses concerned the justice's biggest judicial influence and the overall importance of precedent on Supreme Court decision making.

While much information garnered from the interviews proved valuable, it was also inherently limited. None of the individuals contacted attended the justices' conferences, and none were privy to the most confidential aspects of Court business. Further, *Gregg* was decided over three decades ago, and many memories from that period are undoubtedly incomplete or even inaccurate. All interview accounts were consequently checked against other sources for contradictory or ambiguous information.

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[31] See Appendix B for the specific questions asked.

Table III-3. Evidence Strengths and Weaknesses (Yin, 2003)

Source of Evidence	Strengths	Weaknesses
Secondary	-Easily reviewable -Exact: Contains exact references, names, events, details -Specific: Covers the event under study -Comprehensive	-Possible biases -Possible inaccuracies -One step removed
Primary	-Exact -Specific -Of direct relevance and authenticity	-Possible biases -Limited access
Interviews	-Targeted-focuses directly on case study topics -Provides causal inferences, explanations, and "insider information"	-Possible biases -Limited access -Inaccuracies due to poor recall -Reflexitivity

Although each method has its flaws, combining them provides the most accurate picture possible of *Gregg v. Georgia* and the nature of Supreme Court decision making. As detailed earlier, while previous studies pursued one or two lines of inquiry, this is the first to analyze and triangulate all three: justices' written comments, personal papers, and in-depth interviews with many of those involved in the case.

Table III-4. Data Sources

Source Type	Contents/Information
Secondary Literature	***Gregg v. Georgia:*** *The Brethren* (1979) by Bob Woodward and Scott Armstrong "Furman to Gregg: The Judicial and Legislative History" (1979) by Rupert V. Barry "Disorder in the Court: The Death Penalty and the Constitution" (1987) by Robert A. Burt "Capital Punishment in the Light of Constitutional Evolution: An Analysis of Distinctions between *Furman* and *Gregg*" (1976) by Jane C. England *The Supreme Court and Legal Change: Abortion and the Death Penalty* (1992) by Lee Epstein and Joseph F. Kobylka "Furman Fundamentals" (2006) and "Deciding Death" (2007) by Corinna Barrett Lain "Slow Dance with Death: The Supreme Court and Capital Punishment" (2007) by James S. Liebman "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment" (1995) by Carol S. Steiker and Jordan M. Steiker *Constitutional Issues: The Death Penalty* (1994) by Mark Tushnet "Deregulating Death" (1983) by Robert Weisberg ***The Burger Court:*** *Mr. Justice Rehnquist, Judicial Activist* (1987) by Donald E. Boles *Justice Brennan: The Great Conciliator* (1995) by Hunter R. Clark

Secondary Literature (cont.)	*A Justice for All: William J. Brennan, Jr., and the Decisions that Transformed America* (1993) by Kim Isaac Eisler *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (2005) by Linda Greenhouse *Justice Harry Blackmun: The Outsider Justice* (2008) by Tinsley Yarborough *Justice Lewis F. Powell, Jr.* (1994) by John C. Jeffries, Jr. *The Burger Court: Political and Judicial Profiles* (1991) by Charles M. Lamb and Stephen C. Halpern *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* (1998) by Dennis J. Hutchinson *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court* (1998) by Edward Lazarus *The Chief Justiceship of Warren Burger, 1969–1986* (2000) by Earl M. Maltz *Death Justice: Rehnquist, Scalia, Thomas, and the Contradictions of the Death Penalty* (2009) by Kenneth W. Miller and David Niven *John Paul Stevens: An Independent Life* (2010) by Bill Barnhart and Gene Schlickman *The Burger Court: Counter-Revolution or Confirmation?* (1998) and *The Ascent of Pragmatism: The Burger Court in Action* (1989) by Bernard Schwartz *Thurgood Marshall: Warrior at the Bar, Rebel on the Bench* (1992) by Michael D. Davis *Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall* (2002) by Carl T. Rowan

	Thurgood Marshall: American Revolutionary (1998) by Juan Williams
Primary Literature	***Cases:*** *Witherspoon v. Illinois,* 391 U.S. 510 *McGautha v. California*, 402 U.S. 183 *Furman v. Georgia,* 408 U.S. 238 *Furman v. Georgia,* Oral Arguments *Gregg v. Georgia,* 428 U.S. 153 *Jurek v. Texas,* 428 U.S. 262 *Jurek v. Texas,* Oral Arguments *Proffitt v. Florida,* 428 U.S. 242 *Roberts v. Louisiana*, 428 U.S. 325 *Woodson v. North Carolina,* 428 U.S. 280 ***Papers:*** The papers of Justice Potter Stewart The papers of Justice Lewis Powell The papers of Justice Harry Blackmun The papers of Justice Thurgood Marshall The papers of Justice William Brennan, Jr. The papers of William Rehnquist ***Narratives/Interviews:*** "The Law and Potter Stewart: An Interview with Justice Potter Stewart" (1983) by by Robert Bendiner *Cruel and Unusual: The Supreme Court and Capital Punishment* (1973) by Michael Meltsner *The Making of a Civil Rights Lawyer* (2006) by Michael Meltsner

Primary Literature (cont.)	"Constitutional Adjudication and the Death Penalty: A View from the Court" (1986) by William J. Brennan, Jr. "The Great Dissenter, Justice John Paul Stevens" (2007) by Jeffrey Rosen "Two Old Men v. the Executioners: Why Brennan and Marshall Won't Give Up " (1983)
Interviews/Correspondences	Gregory L. Diskant, Marshall clerk Interviewed 9/22/09 (via phone) Michael Seidman, Marshall clerk Interviewed 3/23/10 (via phone) William H. Jeffress, Stewart clerk Interviewed 10/12/09 (via phone) Benjamin Heineman, Jr., Stewart clerk Interviewed 10/23/09 (via phone) Ron Stern, Stewart clerk Interviewed 11/18/09 (via phone) Robert L. Deitz, Stewart clerk, White clerk Interviewed 10/14/09 (in person) Larry Hammond, Powell clerk Interviewed 11/09/09 (via phone) John C. Jeffries, Jr., Powell clerk Interviewed 12/10/10 (via e-mail) Craig M. Bradley, Rehnquist clerk Interviewed 11/25/10 (via phone) Richard L. Jacobson, Douglas clerk Interviewed 11/25/09 (via phone) Paul R. Hoeber, Brennan clerk Interviewed 11/27/09 (via phone) Richard Bronstein, Brennan clerk Interviewed 11/19/09 (via e-mail)

Interviews/ Correspondences	Potter Stewart, Jr. Interviewed 3/23/10 (via phone) Lewis F. Powell III Interviewed 11/19/09 (via e-mail) Sally A. Blackmun Interviewed 11/23/09 (via e-mail) Charles Byron White Interviewed 11/19/09 (via e-mail)

III. Hypotheses

As detailed in the previous section, the secondary material on *Gregg v. Georgia* and Supreme Court decision making, supplemented by Woodward and Armstrong's *The Brethren,* allowed for the construction of eight initial hypotheses explaining the Court's decision in this case. These hypotheses were then used to evaluate the plausibility of each theory (see Section IV, "Overall Court Analysis"). No hypothesis was assumed to be a priori valid, and these were therefore structured to be as flexible as possible. Alternative hypotheses were constructed and evaluated as the project progressed. These initial hypotheses were meant only to ground the research, and not to predetermine any larger findings or conclusions.

A. The Legalist Model

According to the legalist model of jurisprudence, justices merely interpret and apply the law (Posner, 2008; Wechsler, 1959; Ely, 1980). In this schema, each justice's original(ist) and textual(ist) understanding of the Eighth (and Fourteenth) Amendment determined his decision in *Gregg*.

Two legalist hypotheses seem possible, as noted below.

Hypothesis I. *The Court believed the practice of capital punishment no longer violated the Eighth Amendment and voted accordingly*. In this framework *Gregg v. Georgia* inspired numerous conflicting interpretations of the Eighth Amendment, with Powell, Stewart, and Stevens's version simply proving the most convincing.

Hypothesis II. *Reversing themselves in* McGautha, *Stewart and White sought to relieve Fourteenth Amendment concerns of Due Process, and were adequately appeased*

by the Georgia stature. In this alternative legalist scenario, Anthony Amsterdam effectively convinced Stewart and White that capital punishment was legally problematic from a Fourteenth rather than an Eighth Amendment perspective. The justices believed this could be corrected through jury discretion, despite Amsterdam's contentions that this was impossible. All Amsterdam had left was an evolving standards of decency argument, which failed to legalistically convince either Stewart or White (Epstein and Kobylka, 2002; Woodward and Armstrong, 1979).

B. The Attitudinal Model

According to the attitudinal model, justices' political viewpoints alone determine their legal reasoning. If a justice personally supports capital punishment, he will regard it as constitutional. If a justice personally opposes capital punishment, he will view it as unconstitutional.

Two attitudinal hypotheses seem possible, as noted below.

Hypothesis III. *Pure Politics*. Justices White, Stewart, Powell, Rehnquist, Burger, Blackmun, and Stevens politically supported capital punishment in *Gregg, Proffitt,* and *Jurek*, and only Burger, Blackmun, Rehnquist, and White in *Woodson* and *Jackson*.

Hypothesis IV. *Political Changes in the Court*. The (very) liberal Douglas died and was replaced by the more conservative Stevens, changing the political balance on the Court.

C. The Institutional Model

Institutionalists contend that neither neutral legal reasoning nor political ideologies completely explain judicial decision making, and that the role of the Court as a political and cultural institution must also be considered. Whereas "thin" institutionalists believe judicial decisions are primarily generated through collegial strategy and the potential responses of other governing bodies, "thick" institutionalists consider the role of public opinion and the Court's supposed need to legitimate itself through an "objective" interpretation of the law.

i. Strategic, or "Thin" Institutionalism

One "thin" institutional hypothesis seems possible:

Hypothesis V. *Collegial (Internal) Politics. Gregg* was simply a prudent decision of judicial compromise. Centrists Stewart, Powell, and Stevens neither wanted to alienate the more conservative justices nor did they want to upset existing precedent, and this was the most reasonable decision possible within such a limited time frame.

ii. Interpretive, or "Thick" Institutionalism

Two "thick institutional" hypotheses seem possible:

Hypothesis VI. *External Politics: The Court caved to the public's newfound support for capital punishment, represented by both the state legislatures' immediate reinstitution of the death penalty and a wealth of national opinion polls*. Following the renewed popularity of capital punishment, the post-Warren Court was hesitant to "rock the boat", and crafted an opinion that would appease public opinion while also pacifying potentially rebellious state legislatures and prevent the Court's institutional legitimacy from being challenged (Epstein and Kobylka, 1992; Lain, 2006; Zimring and Hawkins,

1986; Haines, 1996; Woodward and Armstrong, 1979; Haney, 2005; Jefferies, Jr., 1994; Berger, 1982; Friedman, 2009; Bedau, 1987).

Hypothesis VII. *The Court bowed to precedent for the sake of judicial moderation*.

The Court's centrists truly believed *Gregg* was the best decision possible, in that it neither explicitly overruled *Furman* nor misrepresented and expanded the Eighth Amendment to an inappropriate (and seemingly illegitimate) degree.

D. Mixed Model(s)

The following hypothesis combines elements of both the attitudinal and institutionalist paradigms:

Hypothesis VIII. Although they may have been personally uncomfortable with capital punishment, Justices Stewart, Stevens, and Powell felt the issue needed to be confronted following its renewed popularity and was (regrettably) constitutional. So they crafted a ruling that would allow the death penalty's theoretical imposition while cleverly limiting its actual practice (Meltsner, 2006 (regarding Justice Stewart); Burt, 1987; Jeffries, 1991).

The next section, "Findings and Analyses", details and then situates this project's findings within the preceding hypotheses, rejecting, reviewing, and expanding these theories when necessary. In case study research, good analyses should always follow two core principles (Yin, 2009): First, one's analysis must incorporate every data source possible, and second, one's analysis must openly reveal competing findings or

contradictory accounts. When law clerk statements either implicitly or openly contradicted archival information, both sources were carefully reviewed and reevaluated.

Section IV:

Findings and Analyses

I. Layout of Findings

As detailed in the methodology, there are three (potential) primary sources for revealing justices' motivations in a particular case: (1) their public records (including, but not limited to, their written opinions), (2) archival information, and (3) interviews with Court clerks or other relevant parties. "Findings: Justice by Justice", discusses the findings for each justice involved in *Gregg,* and then identifies the model of judicial decision making he used. "Findings: Overall Court Analysis", considers the plurality opinion, and analyzes which of the eight hypotheses discussed in the previous section best explains the Court's overall behavior. This section concludes with a quantitative content analysis, wherein each justice's opinion is coded, and frequency tables are then constructed to determine the *Gregg* Court's overall model of judicial decision making.

A. Breaking Down the Data

In "Findings: Justice by Justice", each justice's findings are presented in five parts:

First is an analysis of the justices' *Gregg* opinion or dissent, detailing any legalist, attitudinal, and/or institutional statements contained therein. Since justices often joined one another's opinions and dissents, the person who announced the opinion is considered its author. The accompanying justices are assumed to share this identical opinion, as is reflected in their individual analyses and summaries.

The second set of findings was gathered from justices' public records, which included:

(1) Oral statements in *McGautha, Furman,* and *Gregg*
(2) Written opinions from previous cases
(3) Relevant books or memoirs
(4) Law review articles
(5) Commentaries
(6) Addresses/speeches
(7) Recorded comments or interviews

The third set of findings was gathered from the justices' archival accounts, which included:

(1) Brennan's case histories (1971)
(2) Conference notes taken by Justice Brennan and Blackmun in *Furman* (1972) and *Gregg* (1976)
(3) Case inscriptions
(4) Internal Court memorandums
(5) Private notes recorded by law clerks

The fourth source of information was collected from Scott Armstrong and Bob Woodward's *The Brethren* (1979), which (as mentioned earlier) offers a remarkably comprehensive account of the *Furman* and *Gregg* periods. The confidentiality of Woodward and Armstrong's sources, however, makes the nature and quality of this information impossible to confirm. Only those passages verifiable through additional interview and archival research are included.

The fifth and final set of findings were gathered from the interviews. Each interview is analyzed and any relevant information presented. It is often best to let respondents speak for themselves, and they are thus quoted extensively. As noted earlier, Justices Stevens, Burger, White, Blackmun, and Rehnquist's clerks either refused to speak or provided very little substantive information.

The justices are presented in three groups: First are those in the plurality, followed by those who voted to uphold capital punishment in all (five) cases, and finally those who

opposed the death penalty entirely. Summaries are included at the end of each section, assessing justice's particular motivations and ideological groupings. When two data sources (seemingly) contradicted one another, both sides are presented in an attempt to reconcile their disparities.

II. Findings: Justice by Justice

The Center

Justice Potter Stewart

Since Justice Stewart was the swing voter in both *Furman* and *Gregg,* understanding his constitutional position on the death penalty is critical. Surprisingly, Stewart's motivations have gone relatively unanalyzed by previous scholars. This may be due to the justice's reluctance to openly discuss his opinions or his relative (and rather difficult to characterize) centrism.

A. Written Opinions

Justice Stewart, joined by Justices Powell and Stevens, announced the written opinion in *Gregg v. Georgia* and *Woodson and Waxton v. North Carolina*. He also joined Justices Powell and Stevens in *Proffitt v. Florida, Jurek v. Texas,* and *Roberts v. Louisiana*.

Gregg v. Georgia

While Stewart's opinion in *Gregg* is explicitly legalistic, it is unclear whether this is a case of genuine legalism or it is motivated by more attitudinal and/or institutional concerns. Stewart begins his opinion by considering capital punishment's constitutionality, and then establishes specific criteria in which its implementation will satisfy *Furman,* or avoid being arbitrarily and capriciously imposed. According to the justice, two things must be considered when determining the death penalty's constitutionality: (1) that such a penalty satisfies "evolving standards of decency" (428 U.S. at 173), and (2) accords with the full dignity of man, "which is the basic concept

underlying the Eighth Amendment". This latter concept is further broken into dual requirements: (a) that such penalties not involve the "unnecessary and wanton infliction of pain", and (b) that the death penalty must never be arbitrarily administered.

Justice Stewart is always careful to couch his opinion in legalistic terms. As the justice remarks, "we may not act as judges as we might as legislators", and a "heavy burden rests on those who would attack the judgment of representatives of the people" (*Id*. at 175). In considering the death penalty's constitutionality, the justice further appeals to the concept of originalism, citing the death penalty's long acceptance in the United States and England, and recognizes that when the Eighth Amendment was ratified capital punishment was practiced in every state.

Stewart then focuses on the case of *Furman* specifically, declaring it evident that a "large proportion of American society continues to regard" capital punishment as "a necessary criminal sanction", and it therefore does not violate contemporary standards of decency (*Id*. at 179). According to Stewart, this is evident for four primary reasons: (1) "the legislatures of 35 states have enacted new statutes that provide for the death penalty for at least some crime crimes that result in the death of another person" (*Id*. at 180); (2) "the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death"; (3) in "the only statewide referendum occurring since *Furman,* the people of California" authorized capital punishment (*Id*. at 181); and (4) juries have sentenced at least 480 persons to death since *Furman*. As Stewart concludes,

> The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested…it is now evident that a large proportion of

> American society continues to regard it as an appropriate and necessary criminal sanction (*Id*. at 182).

Justice Stewart then considers whether capital punishment accords with "the basic concept of human dignity". According to him, the death penalty is meant to serve two primary purposes: retribution and deterrence (*Id*. at 183). While Stewart recognizes the former reason may be unappealing to some, he believes it "essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs" (*Id*. at 184). And while it remains unclear whether the death penalty is an effective overall deterrent, "there are carefully contemplated murders, such as murder for hire", where the "penalty of death may well enter in to the cold calculus that precedes the decision to act" (*Id*. at 186).

Finally, Justice Stewart considers capital punishment's proportionality. While he admits the death penalty may be inappropriate for certain crimes,

> We are concerned here only with the imposition of capital punishment for the crime of murder and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes (*Id*. at 187).

In the second part of Stewart's *Gregg* opinion, the justice considers whether Georgia's specific death penalty statute is constitutional. He first reiterates what was established in *Furman,* or that capital punishment cannot "be imposed under sentencing procedures" that create a "substantial risk that it would be inflicted in an arbitrary and capricious manner" (*Id*. at 188). According to the justice, the Court has long recognized that "there be taken into account the circumstances of the offense together with character and propensities of the offender" (*Id*. at 189). And while the justice acknowledges that

there exists no set formula to accomplish this goal, he identifies three procedures to make its achievement probable:

(1) A bifurcated trial, where the "question of sentence is not considered until he determination of guilt has been made" (*Id*. at 191),

(2) Sentencing guidelines, which personalize the offender and allow juries to consider mitigating and aggravating circumstances, and

(3) The "safeguard of meaningful appellate review", "to ensure that death sentences are not imposed capriciously or in a freakish manner" (*Id*. at 192).

Justice Stewart then explicitly considers Georgia's capital statute, and finds it has met all three criteria. First, the state has required bifurcated trials, separating the guilt and sentencing phases. Second, Georgia juries are now authorized to consider aggravating and mitigating circumstance when deciding the penalty of death; thus, "no longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt…without guidance or direction" (*Id*. at 196). Finally, the Georgia statute allows for automatic appellate review of all death sentences to the state Supreme Court. As Stewart remarks,

> On their face these procedures seem to satisfy the concerns of *Furman*. 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 is not (*Id*. at 198).

The justice ends his opinion by considering the petitioner's continued objections, and finds them legally meritless. The petitioner's first argument—that discretion remains throughout capital sentencing, from the prosecutor's decision to plea bargain to the possibility of executive clemency—Stewart declares an overreach. According to the justice, *Furman* only dealt with arbitrariness at the jury level, which is fully satisfied by Georgia's novel statute. Stewart next dismisses the petitioner's claim that Georgia's

statute is "so broad and vague" that it will allow arbitrariness and capriciousness to continue unabated (*Id*. at 200). The statute's language is clearly constructed to the justice, and he assumes the Supreme Court of Georgia will protect against any absurd or incoherent interpretations. As Justice Stewart concludes,

> The new Georgia sentencing procedures…focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant…in this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines (*Id.* at 201).

Woodson and Waxton v. North Carolina

Justice Stewart's opinion in *Woodson* seems considerably more attitudinal than his legalistic, precedent-based reasoning in *Gregg*. Of course, this is impossible to determine from his written opinion alone, testifying to the importance of considering multiple streams of data.

In *Woodson,* Justice Stewart carefully considers whether North Carolina's revised death penalty statute is constitutional in light of *Furman,* and concludes that it is not. This is for two primary reasons. First, as the history of mandatory sentencing indicates, such penalties violate contemporary standards of decency. According to the justice, mandatory sentences were common throughout the nineteenth century and resulted in widespread jury nullification, since people were unwilling to condemn every supposed murderer to death. This led legislators to establish sentencing guidelines in the first place, granting juries "sentencing discretion in capital cases" (428 U.S. at 292). As Stewart remarks,

> The history of mandatory death penalty statutes in the United States…reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. The two crucial indicators of evolving standards of decency in our

> society—jury determinations and legislative enactment–both point conclusively to the repudiation of automatic death sentences (*Id*. at 292-293).

A second "constitutional shortcoming" of mandatory sentences is their failure to properly individualize capital defendants (*Id*. at 304). This is clearly in violation of *Furman,* the purpose of which was to streamline and channel the sentencing process.

According to the justice,

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind (*Id*. at 304).

Such a process

> treats all persons convicted of a designated offense not as uniquely individualized human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death (*Id*. at 304).

According to Stewart, North Carolina continues to homogenize its defendants, and has therefore failed to resolve the issues highlighted in *Furman*. By not individualizing the offender and the offense, the state has essentially turned its back on a "progressive and humanizing development" (*Id*. at 304). The justice thus concludes his opinion by invoking the extralegal concept of social and political humaneness.

B. Public Records

Public records reveal that Justice Stewart was personally opposed to capital punishment, having acknowledged in a rare interview that he would vote against it as a legislator (Bendiner, 1983). The justice's earliest written opinion on the death penalty, that of *Witherspoon v*. *Illinois* (1968), further foreshadowed what would eventually

become two of his main foci in capital cases: The importance of considering "contemporary standards of decency" when interpreting the Eighth Amendment, set against his own personal distaste for such a severe sanction. As Stewart (somewhat inaccurately) remarked in his opinion in this case, since "less than half" of Americans believed in capital punishment, a "jury composed" exclusively of its supporters would speak only "for a distinct and dwindling minority" (391 U.S. at 520).

As mentioned earlier, even more striking was the justice's solitary footnote in *Witherspoon,* in which he openly criticized supporters of capital punishment. Quoting Arthur Koestler, Stewart drew a distinction between those with and without charity, admonishing the latter to better recognize their fellow human beings. According to him

> The division is not between rich and poor, highbrow and lowbrow, Christians and atheists: it is between those who have charity and those who have not…The test of one's humanity is whether one is able to accept this fact—not as lip service, but with the shuddering recognition of a kinship: here but for the grace of God, drop I (*Id.* at Footnote 17).

Yet Stewart himself was pointedly unable to have "charity" in *McGautha v. California* only three years later, joining the majority opinion upholding the constitutionality of discretionless sentencing.

The justice's initial comments during oral arguments in *Furman* further failed to show much sympathy to abolitionists, focused around whether legislatures had mandatory sentences and skeptically questioning how contemporary standards of decency could most accurately be gauged. The public's seeming distaste for the death penalty may have influenced his more liberal colleagues, but this fact apparently held little weight with Stewart. As the justice explained in his brief opinion, he was far more affected by capital punishment's random imposition; the penalty was cruel and unusual not for its

dwindling popularity, but for its arbitrary and capricious administration.

C. Archival Accounts

Justice William Brennan, Jr.'s case histories, recorded privately by his law clerks during the *Furman* proceedings, reveal Stewart as a justice in considerable intellectual turmoil. As the case histories reveal, Stewart was personally opposed but legalistically mixed on capital punishment. The justice's personal opposition to the death penalty was profoundly Kantian; he did not oppose capital punishment for reasons of race or potential innocence, but rather found it "impermissible" simply "because it treated people as objects" (Brennan, 1971, p. cxli). Although Stewart was personally convinced that capital punishment was immoral, he nevertheless remained unsure as to how this could be constitutionally justified.

According to one of Stewart's clerks, at the beginning of the 1971 term Stewart remained conflicted, and "wished cert had" simply "never been granted" in *Furman* and *Aikens* (p. cxlix). Yet as the year wore on, the justice's personal feelings began to color his more legalist inclinations. According to this same clerk,

> It began to weigh heavily on him (Stewart) that 700 people would die after a decision upholding it. Eventually, he just decided that he could not vote to uphold it. After the argument, his position became stronger and stronger (p. clix).

Stewart's original approach in *Furman* was to initially join Brennan, and simply find the death penalty "cruel and unusual" in treating "people as things" (Brennan, 1971, p. cxliv). The justice further contemplated declaring capital punishment "suspect", alleging that "the death penalty had all the indicia of cruelty and unusualness" and "therefore it was up to the State to justify it" (p. cxxxix). This was further reflected in a

memo to Brennan, in which Stewart remarked that anything "severe, offensive, and arbitrary" the State must prove to be necessary (p. cxlii).

Although convinced that capital punishment was both morally problematic and constitutionally archaic, Stewart ultimately ended up in the Court's center rather than with Brennan on its left. As Brennan's case notes reveal, the reason for the justice's moderation lay down the hall, in the office of Justice Byron R. White. As will be detailed in greater depth below, White was also personally and constitutionally conflicted on capital punishment. Stewart and Brennan desperately sought to lobby him to their side, with the more centrist Stewart taking the lead (p. cxlvi). Yet Stewart had to modify his own opinion in order to appease the more conservative justice. This revision theoretically allowed capital punishment to continue, but also severely restricted its imposition. As one Stewart clerk recalls in Brennan's case histories:

> Over and over Stewart said that White was about to join (the more conservative) Lewis Powell if Stewart didn't come up with a narrower ground than an outright ban on the death penalty. So Stewart ended up with not reaching mandatory sentences in order to get White. In their meeting on June 9, they had agreed that both would write along those lines (p. cxlix).

Although less overtly ideological, Stewart's comments in *Furman* conference reveal someone equally unbending in his opposition to the death penalty, and convinced that history itself was behind him: "Someday the Court will hold the death penalty to be unconstitutional. If the Court holds it constitutional in 1972 it would delay its abolition" (Brennan Conference Notes, *Furman v. Georgia,* 1972). This makes his remarks in *Gregg* conference all the more remarkable; openly admitting that his earlier belief in "death statutes" as "dead letters" had proven woefully incorrect, Stewart proclaimed Georgia's and Florida's revised systems "constitutionally tolerable" (Brennan Conference

Notes, Blackmun Conference Notes, *Gregg v. Georgia*, 1976).

D. *The Brethren*

Similar to Brennan's case histories, *The Brethren* portrays Justice Stewart as deeply conflicted by the issue of capital punishment. While morally troubled by the death penalty, the justice thought abolishing it altogether legally dubious. According to Woodward and Armstrong, Stewart wanted to "take a smaller step" in *Furman,* attacking the "current administration of the laws" as profoundly unfair (p. 260). In doing so, Stewart believed he could abolish capital punishment indirectly, as states would be unwilling to spend the time or money revise their capital statutes. When the states began enacting new death penalty laws, however, Stewart quickly and despondently "realized that he had miscalculated" (p. 525). Still unwilling to abolish capital punishment entirely, yet morally troubled by mandatory sentencing, the justice subsequently staked out a moderate position.

E. Interviews

Interviews with Stewart's law clerks generally support the picture painted in Brennan's extensive case histories and *The Brethren*. According to William H. Jeffress, "Justice Stewart was strongly affected by the moratorium—he often discussed how many people were currently on death row and what the consequence of *Furman* would be" (10/12/09). Benjamin Heineman, Jr. remembers that "Stewart had a lot of doubts about the death penalty", and during the spring of 1970 the justice actually drafted an opinion declaring capital punishment to be "cruel and unusual", but (for whatever reason) found it legally wanting (10/23/09). According to Heineman,

> Upon leaving the Furman conference Stewart announced that he wanted to strike down the death penalty, but wasn't sure how. I wrote an opinion for him rejecting capital punishment and criticizing retribution. Stewart thought it was powerful but didn't agree retribution was an illegitimate justification for punishing someone. He consequently rejected this opinion and wrote another.[32]

Both the justices' *Furman* and *Gregg* clerks believe Stewart thought his compromise with White and subsequent *Furman* opinion would effectively end capital punishment. Robert L. Deitz speculates that Stewart figured *Furman* would set up so many "bells and whistles for legislatures to jump through" they would abandon the effort altogether (10/14/09). When this proved inaccurate, Ron Stern recalls the justice being genuinely surprised, even "shocked", by the public's newfound embrace of capital punishment (11/18/09). Stern further recalls that

> Stewart was deeply affected by how society reacted following *Furman;* it was far stronger than he ever expected...Particularly surprising to the justice were the mandatory sentences, which Stewart still refused to believe…adequately reflected their state's public opinion.

Stern details a much simpler process in *Gregg* than the compromises staked out in *Furman*. This former clerk recalls that

> Unlike in *Furman*, Stewart did not wrestle or struggle with *Gregg…Gregg* was a foregone conclusion following the legislative reaction in *Furman*…[T]he oral arguments in this case were therefore not terribly relevant to how the cases were eventually decided.

According to Stern, the justice "effectively recognized" that reversing all thirty-five statutes would be a blatant example of "judicial overreach", especially since it was he who had laid their groundwork. While Stewart may still have personally favored

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[32] As discussed in the Brennan section, this eventually came to comprise Justice Brennan's *Furman* opinion.

abolishing the death penalty, the justice, "being a good lawyer…felt constrained by the law" which he had helped to create.

Stewart's legalist philosophy was perhaps the most commonly repeated theme throughout the various interviews. All four clerks and the justice's son (3/23/10) stressed his incredible admiration for the judicial restraint of Justice John Marshall Harlan[33] and his abiding reliance on precedent. According to William H. Jeffress, Stewart was primarily "concerned about the overreach of judicial power", and always careful "not to upend the law" or "go too far": "Potter Stewart was really a human being, and did not have a rote judicial philosophy like Thomas and Scalia. He thought of himself as a lawyer and there were a lot of gray areas".

Ron Stern characterizes Stewart's jurisprudence as one of caution: "Stewart had a very modest view of the Court's role in a democracy; it should protect those individual liberties guaranteed by the Constitution and stay its hand otherwise". Benjamin Heineman, Jr. also cites Stewart's belief that he was always in a "classic dialogue with other branches of government", and Deitz echoes this, remarking that the justice would have been unlikely to go off the legislative or public radar". According to Potter Stewart, Jr., his father always focused intensely on the case at hand, and was especially careful to limit its potential ramifications. This again explains the justice's decision in *Gregg*: There would be nothing more radical than reversing his own precedent, and Stewart therefore felt little choice but to reinstate capital punishment.

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[33] With one clerk even suggesting that this may have been his primary influence in *McGautha*.

Summary

Although Justice Stewart explicitly opposed capital punishment for its arbitrariness, this was an ad hoc rationalization—a move made to accomplish his overriding Kantian concerns. The justice cared less about the penalty's capriciousness than its very existence. Simply joining Justices Brennan and Marshall in *Furman* would have resulted in capital punishment's discretionless continuance, however, since White would then vote to create a conservative majority. Stewart had to make a decision: Either stand on principle or bend to strategy, moderating his more liberal inclinations to form a center with White.

There exist two conceivable explanations for Stewart's choice of the latter. First, as *The Brethren* and the justice's clerks indicate, Stewart may have believed that establishing stringent standards would abolish the death penalty through other means, influencing states to abandon capital punishment altogether rather than spend the time and money on adopting refurbished sentencing guidelines. Second, Stewart may have felt the death penalty could well return but he had at least helped limit and constrain its imposition, and essentially done everything he could to ameliorate its entirely discretionless practice.

Regardless, by the time of *Gregg,* capital punishment had returned, and the justice likely felt little choice but to endorse a system he had (however halfheartedly) helped to create. The American people had made clear that the death penalty was simply not going away, and was now more popular than ever. Many legislatures had responded by attempting to fulfill the justice's *Furman* conditions, and it would be nonsensical to spurn

them. The justice likely felt unable to oppose his own decision, no matter how much he may have abhorred its consequences.

Stewart's Kantian concerns undoubtedly remained relevant, however, manifesting themselves most clearly in his *Woodson* opinion and the justice's firm rejection of mandatory sentences. Following the justice's negotiations with White in *Furman,* one of Brennan's clerks remarked that Stewart was pacing around his office like a "caged tiger" (Brennan, 1971, p. cliii). By the time of *Gregg*'s resolution, this description seems only half-accurate: The justice may have felt little choice but to endorse demands he only minimally supported, but certain principles clearly remained beyond compromise.

Despite his legalistic inclinations, Stewart's opinions in *Furman* and *Gregg* involved both strategic and attitudinal motivations. The justice's original position against the death penalty was entirely ideological; he could not stomach any punishment that "treated people as objects", and was willing to strike it down for this reason alone. Yet Stewart's eventual decision in *Furman* was undoubtedly strategic; he needed White on his side, and altered his own opinion accordingly. It was only in *Gregg* that Stewart's legalist principles fully surfaced, yet here he had little choice: Abolishing the death penalty would have been a blatantly ideological act, and would have clearly contradicted his professed belief in judicial restraint. An attitudinal kernel remained, however, in Stewart's final stand against mandatory sentencing. As Robert L. Deitz neatly summarizes, "Justice Stewart was not an everything or nothing guy". The justice therefore presents a varied picture for scholars of Supreme Court decision making, perhaps most closely resembling Richard Posner's mixed theory of judicial pragmatism, having incorporated a variety of legalist, attitudinal, and institutional concerns.

Justice Lewis F. Powell, Jr.

A. Written Opinion

Justice Powell, joined by Justices Stewart and Stevens, announced the Court's plurality opinion in *Proffitt v. Florida*. He further joined Justices Stewart and Stevens in *Gregg, Jurek, Woodson,* and *Roberts*.

Proffitt v. Florida

In *Proffitt v. Florida*, which was modeled after the *Gregg* opinion, Justice Powell concludes that Florida, like Georgia and Texas, has fully satisfied *Furman*'s sentencing concerns. Whether this opinion is driven by genuine legalism or interpretive institutionalism, however, is impossible to determine from the justice's written remarks alone.

As Powell summarizes, in response to *Furman v. Georgia,* the Florida legislature adopted (1) a bifurcated trial, (2) sentencing guidelines allowing juries to consider mitigating and aggravating circumstances, and (3) automatic appellate review to the Florida Supreme Court whenever the death sentence has been imposed. "The basic difference between the Florida system and the Georgia system is that, in Florida, the sentence is determined by the trial judge, rather than by the jury" (428 U.S. at 252). According to the justice, while this is a notable difference, it is one without constitutional significance: While juries may play an important "social function" in capital sentences, the Court "has never suggested that jury sentencing is constitutionally required".

Justice Powell ends his opinion by dismissing the petitioners' continued objections that (1) "arbitrariness is inherent in the Florida criminal justice system" and (2) "the new Florida sentencing procedures…do not eliminate the arbitrary infliction of

death" (*Id*. at 254). Regarding the former, "as noted in *Gregg,* this argument is based on a fundamental misinterpretation of *Furman*". Regarding the latter, "the directions given to judge and jury by the Florida statute are sufficiently clear and precise". As the justice concludes,

> Florida, like Georgia, has responded to *Furman* by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death (*Id*. at 259).

B. Public Records

In his biography of Justice Powell, John C. Jeffries, Jr. (1994) notes that the former president of the American Bar Association came to the Supreme Court without any fixed legal or political position on capital punishment. As Powell personally explained to Jeffries, he was neither "enthusiastically for" nor "categorically against" the death penalty, but fiercely "rejected the extremes on both sides" (p. 409). Before arriving on the Court, Powell's only relevant comment on the matter was in a brief 1966 memorandum on criminal policy. Recognizing that the number of executions was steadily dwindling, Powell proclaimed that capital punishment was "not one of large dimensions nor of first importance in terms of the administration of criminal justice" (p. 409).

Perhaps because of his marked indifference to the issue, Powell's written opinion in *Furman* was a measured and relatively passionless call for judicial restraint. Declaring that both original intent and a long line of precedent constitutionally legitimated the death penalty, the justice thought it a matter best left to state legislatures. And while Powell acknowledged that the penalty could be discriminatorily applied, he thought this would logically indict the entire criminal justice system. Concluding that the *Furman* majority

had simply gone too far, the justice openly accused it of lacking "faith and confidence in the democratic process" (p. 464).

C. Archival Accounts

Powell's comments during conference in *Furman* strongly resemble his written opinion. Remarking that "in eight of their previous cases" the Court had found capital punishment perfectly constitutional, he warned against going "too far" and usurping the role of the legislature. Internal memorandums further reveal that Powell most appreciated Blackmun's dissent (408 U.S. at 92), but found it "too personal" to join (Powell *Furman* Memorandum, June 17, 1971). Yet the justice was more disturbed by racial disparities than his written opinion suggests, admitting in conference that the death penalty could be "cruel and unusual" when clear racial biases were present. Nevertheless, Powell still refused to concede that this made the penalty itself unconstitutional, reasoning that African-Americans' increasing prevalence on capital juries would eventually eliminate the problem of systemic discrimination (Brennan Conference Notes, *Furman v. Georgia,* 1972).

Considering his firm stance in *Furman,* Powell's conference comments in *Gregg* are somewhat mystifying. Unlike Blackmun or Burger, who consistently labeled *Furman* "bad law", Powell now complimented the majority's decision in the previous case. Declaring that "*Furman* had served a purpose" through eliminating arbitrariness and providing "salutary review", the justice labeled it "binding precedent" (Brennan Conference Notes, Blackmun Conference Notes, *Gregg v. Georgia*, 1976). Although Powell believed "capital punishment a lawful response for security", he further thought

North Carolina's statute had gone "too far" and should be abolished,[34] a stance at considerable odds with his previous deference to state legislatures.

D. *The Brethren*

In *The Brethren,* Powell's shift in perspective from *Furman* to *Gregg* is discussed at considerable length. The authors confirm that Powell had never really pondered the morality or efficacy of capital punishment before arriving on the Court. The justice was sympathetic to claims of racial discrimination, but believed such cases better handled on an individual basis. Powell ultimately thought it an "extreme example of judicial activism" to claim the death penalty was unconstitutional, and penned as legalistic an opinion as possible (p. 258).

Although the justice remained confident that his *Furman* opinion was legally valid, the authors reveal that Powell, like Stewart, was deeply troubled by *Gregg*'s implications, or that a single decision would potentially lead to the execution of over six hundred people. While Powell was bothered by the prospect of a "wholesale slaughter", however, he was equally concerned by the prospect of annulling the wishes of thirty-five legislatures through a single judicial decree (p. 525). Originally believing that Stevens and Stewart planned to abolish the death penalty, Powell was pleasantly surprised by their votes in conference. Sharing the two justices' personal disdain for mandatory sentencing and such statutes' potentially high execution rate, he thus joined Stewart's middle ground: to uphold those statutes that clearly followed *Furman,* while eliminating the few that seemed overly harsh. The justice effectively sought to reconcile his legalist

[34] Interestingly, memorandums reveal that Powell voted to hear cert in every case but North Carolina's, as it dealt with felony murder and was therefore not "clean enough to warrant a hearing" (Powell, 1976).

and attitudinal inclinations, respecting legislative will while preventing mandatory sentences and the "wholesale slaughter" they would conceivably result in.

E. Interviews

The neat narrative told by Woodward and Armstrong is mostly supported by interviews with Justice Powell's law clerks. According to John C. Jeffries, Jr., the justice had no "fixed view" on capital punishment when he first came to the Court:

> I'm confident that if Powell had confronted the constitutionality of the death penalty before going to the Court, he would have thought it constitutional because of its long history and because of the language of the Due Process Clauses. But he never had occasion to confront the issue. So the constitutionality of capital punishment was for Powell—like many other constitutional issues—unexamined territory when he went on the Court. That's not to say that he wouldn't have had an instinct but only that he didn't have a settled opinion (12/10/10).

Larry Hammond, who actually wrote Powell's opinion in *Furman,* notes that

> Powell knew very little about criminal law when first arriving on the Court…From the beginning Powell admitted he was weakly against the death penalty, and as a legislator would vote against its implementation. That being said, he also found no constitutional grounds to justify its abolition, and mentioned this to me a number of times. Powell was most troubled by the idea of tampering with a penalty that that had not only been around since the Republic's founding but was also widely supported by the American public (11/09/09).

Over time this position only hardened. While Powell thought the penalty's "cost was absurd" and "the nation would be better off without it", the justice constitutionally supported "its imposition". As Hammond completed *Furman,* "Powell became more and more wedded to this position". According to this former clerk,

> When Stewart and White eventually sided against Powell (in *Furman*) he was distraught, and this was only magnified when I revealed I would also have come out constitutionally against the death penalty as well!

Hammond further reveals that, unlike Stewart, Powell believed the death penalty would inevitably return, and by the time of *Gregg* became increasingly anxious to determine its newfound constitutionality. Yet Powell's viewpoint had also changed substantially in the interim. As Hammond recalls, the justice had become particularly interested in matters of counsel, and "capital punishment's failure to provide adequate representation to defendants". In fact, "he once proposed waiving habeas altogether if states provided adequate funding to improve counsel".

This paints an even more complicated picture than that of Woodward and Armstrong. The justice was not only concerned with "pulling the switch" on over six hundred lives, but also uncomfortable with how those lives ended up at risk. Hammond further denies that Powell's stance on *Gregg* was purely based on respecting *Furman* as precedent. According to him, Powell saw "*Gregg* as a way to address his own personal concerns with the death penalty", and especially regarding issues of legal representation:

> Following *Furman,* Powell thought Gregg could be used to temper problems he saw with the death penalty; he believed that by tempering aggravators and mitigators arbitrariness could be substantially reduced, and was therefore proud to join with Stewart and Stevens…If defendants weren't going to receive the level of counsel he desired, he could at least try and make capital trials fairer by joining with Stewart and Stevens in order to reduce jury discretion.

While Powell was unwilling to "constitutionally strike down capital punishment", he thought that "*Gregg* could be used to improve the way it was administered".

Summary

Both Powell and Stewart's opinions contained a mix of legalist, strategic, and attitudinal motives. Powell began as a pure legalist, even openly chastising the majority for acting like a "superlegislature" (Woodward and Armstrong, 1979, p. 533). By the time of *Gregg,* however, Powell was increasingly disturbed by the ramifications of reinstatement, and the gnawing concern that those on death row had been insufficiently represented. Although unwilling to entirely shed his legalist skin, Powell's model of decision making changed dramatically: The justice now saw *Furman* as more opportunity than problem, and used *Gregg* to alleviate his own attitudinal concerns with capital sentencing.

Justice John Paul Stevens

A. Written Opinion

Justice Stevens, joined by Justices Stewart and Powell, announced the plurality opinion in *Jurek v. Texas* and *Roberts v. Louisiana*. He also joined Justices Stewart and Powell in *Gregg, Proffitt,* and *Woodson*.

Jurek v. Texas

In *Jurek v. Texas,* which was modeled after the *Gregg* opinion, Justice Stevens concludes that Texas, like Georgia and Florida, has fully satisfied *Furman*'s sentencing concerns. As with Stewart and Powell, whether this opinion is driven by genuine legalism or interpretive institutionalism, however, is impossible to determine from the justice's written remarks alone.

As Justice Stevens summarizes, in response to *Furman v. Georgia* the Texas legislature adopted (1) a bifurcated trial, (2) sentencing guidelines allowing juries to consider mitigating and aggravating circumstances, and (3) automatic appellate review to the Texas Supreme Court whenever the death sentence is imposed. The justice recognizes that, while

> Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may never be imposed serves much the same purpose (428 U.S. at 270).

Justice Stevens continues his opinion by dismissing the petitioners' continued objections: (1) "that arbitrariness still pervades the entire criminal justice system of Florida" and (2) that Texas's sentencing procedures "are so vague as to be meaningless" (*Id*. at 274-275). Regarding the former, as declared in *Gregg,* this argument "fundamentally misinterprets the *Furman* decision" (*Id*. at 275). Regarding the latter, while Stevens recognizes that Texas's statutory language may be difficult, this does not make its interpretation impossible. As the justice remarks, the "task that a Texas jury must perform in answering the statutory question" is "no different from the task performed every day throughout the American criminal justice system". Stevens concludes that "Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law" (*Id*. at 276).

Roberts v. Louisiana

Similar to the opinion in *Woodson,* Justice Stevens's *Roberts* opinion seems considerably more attitudinally than legalistically driven. Of course, this is impossible to

determine from the justice's written opinion alone, again testifying to the importance of considering multiple streams of data.

In *Roberts,* Justice Stevens determines that Louisiana's revised death penalty statute is unconstitutional in light of *Furman*. Similar to North Carolina, the Louisiana legislature "changed its discretionary statute to a wholly mandatory one", requiring capital punishment to be imposed "whenever the jury finds the defendant guilty…of first degree murder" (431 U.S. at 329). The justice first outlines two major differences between Louisiana and North Carolina's capital statutes. Whereas the former's "includes any willfully, deliberate, and premeditated homicide and any felony murder", the latter's is limited to five specific categories of homicide (*Id*. at 332). Second, Louisiana "employs a unique system of responsive verdicts", in which juries are instructed in the difference between first- and second-degree murder, a process entirely absent within the North Carolina statute. As Stevens recognizes, "Louisiana has…adopted a different and somewhat narrower definition of first-degree murder than North Carolina".

Nevertheless, Justice Stevens declares Louisiana's capital statute substantively similar to North Carolina's, and therefore constitutionally inadequate. First, according to the justice,

> The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute (*Id*. at 333).

And second,

> Louisiana's mandatory death sentence statute also fails to comply with *Furman*'s requirements that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and

> capricious imposition of death sentences (*Id*. at 334).

According to Justice Stevens, Louisiana's statute lacks standards to guide the jury "in sentencing among first degree murderers", and invites jurors "to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate" (*Id*. at 335). As his opinion concludes,

> There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions. The Louisiana procedure neither provides standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's *de facto* sentencing discretion.

B. Public Records

Since Justice Stevens only recently retired from the Supreme Court, little archival information is available on his early death penalty jurisprudence. While a judge on the Seventh Circuit, Stevens neither encountered any capital cases nor openly discussed his thinking on the death penalty (Barnhart and Schlickman, 2010). During his 1975 confirmation hearings, the future justice was noticeably vague on the issue: When asked by Senator Edward Kennedy if he thought capital punishment was an effective deterrent, Stevens merely remarked that his "first reaction" might differ tremendously from his decisions on the Court (p. 213).

While personally skeptical of capital punishment's efficacy, Stevens's biographers claim his early death penalty jurisprudence was relatively unformed (Barnhart and Schlickman, 2010). In recent years Stevens has made his position considerably clearer, highlighting the death penalty's "potential for error" and repeatedly declaring that the "country would be much better off" without it (Pallasch, 2004). The

justice has still maintained capital punishment's constitutionality,[35] however, adopting a clear position of judicial restraint.

C. Archival Accounts

During the *Gregg* conference, Stevens advocated a position quite similar to that of Powell's; according to the justice, "*Furman* is law for me" (Brennan Conference Notes, Blackmun Conference Notes, 1976, *Gregg v. Georgia*). Considerably less legalistic were the justice's comments on *Woodson*: Declaring the North Carolina statute a "monster", Stevens labeled anything that increased executions "abhorrent".

D. *The Brethren*

The Brethren portrays Stevens as a confident but freshly arrived justice, who felt most naturally inclined toward the centrism of Stewart and Powell. The authors cite Stevens's reference to North Carolina's statute as a "monster", claiming he considered it a "lawless use of the legal system" (p. 528). The justice refused to oppose capital punishment altogether, however, and therefore found Stewart and Powell's position the most accommodating. While Stevens agreed with the two elder justices in *Gregg,* Woodward and Armstrong claim he was also deeply troubled by acting as a "superlegislature", handpicking the most appropriate statutes for states to institute (p. 533).

Summary

With so little information available, it would be inappropriate to tie Stevens's decision in *Gregg* to any particular model of judicial decision making. The justice's

[35] Until relatively recently, actually (see *Baze v. Rees*, 553 U.S. 35, 2008; Liptak, 2010).

personal disdain for *Woodson* hints at an attitudinal influence, although his respect for precedent fits more within a legalist framework. At the time of these decisions, Stevens was undoubtedly still finding his footing on the Court, and cautious not to go too far in either direction. The moderation of Powell and Stewart and his inexperience with capital cases were likely the largest influences on the newly arrived justice. As Stewart clerk Ron Stern asserts (11/18/09), while Stevens's recent arrival made him unpredictable, he eventually "followed Powell and Stewart's lead", a fact made clear in both the *Jurek* and *Roberts* opinions.

The Center: Overall Summary

Although publicly united in their *Gregg* opinions, Justices Stewart, Powell, and Stevens's motivations varied significantly. Justice Stewart was torn between his personal distaste for capital punishment and his belief in judicial review: Justice Powell was primarily concerned with providing adequate counsel for capital defendants while also respecting precedent; and Justice Stevens was cautiously transitioning into his new responsibilities on the Court, seemingly comfortable to follow the two elder justices' lead.

The Right

Justice Byron R. White

A. Written Opinions

Justice White, joined by Chief Justice Burger and Justice Rehnquist, concurred with the plurality's opinion in *Gregg, Proffitt,* and *Jurek,* and dissented alongside Burger and Rehnquist in *Woodson* and *Roberts*.

Gregg v. Georgia

Justice White's brief opinion in *Gregg* is considerably more attitudinal than that of Justice Stewart's, focused on the policy inspired in *Furman*'s wake rather than whether it has been properly treated as precedent. Nevertheless, the justice's opinion begins with a legalistic review of Georgia's statutory schema, declaring that the state's legislature "has plainly made an effort to guide the jury in the exercise of its discretion", and thereby adequately attempted to prevent capital punishment from being administered in a "discriminatory, standardless, or rare fashion" (408 U.S. at 222).

Justice White next focuses on the petitioner's claim that there is an "unconstitutional amount of discretion" in the entire system of capital sentencing. According to White, "This seems an indictment of our entire system of criminal justice", and makes little constitutional or practical sense. The justice then takes a more results-oriented stance, recognizing that while mistakes will undoubtedly be made, "one of society's most basic tasks" is protecting the lives of its citizens, and "one of the most basic ways in which" this task is achieved is "through criminal laws against murder" (*Id*. at 226). As the justice concludes,

> I decline to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner.

Roberts v. Louisiana

Justice White's dissent in *Roberts* seems a mix of attitudinal and legalistic concerns. While the justice details how Louisiana has adequately respected the precedent established in *Furman,* he also expresses concern in achieving the "legitimate ends of criminal justice", a result-oriented rather than purely formalist approach to jurisprudence (428 U.S. at 355).

White begins his opinion by framing the petitioners' objections: First, that the "statute under which" Roberts was sentenced differs little from that of Furman's, and second, that "death is a cruel and unusual punishment for any crime committed by any defendant under any conditions" (*Id*. at 345). The justice's *Furman* decision was primarily driven by capital punishment's increasing infrequency, and its consequent inability to serve the "legitimate ends of criminal justice". By making the death penalty compulsory for first-degree murder, the Louisiana legislature has adequately eliminated the jury's discretionary powers, and alleviated White's *Furman* concerns. Juries will now sentence more defendants to death, and capital punishment will once again serve a deterrent and retributive function.

The justice further finds the plurality's concerns of jury nullification considerably overblown. First, while certain juries may violate their instructions and choose to nullify, rejecting mandatory sentencing altogether seems a disproportionate measure. Second, White believes the plurality's decision is internally inconsistent. According to the justice,

> If it is truly the case that Louisiana juries will exercise too much discretion…then it seems strange indeed that the statute is also invalidated because it gives the jury too little discretion by making the death penalty mandatory (Id. at 360).

Finally, Justice White disputes the plurality's picture of mandatory sentence's historical rejection: "The fact that juries at times refused to convict despite the evidence" does not necessarily imply a widespread repudiation of mandatory measures, but may have simply resulted from a number of individually obstinate jurors (*Id*. at 361).

The justice steeps his opinion's conclusion in explicitly legalistic rhetoric. According to White, while the plurality may prefer a "different system", the "issue is not our individual preferences but the constitutionality of the mandatory sentences chosen by these two states" (*Id*. at 363). As the justice concludes,

> The plurality claims that it has not forgotten what the past has taught about the limits of judicial review; but I fear that it has again surrendered to the temptation to make policy for and attempt to govern the country through a misuse of the powers given this Court under the Constitution.

B. Public Records

Justice White's written opinion in *Furman* stands out for its uniqueness. According to White, since capital punishment was so infrequently implemented, it failed to serve as any more effective a deterrent than life imprisonment. This lack of penological justification made the death penalty both wanton and unnecessary, and therefore cruel to impose. In White's view, states should provide guidelines to increase the number of executions or abolish them altogether, and the former was successfully fulfilled in all five state's newly refurbished capital statutes.

Unlike many of his colleagues Justice White never publicly disclosed his attitudinal feelings on capital punishment. The justice was (almost absurdly) cryptic when

discussing *any* of his political positions, once remarking to a reporter that "being a conservative or a centrist is all in the minds of the speaker. It just depends on what you think—and if you think I'm one, you're right, but other people might think I'm something else and they're right" (Hutchinson, 1998, p. 444).

C. Archival Accounts

Justice White's comments during conference in *Furman* reveal a similar position to that contained in his written opinion: Since the death penalty's infrequency prevented it from "killing those who should be killed", White believed it presently "unfair" and "impermissible" (Brennan Conference Notes, *Furman v. Georgia,* 1972). In the justice's opinion, if this trend continued "the community" would reject capital punishment altogether, and it either needed to be transformed or abolished. Since his objections were entirely based upon capital punishment's infrequency, White believed that each state had satisfactorily met "the test" he "had in mind" by the time of *Gregg* (Brennan Conference Notes, Blackmun Conference Notes, *Gregg v. Georgia,* 1976). As the justice told his colleagues in this conference, "I thought…that once you provide juries with standards the number of death sentences would increase, and that is what is happening".

According to Brennan's files (1971), White was rigidly quiet about his thoughts in *Furman,* even refusing to discuss the case with his closest law clerks. The justice's colleagues knew he was sympathetic to capital punishment, however, and assumed that he would uphold the Georgia statute. When Stewart and White were overheard conferring on the issue, it was actually somewhat of a surprise; Stewart's abolitionist tendencies were somewhat known, and certainly not shared by the more conservative White. While Stewart opposed his colleague's support of mandatory sentences, he still saw room for

compromise: The more liberal justice would narrow his own opinion if White did likewise, effectively eliminating discretionless sentencing in capital cases.

D. *The Brethren*

The Brethren portrays White as considerably more conflicted than his comments in conference indicated. While White was deeply impressed with Amsterdam's argument for abolition, the authors claim that he personally supported capital punishment for particularly heinous crimes.[36] Further, if the twin goals of deterrence and retribution were satisfied, the justice thought capital punishment justifiable even if "cruel and unusual". The penalty's relative infrequency prevented these penological purposes from being achieved, however, which White attributed to legislatures' failure to provide specific sentencing guidelines. According to Woodward and Armstrong, "White resented the fact that the state legislatures avoided the issue…If they wanted a death penalty, they would have to say so and enact new ones" (p. 263). The statutes reviewed in *Gregg* consequently convinced White that the states were truly serious, and would now allow the "killing of those who should be killed", increasing capital punishment's frequency and certainty.

E. Interviews

According to former Douglas clerk Richard L. Jacobson,

> More than anything else, White was a common law judge, caring more for the consequences of his decisions…than the substance of the words themselves. This was likely the case in both *Furman* and *Gregg* (11/25/09).

[36] Although impossible to verify, the authors speculate that the recent assassinations of President and Senator Kennedy, two of White's personal friends, particularly influenced his support for the death penalty.

Summary

As Robert A. Burt (1987) has aptly summarized, Justice White's positions in *Gregg* and *Furman* were

> reminiscent of the attitude expressed in some quarters about American military policy during the Vietnam War—that if we were truly engaged in war then we should be prepared to use every weapon at our disposal, but if we had no real taste for warfare then we should abandon the enterprise (p. 1770).

Following *Furman,* states had shown their commitment to the "enterprise" of capital punishment, and White refused to hinder their desires any further.

Yet was the justice driven by legalist or attitudinal concerns? As his opinion in *Furman* indicates, White was less affected by constitutional provisions than tangible results: Either capital punishment should improve society, or the nation was simply better off without it. This is further supported in *The Brethren,* where White deems capita punishment's penological purposes more important than constitutional concerns of it being "cruel and unusual". Despite the legalistic flourishes at *Robert*'s conclusion, White's position ultimately had less to do with the nature or tenor of the Constitution than the justice's attitudinal evaluation of contemporary public policy and the "legitimate ends of criminal justice".

Justice Harry A. Blackmun

A. Written Opinion

Justice Blackmun concurred with the plurality opinions in *Gregg, Proffitt,* and *Jurek,* and with the dissenting opinions in *Roberts* and *Woodson*.

B. Public Records

As a Second Circuit judge in the case of *Pope v. United States,* 372 F. 2nd 710 (1967), Justice Blackmun criticized the death penalty's lack of penological justification while also upholding its constitutionality. A 1970 interview yielded perhaps Blackmun's most succinct statement on capital punishment: admitting that as a legislator he "would plump for its appeal", the justice ultimately felt capital punishment absent from the judicial "side of our three legged stool" (Yarbrough, 2008, p. 127). Blackmun made this position even clearer in his opening paragraph of *Furman,* remarking that he yielded to no one in his "distaste, apathy, and indeed, abhorrence, to the death penalty" but could find no constitutional grounds in which to abolish it (p. 406).

C. Archival Accounts

During the *Furman* conference, Justice Blackmun admitted that he "supported evolving standards", but refused to contradict the Court's long line of precedents upholding capital punishment. Interestingly, the justice was considerably more critical of the abolitionists here than in his brief written opinion. Expressing some hesitation toward outlawing capital punishment in "treasonous acts", he acknowledged his surprise to hear nothing about the "victim's families" from the petitioners (Brennan Conference Notes, *Furman v. Georgia,* 1972). The justice also revealed that his professed legalism was shaky, however, and admitted that he might one day vote against capital sentencing[37].

Justice Blackmun's personal papers further highlight his thinking on the death penalty. Here the justice admits that even for crimes as serious as treason, he would likely vote against it as a legislator (No 69-5003, 1971). And although Blackmun found the

[37] As indeed it eventually did (see *Callins v. James*, 510 U.S. 1145, 1994).

prospect of hundreds of executions "horrifying", the justice firmly "adher(ed) to the concept that ordinarily punishment, including the death penalty, is a matter for the legislature and not for the judiciary" (1971, Memorandum No. 203 and 204, p. 1). While he was "on record as opposing the death penalty", Blackmun felt he simply "could not throw it out…on constitutional grounds".

D. *The Brethren*

Woodward and Armstrong further confirm Blackmun's legalistic mentality. Although morally opposed to capital punishment, the justice could find no constitutional reason to abolish it. Presciently, Blackmun found Stewart's incremental stance counterintuitive; such a decision could influence states to pass mandatory sentences and in his view potentially "throw penology back into the Middle Ages" (p. 264).

Summary

Justice Blackmun's stance in *Gregg* was remarkably straightforward. Although deeply and consistently against capital punishment, the justice could find no legal reason to restrict its imposition. Although Blackmun openly admitted that his legalist mentality might one day give way to his more attitudinal inclinations, throughout *Furman* and *Gregg* his stance remained textually conservative.

Justice Warren E. Burger

A. Written Opinion

Chief Justice Burger joined Justice White's concurrence in *Gregg, Proffitt,* and *Jurek*, and his dissent in *Woodson* and *Roberts*.

B. Public Records

The chief justice's opinion in *Furman* began similar to that of Blackmun's, stating that his legislative sympathies were with Brennan and Marshall. Regardless, Burger remained wholly unconvinced that capital punishment violated "evolving standards of decency", declaring capital sentencing best left to state legislatures. The chief justice even implored the states to pass mandatory sentences, a stance firmly echoed by his rigorous dissents in *Woodson* and *Roberts*.

C. Archival Accounts

While publicly silent on capital punishment, Chief Justice Burger admitted having attitudinal reservations about the death penalty in *Furman* conference, and that he would "restrict it for some types as a legislator" (Brennan Conference Notes, *Furman v. Georgia,* 1972). Yet while the death penalty was "infrequently administered", this failed to make it either "cruel or unusual" to the chief justice. Burger's remarks were even more striking during conference in *Gregg* (Brennan Conference Notes, Blackmun Conference Notes, *Gregg v. Georgia,* 1976). Whereas he previously admitted being against the death penalty for some crimes, the chief justice now said he opposed it altogether. According to Burger, this had nothing to do with issues of constitutionality, however, and he once more posited capital punishment as a purely legislative concern.

Brennan's case histories (1971) also comment on Burger's conflicting attitudinal and legalist inclinations. Although the chief justice repeatedly told his more liberal colleagues that he was personally against capital punishment, Burger distributed a series of internal memorandums harshly criticizing their respective positions. Perhaps most remarkable was the chief justice's reaction upon receiving Stewart and White's written opinions. While hostile to Brennan's constitutional framework, Burger hoped the more liberal justices' position would prevail. When presented with Stewart's and White's opinions, however, Burger felt little but despair; he predicted that the states would pass mandatory sentences, and he would have to uphold them. As the chief justice almost poignantly remarked, "I had hoped it was all behind us, and even though I think the decision would be wrong, I was really relieved—but now we will get it all back (p. cli)".

D. *The Brethren*

Woodward and Armstrong barely mention the chief justice, other than citing his distress in *Furman* at the prospect of mandatory sentences.

Summary

Chief Justice Burger's constitutional support for capital punishment has been attributed to his ideological conservatism (Schwarz, 1989; Woodward and Armstrong, 1979). Yet unlike Justices White or Rehnquist, Burger was personally critical of the death penalty. Burger remained wholly unconvinced that capital punishment violated "evolving standards of decency", however, and therefore believed capital sentencing was best left to state legislatures. The chief justice's opinion in *Gregg* thus bears the greatest similarity to that of Justice Blackmun's. Although personally opposed to capital punishment, Burger

could find no constitutional grounds on which to abolish it. Further, the chief justice's fixation on acting legalistically became a sort of ideological battle-ax, aimed squarely and unsparingly at his more liberal brethren.

Justice William H. Rehnquist

A. Written Opinion

Justice Rehnquist joined Justice White's dissent in *Woodson and Waxton v. North Carolina,* and also filed his own separate dissent in this case. He also joined Justice White's concurrence in *Gregg, Jurek,* and *Proffitt*, and his dissent in *Roberts*.

Woodson and Waxton v. North Carolina

Justice Rehnquist's solitary *Woodson* dissent is explicitly legalistic, attacking *Furman* as a glaring example of judicial activism. As with the other justices, whether Rehnquist's motives are truly legalistic or driven by more attitudinal concerns is impossible to determine from his written opinion alone.

Justice Rehnquist begins his dissent by attacking the plurality opinion as historically problematic. While the justice admits that there was "undoubted dissatisfaction" with mandatory sentences in the nineteenth century, this does not "indicate that society as a whole rejected mandatory punishment for such offenses" (428 U.S. at 311). Rather, "occasional refusals to convict may just as easily have represented the intransigence of only" a few jury members rather than the overall polity (*Id*. At 312).

Rehnquist focuses the majority of his opinion, however, on the supposed incoherence of the Court's decision in *Furman*. According to the justice, each state's

capital sentencing procedure will remain arbitrary and capricious despite the plurality's declarations to the contrary. As Rehnquist details,

> In Georgia, juries are entitled to return a sentence of life, rather than death, for no reason whatever, simply based upon their own subjective notions of what is right and what is wrong. In Florida, the judge and jury are required to weigh legislatively enacted aggravating factors against legislatively enacted mitigating factors, and then base their choice between life or death on an estimate of the result of that weighing. Substantial discretion exists here, too, though it is somewhat more channelized than it is in Georgia. Where there types of discretion are regarded by the plurality as constitutionally impermissible, that which may occur in the North Carolina system is not readily apparent (*Id*. at 314-315)**.**

Further, appellate review will do little to alleviate this endemic capriciousness:

> All that such a review of death sentences can provide is a comparison of fact situations which must, in their nature, be highly particularized, if not unique, and the only relief which it can afford is to single out the occasional death sentence which, in the view of the reviewing court, does not conform to the standards established by the legislature (*Id*. at 316).

Rehnquist concludes his opinion by deferring to *McGautha,* and Justice Harlan's earlier claim that devising adequate capital standards lay beyond the present ken of human ability. According to the justice, *Furman* "repudiates not only the view expressed in *McGautha,* but usurps every other American jurisdiction which had considered the question" (*Id*. at 321). Akin to White, the justice openly accuses the Court of substituting its own attitudinal view for those of the citizenry. As Rehnquist concludes,

> What the plurality has actually done is import into the Due Process Clause of the Fourteenth Amendment what it conceives to be desirable procedural guarantees where the punishment of death, concededly not cruel and unusual for the crime of which the defendant was convicted, is to be imposed. This is squarely contrary to *McGautha,* and unsupported by any other decision of this Court (*Id*. at 324).

B. Public Records

Although Rehnquist was relatively open about his personal conservatism, he rarely addressed the issue of capital punishment either publicly or privately. In his brief *Furman* dissent, the justice faulted the majority for acting like "a roving commission", "striking down laws" they had no constitutional role in addressing, a notion effectively repeated in *Gregg* (408 U.S. at 467). As a law clerk to Justice Robert Jackson, Rehnquist once opined that convicted saboteurs Julius and Ethel Rosenberg should be "drawn and quartered", and (supposedly) lamented this penalty's historical abolition (Lazarus, 1998, p. 140). Whether the justice was being attitudinally sincere or rhetorically provocative, however, is impossible to discern.

C. Archival Accounts

In conference during *Furman,* Rehnquist first argued that the Court had "crossed the bridge in *McGautha*", and should have simply stopped there. His next statement was considerably more telling: "If it is a good law I will follow it. As a legislator, I would keep it. I have no trouble and I affirm" (Brennan Conference Notes, *Furman v. Georgia,* 1972). During the *Gregg* conference Rehnquist gave no further indication of his personal feelings, and immediately passed his turn to the newly arrived Justice Stevens. Rehnquist's personal archives make no mention of capital punishment. Brennan's case histories (1971) on *Furman* reference the justice only once, stating that "No one had any illusions about where Rehnquist would stand" (p. cxxxviii).

D. *The Brethren*

The Brethren is also relatively quiet on Rehnquist's participation during the *Furman* and *Gregg* proceedings, save for one striking passage:

> [Rehnquist thought that] human error might result in some men being sentenced to death for no particularly good reason, perhaps even for an absolutely bad one. But the human error of wrongfully depriving a man of his constitutional rights was less severe than mistakenly striking down an otherwise constitutional statute (p. 264).

According to Woodward and Armstrong, the justice fully acknowledged fatal errors would occur, but saw violating the Constitution as "a far greater wrong than allowing one man to die".

E. Interviews

Craig M. Bradley, the only Rehnquist clerk willing to speak (albeit briefly), confirmed both Rehnquist's legalist inclinations and his relative indifference to the issue of capital punishment. According to Bradley,

> Justice Rehnquist believed that capital punishment, like so many other matters, was purely a legislative rather than a judicial concern [although] he never discussed the death penalty with any of his law clerks (11/25/10).

Summary

Because Justice Rehnquist was the only justice generally to the right of Burger, his decisions in *Furman* and *Gregg* surprised none of his colleagues. And while Justice Rehnquist seems to have personally supported the death penalty, it remains difficult to determine how deeply this affected his jurisprudence. The justice's comment in conference—that capital punishment was "good law" and he would therefore uphold it—

certainly seems attitudinally driven. And while his separate *Woodson* dissent is explicitly legalistic, this fails to invalidate the possibility of more attitudinal motivations. Most clear is that Rehnquist had very little interest in the issue, and was glad to write his opinions and move on. This most resembles H.W. Perry's "outcome model", where a justice's attitudinal intensity is determined by the personal importance of the issue before him or her. While Justice Rehnquist personally supported capital punishment and voted accordingly, his lack of interest in the topic likely explains his relative reluctance to more extensively defend this position.

The Right: Overall Summary

Conservative jurisprudence is generally defined by its rigid adherence to legalism. While this appears to be consistent with the opinions of Justices Blackmun and Burger, those of Justices White and Rehnquist are not nearly as straightforward. Both these justices' decisions seem more driven by attitudinal preference than legal consistency.

The Left

Justice William H. Brennan, Jr.

A. Written Opinions

Justice Brennan dissented in *Gregg, Proffitt,* and *Jurek,* and concurred in the judgment of *Woodson* and *Roberts*.

Gregg v. Georgia

Justice Brennan's dissent in *Gregg* is clearly attitudinally driven, predicated on the extralegal concept of human dignity rather than careful legalistic reasoning. As originally declared in *Furman,* the justice finds capital punishment per se unconstitutional. According to Brennan, it is the Court's "inescapable duty" to apply "moral concepts" to legal circumstances, and inherent in the Eighth Amendment is the "primary moral principle" that governments must treat their citizens "in a manner consistent with their intrinsic worth as human beings" (428 U.S. at 229).

The justice argues that capital punishment violates this principle for a number of reasons. First, "the calculated killing of a human being by the State" is, by its very nature, a repudiation of that individual's humanity (*Id*. at 230). Second, capital punishment is unnecessarily harsh, serving no "penal purpose more effectively than a less severe punishment". Finally, and most importantly, the death penalty

> treats "members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity (*Id*. at 230-231).

According to Brennan, this final fact alone convinces him that "death is today a cruel and unusual punishment".

B. Public Records

According to Justice Brennan's *Furman* opinion, the death penalty offended individual worth in four distinct ways: Capital punishment (1) was an "unusually severe and degrading punishment", (2) had a strong probability of being "inflicted arbitrarily", (3) had been almost entirely rejected by contemporary society, and (4) served no larger penological purpose (408 U.S. at 305). This is repeated nearly verbatim in *Gregg,* with the justice expressing deep revulsion that so many legislatures had now chosen to reenact such a morally archaic sanction.

In his speeches on the subject, the justice was careful not to couch his position as strictly ideological, but also firmly rooted in the Constitution. Brennan (1985) insisted that he had a larger "constitutional duty to the community", and this meant striving for an as "yet unrealized human dignity". According to the justice,

> Some have argued the view that the death penalty is cruel and unusual because it treats humans as objects to be hurt and then discarded is based on little more than personal opinion. But I have always attempted to justify my position by means of reasoned argument about the meaning of the vague words of the Eighth Amendment (1994, p. 8).

Yet Justice Brennan once remarked in an interview that "when it comes to state-sponsored death, there is no line" (Eisler, 1993, p. 273).

C. Archival Accounts

Justice Brennan's case histories (1971) reveal he was opposed to capital punishment well before *Furman* was argued, and deeply grateful that Justices Stewart and Marshall shared this opinion (p. ix). During conference, Brennan focused first on evolving standards of decency, and then remarked (in tandem with Stewart) that such a "highly suspect punishment" required a "compelling state interest" (Brennan Conference

Notes, *Furman v. Georgia,* 1972). Although Brennan admitted that this could change if mandatory sentences were enacted, he doubted that such an event would ever come to pass. When this occurred following *Furman,* Brennan was notably silent in conference, merely stating that "there was no justification for the death penalty" (Brennan Conference Notes, *Gregg v. Georgia,* 1976). Scholar Robert A. Burt (1987) has described Brennan's position here as one of quiet defeat; recognizing that he was now part of a losing minority, the usually gregarious justice resigned himself to silence.

D. *The Brethren*

According to Woodward and Armstrong, Brennan categorically opposed capital punishment. His reasons for doing so are (supposedly) made clear in his written opinions in *Furman* and *Gregg*.

E. Interviews

Interviews with Brennan's clerks tell a similar story to that of Robert A. Burt. According to Richard Bronstein, Brennan's views were simple and direct: "He thought the death penalty was unconstitutional in every way and in every case" (11/19/09). The death penalty's deeper affront to human dignity made it both ethically and legally impermissible. As Paul R. Hoeber echoes, "Brennan thought his opinions in *Furman* and *Gregg* were not only constitutionally but morally sound" (11/27/09).

Yet Benjamin Heineman, Jr., one of Justice Stewart's clerks, sheds some intriguing light on Brennan's death penalty jurisprudence. As mentioned previously, Heineman wrote an early *Furman* draft for Justice Stewart, who thought it powerful but unreflective of his own views. According to this former clerk,

> It took me months to write this opinion, and it was eventually rejected by Stewart. Brennan's clerks asked me for this opinion, and I gave it to them. They said Brennan liked it and asked if they could use it, and it was submitted as Brennan's opinion in *Furman* (10/23/09)

Although rejected by Justice Stewart, Brennan's clerks found Heineman's opinion adequate for their boss, and it was submitted (undoubtedly with a few revisions) as this justice's written opinion. This is not only historically interesting, but also indicative of Brennan's profoundly attitudinal motives, which rested on ideological opposition rather than constructive legalistic reasoning.

Summary

As the preceding interview indicates, Justice Brennan did not evaluate the death penalty through some reasoned constitutional analysis of the Eighth Amendment, but accepted a prewritten argument. Principle came first and justifications later, or Brennan would surely have produced his own opinion. Despite some of his public statements to the contrary, Brennan's death penalty jurisprudence was clearly attitudinal.

Justice Thurgood Marshall

A. Written Opinion

Justice Marshall dissented in *Gregg, Proffitt,* and *Jurek,* and concurred in the judgment of *Woodson* and *Roberts*.

Gregg v. Georgia

Similar to Justice Brennan's, Justice Marshall's *Gregg* opinion is driven by capital punishment's supposed violation of human dignity. This makes it unconstitutional under any and all circumstances.

Justice Marshall initially invokes his *Furman* opinion, which found capital punishment unconstitutional for two reasons: first, the penalty's excessiveness, and second, that an "informed American public" would reject the death penalty "as morally unacceptable" (428 U.S. at 232). Marshall admits that the legislative reaction in *Furman*'s wake has given him pause. Nevertheless, the justice reasserts that a truly knowledgeable citizenry, made fully aware of the death penalty's moral and procedural nature, would still spurn the ultimate sanction.

Marshall continues that, even if an informed citizenry authorized the death penalty, the punishment is unconstitutionally excessive. First, there is inadequate evidence that capital punishment is an effective deterrence. Few studies have been conducted on the death penalty, and there exists no statistical evidence to prove its efficacy. Second, appeals to pure retributivism are morally dubious. As Marshall concludes, "the taking of life because the wrongdoer deserves it surely must fall, for such a punishment has as its very basis the total denial of the wrongdoer's dignity and worth" (*Id*. at 240-241).

B. Public Records

Justice Marshall's written opinion in *Furman,* echoed in *Gregg,* stands as a bold refutation of his more conservative colleagues' repeated appeals to judicial restraint. According to the justice, capital punishment's violation of "contemporary standards of decency" actually required the Court to involve itself in legislative affairs, or it risked abdicating its role as the "ultimate arbiter of the Constitution" (408 U.S. at 359). In Marshall's view, supporting the death penalty was even "irrational", as no educated, enlightened individual would allow "purposeless vengeance" (*Id*. at 363).

The justice was surprisingly open in interviews. As Marshall explained to one journalist, as a young NAACP attorney the future justice had defended numerous African-Americans sentenced to death (Davis, 1992). One of these was a former high school classmate of his, and when Marshall failed to halt his execution, the rising lawyer took this to heart. When asked whether this event affected both his political and constitutional stance toward capital punishment, Marshall was surprisingly honest, admitting that "it did. It did because I lost the death penalty case in private practice" (p. 320). When another journalist asked Marshall if he would reject the death penalty even for the murderer of his loved one, the justice immediately replied, "That's right" (Williams, 1998, p. 360). As Justice Marshall once made clear, "On something like that [the death penalty], you can't give up and you can't compromise. It's so morally correct, I wouldn't think of giving it up" (*Washington Post,* 1983).

C. Archival Accounts

Marshall's comments in *Furman* conference focused entirely on capital punishment's violation of "contemporary standards of decency", and the death penalty's disproportionate imposition on society's minorities (Brennan Conference Notes, *Furman v. Georgia,* 1972). Like Brennan, Justice Marshall was uncharacteristically quiet in *Gregg,* merely stating that he "had not changed his mind" (Brennan Conference Notes, Blackmun Conference Notes, *Gregg v. Georgia,* 1976). Perhaps Robert Burt (1987) describes Marshall's post-*Furman* mentality the most accurately, explaining that

> The rapid response to Furman by the thirty-five legislatures seemed for Marshall to signify little more than thoughtless bloodlust, evidence that legislators and his fellow citizens were not as

> earnest, as decent as he had hoped—that they indeed had become "hardened" and "embittered" as he had feared (p. 1766).

D. *The Brethren*

In *The Brethren,* Justice Marshall is portrayed as a tireless crusader against capital punishment, most affected by the disproportionately high number of executions of African-American offenders. According to Woodward and Armstrong,

> Marshall was opposed to the death penalty in any form. He considered it the most conspicuous example of the unfairness of the criminal justice system. It almost seemed a penalty designed for poor minorities (p. 247).

The authors contend that before *Furman* was even argued, Marshall had his clerks write an opinion categorically opposing capital punishment. Following the legislative reaction in *Gregg,* Marshall was understandably demoralized, and swore to deny cert in all future capital cases.

E. Interviews

Marshall's clerks openly admit that their former boss saw *Furman* and *Gregg* as "political cases" (Diskant, 9/22/09). According to Gregory L. Diskant, "for Marshall, there was cases he cared about and ones he didn't, and for those he cared about he knew his stance". Diskant paints Marshall's jurisprudence as fundamentally attitudinal:

> He was interested in how he voted and what the outcomes were—it had to represent his views. Marshall wasn't intellectually engaged in the work of the Court except for a few cases that he passionately cared about.

The justice's clerks often knew what to write without their bosses' instructions, with capital cases given the highest priority. And here Marshall left little mystery as to where he stood; as Michael Seidman remarks, the justice "made it no secret that he was totally

against the death penalty" (3/23/10). This political stance, combined with Marshall's hypersensitivity towards minority rights, undoubtedly motivated the justice's legal schema. Diskant is even blunter, admitting that the justice's death penalty jurisprudence was principally driven by racial concerns. According to this former clerk, "to me, *Gregg* was foregone"—Marshall had simply "seen too many black men executed to support a death penalty".

Summary

Justice Marshall's opinion in *Gregg v. Georgia,* like Brennan's, was clearly based upon his personal opposition to the death penalty. As the justice once remarked, "You do what you think is right and let the law catch up" (Savage, 2010, p. 1). Interviews with both the justice himself and his clerks reveal Marshall's utter disdain for capital punishment's disproportionate infliction on minorities, and his efforts to enshrine this opposition into law. Later in life Marshall became even more openly outspoken against the death penalty, even integrating his opposition into a recurring narrative (Rowan, 2002):

> It's the old story about the man who was arguing with the hunter, and he said, "It's a shame, the way you shoot these poor little rabbits." He said, "Well, what do you complain about? You go fishing every weekend." And the guy said, "Yeah, but the fish, it doesn't hurt the fish." And he said, "Have you ever asked a fish?" Well, it's the same way about these people that are electrocuted and gassed and all. Some say it doesn't hurt them. Has anybody asked them? How do you know (pp. 386-387)?

The Left: Overall Summary

Justices Brennan and Marshall cannot be faulted for inconsistency. Both justices' stern opposition to capital punishment was continually reflected in their written statements and archival accounts. Whereas Marshall was more concerned with the specter of racial disparity, Brennan largely stressed such punishment's inherent violation of human dignity. Although slightly less attitudinal than his colleague, Brennan's professed legalism was just as ideologically driven.

III. Judicial Priorities

As explored throughout the preceding section, the individual justices' models varied significantly. Justices Brennan, Marshall, White, and Rehnquist decided attitudinally; Blackmun and Burger legalistically; and Stewart and Powell according to a mix of judicial motivations. Perhaps we can gain some greater understanding by outlining each justice's major priority in *Gregg* and then linking this with his particular jurisprudential model (see next page).

Table IV-1. Justices' Priorities in *Gregg* and their Corresponding Model

Justice	Priority	Model (see Chapter Three for complete explanations of each model)
Stewart	To Prevent People from Being Treated as Objects and To Uphold Precedent	Mixed (Pragmatic)
Powell	To Uphold Precedent and To Abolish Troubling Laws	Mixed (Pragmatic)
Stevens	To Uphold Precedent or To Abolish "Abhorrent" Laws	Unclear
White	To Punish Better	Attitudinal
Blackmun	To Prevent Judicial Overreach	Legalistic
Burger	To Prevent Judicial Overreach	Legalistic
Rehnquist	To Uphold Good Law	Attitudinal
Brennan	To Protect Human Dignity	Attitudinal
Marshall	To Limit Racial Discrimination	Attitudinal

Easiest to comprehend are the positions of Justices Burger and Blackmun. Since judicial restraint is predicated around a limited reading of the Constitution, their opinions would logically fall within a legalist framework. Justices Brennan, Marshall, White, and Rehnquist all invoked extralegal principles to justify their positions; these values were political, shaped by each person's perspective on the failure, inadequacy, or merits of capital punishment. Finally were Justices Stewart and Powell. Stewart's priority went unmet in the statute under review in *Furman,* and was consequently satisfied in *Gregg*. Powell's priority *was* met in the *Furman* statute, but adapted accordingly in *Gregg*. Both justices' priorities were contextual, and (as will be explored) perhaps this pragmatic flexibility led to their success.

IV. Findings: Overall Court Analysis

One cannot gain a full understanding of *Gregg* simply by analyzing the individual justices, but must also scrutinize the Court as a whole. This subsection first details the plurality's formation. This is done using the preceding chapter's individual analyses, as well as additional information from *The Brethren,* the justices' archives, and any relevant clerk interviews. The eight hypotheses presented in Section III are then reviewed in order to explain the *Gregg* decision. The literature on judicial decision making is generally dominated by solitary explanations for Supreme Court jurisprudence, a notion reflected in the majority of the hypotheses. As this section concludes, the *Gregg* plurality was not guided by any single criteria, but driven by a mix of attitudinal, legalistic, and institutional concerns. In Section V the larger implications of this determination are discussed, and a number of recommendations are provided for future research on Supreme Court decision making.

A. Tracing the Troika

According to a number of sources, the *Gregg* decision was rife with internal Court politics (Woodward and Armstrong, 1979; Powell, Bench Memo from Christine Whitman, 1975; Diskant, 9/22/09). While the minority attitudinalism of Brennan and Marshall, the fixed legalism of Blackmun, and the limited interest of Rehnquist prevented these justices from acting strategically, Burger and White immediately sought to take control of the Court's decision. This duo was quickly outmaneuvered by Powell, Stevens, and Stewart, however, who tempered the former justice's natural conservatism with the latter's more moderate inclinations.

Immediately following oral arguments, the justices convened and took a preliminary vote (Woodward and Armstrong, 1979; Brennan, *Gregg,* internal memorandums, 1975). According to the initial count, *Gregg* was 7 to 2 to uphold, with only Brennan and Marshall dissenting. *Jurek* was more complicated, being 5 to 3 to uphold. Here Stevens joined Brennan and Marshall in dissenting, while Stewart passed. *Proffitt* was identical to *Gregg,* with 7 to 2 to uphold, with Brennan and Marshall again in dissent. *Woodson* was 4 to 3 to 2 to strike. Brennan, Marshall, Stewart, and Stevens were in the majority, with Blackmun and Powell passing. Finally, *Roberts* was somewhat clearer, being 5 to 4 to uphold with Stevens and Stewart joining Brennan and Marshall.

Table IV-2. Justices' Initial Votes in *Gregg*

	Gregg	*Jurek*	*Proffitt*	*Woodson*	*Roberts*
Stewart	U	P	U	S	S
Powell	U	U	U	P	U
Stevens	U	S	U	S	S
White	U	U	U	U	U
Blackmun	U	U	U	P	U
Burger	U	U	U	U	U
Rehnquist	U	U	U	U	U
Brennan	S	S	S	S	S
Marshall	S	S	S	S	S

U=Uphold, P=Pass, S=Sustain

The justices' convoluted voting pattern made it difficult to determine exactly who was in the majority in all five cases. Most obvious was the conservatives' victory; Brennan and Marshall were defeated in four of the five cases, while centrists Stewart and Stevens passed, were in the majority, or had been outvoted alongside their more liberal colleagues. Victorious in nearly every case (save the undecided *Woodson*), chief justice Burger decided to take the initiative, and contemplated assigning the *Gregg* opinion to Justice Rehnquist. Yet upon reconsidering the results, Burger decided White would

clearly make the better choice; although firmly aligned with the conservatives, this justice's centrism in *Furman* made him strategically suspect. Having White write the case would presumably guarantee his loyalty, and prevent the justice from being swayed again by the more moderate Stewart. When White accepted Burger's offer, it seemed as if capital punishment would not only be reinstated, but mandatory sentences constitutionally upheld.

Although Burger put his plan in place almost immediately, it failed to adequately take into account Powell's mind-set. As discussed in the previous chapter, this justice's legalism had waned significantly with the prospect of executing over six hundred people. While unwilling to abolish capital punishment, Powell sought to somehow limit its imposition. North Carolina lay at the heart of this concern: Such a mandatory sentence not only seemed historically archaic to the justice, but could potentially result in a "wholesale slaughter" (Woodward and Armstrong, 1979, p. 525).

Stewart recognized Powell's hesitancy and, as he had done in building his alliance with White, immediately decided to forge a compromise. If Powell agreed to strike North Carolina *and* Louisiana, Stewart would reverse his vote in Texas. This would abolish all mandatory sentences, while clearly upholding the *Furman* precedent. Powell agreed, and the two sought a final partner to take total complete control of the *Gregg* decision. The obvious choices were either Justice Blackmun or Justice Stevens; Blackmun's legalist inclinations remained impressively strong, however, despite the justice's continued distaste for capital punishment. Stevens ultimately proved to be their man: While this justice's general jurisprudential style was unclear, he had already expressed open hostility towards mandatory sentencing in conference (Rosen, 2007; Woodward and Armstrong,

1979). Stevens happily agreed to align with the two elder justices, and the *Gregg* plurality was formally established.

Although matters of strategy had been resolved, the larger philosophical issues remained. As discussed in the previous section, Stewart and Powell's motives were largely attitudinal, and they therefore lacked a legalist argument justifying the abolition of mandatory sentencing. Since *Furman* was precedent, Stewart knew this decision would have to ground his stance in *Gregg*. While discretionless sentencing was arbitrary and capricious, however, mandatory sanctions were exactly the opposite: By routinizing capital sentencing, such systems would theoretically eliminate disparities in those chosen to die. Yet by stretching this line of argument, Stewart claimed to identify capriciousness from the other end: No two murderers were the same, and treating them identically was an arbitrary action. As Woodward and Armstrong summarize, Stewart now claimed it was

> capricious to treat two different things the same way. Since each defendant is different, to give all convicted murderers the same penalty, the death penalty, was just as capricious as imposing it randomly. Some sentencing guidelines were therefore necessary (p. 533).

Having formulated their legalist reasoning, Stewart, Powell, and Stevens began to assign one another the different opinions. Since he had clearly taken command, Stewart assigned himself the lead case. Stevens was then assigned *Jurek* and Powell *Proffitt*. Having formulated the flaws in *Woodson* Stewart also took charge here, and Stevens agreed to round out the group's arguments in *Roberts*.

Stewart, Powell, and Stevens's law clerks reveal a similar process to that described in the preceding account. According to former Stewart clerk Ron Stern, while "all three justices were ethically troubled by the death penalty," they also felt legally

restrained by the state legislatures and previous precedent (11/18/09). Stewart clearly took the lead, with Powell and Stevens following suit. And although "Stevens was unpredictable at the beginning" (Stern), he eventually became a staunch ally of the senior justices. Yet perhaps most remarkable was the lack of any overtly negative Court drama. While perturbed about losing their majority, Justices White and Burger apparently resigned themselves fairly quickly to defeat, and no clerk remembers any open hostility. The other justices all recognized that capital punishment was to be reinstated, and again in accordance with Justice Stewart's more moderate vision.

B. The Winning Hypothesis

What theory of judicial decision making best describes the actions of the *Gregg* plurality? This section will first identify the fatal flaws of the eight "losing" theories, and then analyze the unique strength of the "winning" hypothesis. As should be obvious by now, only a mixed model of judicial decision making can comprehensively account for Stewart, Powell, and Steven's attitudinally driven but legalistically tempered opinions.

i. The Legalist Models

Hypothesis I: The Court truly believed the practice of capital punishment no longer violated the Eighth Amendment and voted accordingly.

Analysis

Although perhaps the most traditional explanation for the Court's behavior in *Gregg,* this hypothesis has very little empirical support. As revealed above, Powell and Stewart only formed their constitutional argument *after* deciding how extensively to

temper their political beliefs. Rehnquist and White also clearly voted attitudinally in *Gregg, Proffitt,* and *Jurek,* and Brennan and Marshall in *Woodson* and *Roberts*.

Hypothesis II: Reversing themselves in *McGautha,* Stewart and White sought to relieve Fourteenth Amendment concerns of due process, and were adequately appeased by *Gregg*.

Analysis

This argument is also empirically flawed. By the time of *Gregg,* Stewart had clearly conflated his Eighth and Fourteenth Amendment concerns. Further, this hypothesis still fails to explain the attitudinal positions taken by many on the Court's shifting majorities.

ii. The Attitudinal Models

Hypothesis III: Justices White, Stewart, Powell, Rehnquist, Burger, Blackmun, and Stevens politically supported capital punishment in *Gregg, Proffitt,* and *Jurek,* and only Burger, Blackmun, Rehnquist, and White did so in *Woodson* and *Jackson*.

Analysis

While more convincing than the purely legalist models, such a broad attitudinal explanation also fails to empirically hold. Every justice save White and Rehnquist personally opposed capital punishment. If Stewart, Powell, and Stevens were acting attitudinally, they would surely have struck not only *Woodson* and *Roberts,* but *Gregg, Proffitt,* and *Jurek* as well.

Hypothesis IV: The (very) liberal Douglas died and was replaced by the more conservative Stevens.

Analysis

While Stevens's addition was certainly important, Stewart's and Powell's changes in opinion was likely even more so. Further, Stevens was influenced by Powell and Stewart in making his decision, and, as discussed earlier, essentially followed the lead of the two senior justices.

iii. The Institutional Models

Hypothesis V: *Gregg* was simply a decision of judicial compromise. Centrists Stewart, Powell, and Stevens neither wanted to alienate those on the right nor upset existing precedent, and this was the most reasonable decision possible within such a limited time frame.

Analysis

No evidence exists that Stewart, Powell, and Stevens tempered their opinions to appease the Court's conservatives. Relevant documents show quite the opposite: that Stewart actively moved against White and Burger, rejecting their unbridled support for mandatory sentencing. Time constraints also seemed to have played very little role here. While the plurality formed relatively quickly, former clerks Ron Stern and Gregory L. Diskant deny the justices were in any rush to get out their decision (11/18/09; 9/22/09).

Hypothesis VI: The Court caved to the public's newfound support for capital punishment, represented by both the state legislatures' immediate reinstitution of the death penalty and a wealth of national opinion polls.

Analysis

This seems to be the most common hypothesis in the secondary literature,[38] although it remains both logically and empirically incomplete. Stewart, Powell, and Stevens did not primarily predicate *Gregg* (or *Furman*) on newfound standards of decency, but rather on its reduction of arbitrariness. Further, this account fails to explain the *Woodson* and *Roberts* decisions, where the plurality expressly repudiated North Carolina and Louisiana's legislative agendas. Finally, no empirical proof indicated that the justices were primarily influenced by public opinion, nor was this supported by interviews with their former law clerks.

Of course, this is not to say the Court was unaffected by popular sentiment. Stewart, Powell, and Stevens were undoubtedly aware that the country had reacted vociferously in *Furman*'s wake. The plurality was driven by a number of attitudinal and institutional concerns, however, and therefore adjudicated on considerably more complex grounds than simple public opinion.

Hypothesis VII: The Court bowed to precedent for the sake of judicial moderation.

Analysis

Again, this hypothesis contains some degree of truth but is logically and empirically incomplete. If the Court merely chose to uphold precedent, *Furman* and *Gregg* would never have occurred in the first place. Further, this theory fails to explain why the Court was unwilling to take a broader or narrower reading of the Eighth Amendment. Finally, it wholly ignores the importance of ideological and legalistic

[38] See Zimring and Hawkins, 1986; Haines, 1996; Woodward and Armstrong, 1979; Haney, 2005; Jefferies, Jr., 1994; Berger, 1982; Friedman, 2009; Lain, 2006, 2007; Bedau, 1987.

concerns on the plurality's mind-set, and how this influenced their particular interpretation of *Furman* precedent.

iv. The Mixed Model

Hypothesis VIII: Although they may have been personally uncomfortable with capital punishment, Justices Stewart, Stevens, and Powell felt the issue needed to be confronted following its renewed popularity and was (regrettably) constitutional. So they crafted a ruling that would allow the death penalty's theoretical imposition while hoping to limit its actual practice.

Analysis

This mixed hypothesis best matches the preceding findings. While attitudinally troubled by upholding capital punishment, Justices Stewart, Powell, and Stevens recognized that the legislatures had spoken, and were legalistically constrained by the Court's recent precedents. They consequently formulated a set of rulings upholding the death penalty's constitutionality, while eliminating its more egregious manifestations. This "middle path" was an obvious mix of attitudinal, legalist, and institutional concerns, although (as explored in "Findings: Justice by Justice") the nature and tenor of these concerns varied by justice.

Ultimately, only a mixed model of Supreme Court jurisprudence can therefore account for the Court's decision in *Gregg*. Contrary to previous case studies, the Supreme Court was not simply led by legal arguments or public opinion (Epstein and Kobylka; 1992 Lain, 2006), but driven by a host of discrete and often conflicting motivations. Justice Stewart, the Court's most important swing voter, was morally uncomfortable with the death penalty in *Furman* and therefore advocated its abolition in this pivotal case.

When this became impossible in *Gregg*, however, Stewart was forced to moderate his stance, using precedent as a way to temper what he viewed as capital punishment's more troubling excesses. Justice Powell took the opposite route: a committed legalist in *Furman*, his opinion in *Gregg* was driven by personal concerns with the death penalty's "failure to provide adequate representation to defendants" (Hammond, 11/09/09). And while Justice Stevens's motivations are less clear, he was undoubtedly affected by the two elder justices' positions.

The remaining justices also demonstrated mixed models of judicial decision making. Justice White's opinion, while explicitly legalist, was motivated by his belief that a proper criminal justice system could deter society's most serious offenders. While Burger and Blackmun clearly adhered to formalism, Justice Rehnquist shared White's view in capital punishment's potential efficacy. Finally were Justices Brennan and Marshall, whose moral repulsion to capital punishment overshadowed any positive results such a penalty could inspire. As Lawrence Baum has argued (1997), the Supreme Court is rarely driven by a single concern, but rather by a mixture of ideological and pragmatic concerns. Each justice was clearly influenced by a variety of (often competing) motivations, leading to a decision neither uniform in content nor conclusion.

The next and final Findings section provides a content analysis of the *Gregg* decision. As argued throughout this study's methodology, quantitative and qualitative research should both contribute to the practice of good social science. While this project is primarily qualitative, any quantitative results are therefore important to report and analyze. As explored below, such data lends even greater support to a mixed hypothesis of jurisprudence.

V. Findings: Content Analysis

By coding and charting the frequencies of each justice's position, a content analysis can lend quantitative insight into the model(s) of judicial decision making employed in *Gregg v. Georgia*. Of course, it is first necessary to review what such an analysis entails. Hsiu-Fang Hsieh and Sarah H. Shannon (2005) have delineated three discrete types of content analyses: (1) a conventional content analysis, which generates its own unique set of codes; (2) a direct content analysis, which analyzes preexisting models or theories; and (3) a summative content analysis, which interprets words or statements within a particular context. Since this project applies preexisting models to a specific data set, it requires a direct content analysis. This technique codes complementary or conflicting evidence for different theories, establishing the most plausible through analytic review. By matching specific propositions to larger models, one can expand, revise, or even reject preexisting hypotheses and/or theories.

A. Constructing a Direct Content Analysis

A direct content analysis shares many of the challenges of traditional qualitative research. First, since one has already established one's hypotheses, he or she may be predisposed to ignore or dismiss any conflicting evidence (Krippendorff, 2004). Such bias can be countered by recognizing that one's models are neither conclusive nor immutable. Second, the researcher must not overemphasize theory at the expense of facts, or have his or her hypotheses guide the data rather than inform it. Finally, one must always consider the importance of context and the inherent ambiguity of interpretation; when a statement is vague or unclear, it is better left uncoded than coded incorrectly.

All content analyses, regardless of being conventional, direct, or summative, are conducted in seven distinct stages (Kaid, 1989):

(1) Framing one's research question

(2) Selecting the relevant models

(3) Choosing the data set to be analyzed

(4) Establishing the coding process

(5) Implementing the coding process

(6) Checking for validity

(7) Analyzing the findings/results

This study's research question is well established, and will not be (re)reviewed here. The relevant models are the legalist, attitudinal, institutional (strategic and interpretive), and mixed paradigms of Supreme Court decision making. The data set consists of justices' (1) *Gregg* opinions, (2) public statements, (3) archival accounts, and information gathered from (4) *The Brethren*, and (5) interviews with former law clerks. The coding process is slightly complex, and is reviewed in detail below. A short summary is given for each model, and the coding schema constructed from this account.

i. Legalism: This model claims that justices make decisions by reading the text before them and simply applying the law as written. If the words are somehow unclear, justices consult the writers' intent. If this is still unclear, justices hew to precedent as closely as possible.

   -Whenever a justice refers (or is said to refer) to (1) the text itself, (2) original intent, (3) precedent/stare decisis, and/or (4) the concept of judicial restraint, he is coded as adhering to the legalist model of judicial decision making.

ii. Attitudinalism: According to this model, justices decide based purely upon their own personal political beliefs. For example, if a justice is against the death penalty he/she will vote to strike it down regardless of capital punishment's explicit or implicit support in the text/Constitution.

-Whenever a justice supports his position by invoking (1) his own political views and/or (2) extralegal or results-oriented principles, he is coded as adhering to the legalist model of judicial decision making.

iii. Institutionalism I: Strategic: According to this model, justices' personal politics are constrained by the preferences of their colleagues and other governmental bodies (the president, Congress, state legislatures, etc.). For example, if justices know that their decision will alienate their colleagues or another government branch, they will temper or even suppress their own personal inclinations.

-Whenever a justice expresses the influence of either (1) his colleagues or (2) another governmental branch in making his *Gregg* decision, he is coded as adhering to the strategic institutional model of judicial decision making.

iv. Institutionalism II: Interpretive: According to this model, personal politics are constrained by justices' perceived institutional role. For example, a justice may personally oppose the death penalty, but be unwilling to strike it down since he or she believes the ideal justice should be a legalist (i.e. follow the text and not his or her own personal convictions). Legalists and thick institutionalists ultimately differ regarding public opinion's proper role injudicial decision making. Whereas the former treats public opinion as entirely irrelevant to judging, the latter fears

that disregarding public opinion could potentially challenge the Court's institutional legitimacy, and therefore takes this into account when judging.

-Whenever a justice expresses the influence of public opinion in making his *Gregg* decision, he is coded as adhering to the interpretive institutional model of judicial decision making.

v. Mixed

i. Legal Pragmatism: According to this model, justices' decisions are affected by a combination of legalist, attitudinal, and institutional beliefs, the importance of which vary depending on the case at hand.

ii. Outcome Model: According to this theory, justices will act attitudinally if the case is personally important to them, otherwise legalistically or institutionally (depending on the case at hand).

-A justice influenced by a variety of models is coded as following a pragmatic model of judicial decision making.

-If justices' stress or downplay a particular case's importance and influence on their views, they are coded as adhering to the outcome model of judicial decision making.

Before conducting the analysis, it is necessary to recognize four challenges of this particular project. First, as mentioned previously, written opinions will generally skew toward legalism, and subsequently fail to reveal a justice's personal intentions or ideological motivations. This is accounted for in this appendix's second frequency table, which holds this specific variable constant. Second, some statements are difficult to code as either legalist or interpretive institutionalist, as these positions may be identically

expressed. Other accounts are thus especially valuable here, since these will lack the institutional constraints of written decisions. Third, although it may seem natural to assign a "point value" to each position, one should always remember the possibility of hidden or inconsistent motivations: What appears to be legalist may actually hide a more attitudinalist position, or denote only a piece of a more mixed model of judicial decision making.

The final challenge is also the most difficult, but (fortunately) only relevant when coding justices' written opinions; this entails determining what counts as a single statement or point of view rather than the continuance of a previous argument. For example, justices may spend an entire paragraph invoking stare decisis; should each sentence be considered legalistic, or the paragraph itself? Here justices' statements have to be reviewed in context. If the justice is clearly continuing a previous argument, this argument is coded as advocating a single position. If the justice offers a novel justification or raises a topic of interest, however, this requires an entirely separate review. Hopefully, this point will become clearer as the analysis progresses.

B. Justice by Justice

Justice Stewart

i. Written Opinion

Justice Stewart's written opinions in *Gregg* and *Waxton* consist of six legalistic and one attitudinal statement.

Gregg v. Georgia

Legalistic statements:

(1) "While we have an obligation to insure that constitutional bonds are not overreached, we may not act as judges as we might as legislators" (p. 175). *Judicial restraint*

(2) "It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers" (p. 177). *Originalism/Textualism*

(3) "For nearly two centuries, this Court, repeatedly and often expressly, has recognized that capital punishment is not invalid *per se*" (p. 178). *Stare decisis*

(4) "The petitioners in the capital cases before the Court today renew the 'standards of decency' argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested" (p. 179). *Stare decisis*

(5) "The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily…the new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and particular characteristics of the individual defendant" (p. 206). *Stare Decisis*

Woodson and Waxton v. North Carolina

Legalistic statement:

(1) "The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons of a particular

offense has been rejected as unduly harsh and unworkably rigid" (p. 293). *Stare decisis*

Attitudinal statement:

(1) "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration … the possibility of compassionate or mitigating factors stemming from the diverse frailties of mankind" (p. 304). *Extralegal Principles*

ii. Public Records

Public records reveal one legalistic statement:

(1) "I would vote against it [capital punishment] as a legislator" (Bendiner, 1983).

iii. Archival Accounts

Archival accounts produce two attitudinal, one strategic institutional, and one legalist/interpretive institutional statement.

Attitudinal statements:

(1) "It began to weigh heavily on him [Stewart] that 700 people would die after a decision upholding it [capital punishment]. Eventually, he just decided that he could not vote to uphold it" (Brennan Case Histories, p. cxlix).

(2) "As of now, I cannot uphold the constitutionality of death sentences. Someday the Court will hold the death penalty to be unconstitutional. If the Court holds it constitutional in 1972 it would delay its abolition (Stewart, Oral comments, *Furman* conference). *Extralegal principles/Results-oriented*

Strategic Institutional statements:

(1) "It soon became apparent to him (Stewart) that something had to be done to get BRW (Byron R. White) to go along. Over and over PS said that BRW was about to join LP (Lewis Powell) if PS didn't come up with a narrower ground than an outright ban on the death penalty. So PS ended up with not reaching mandatory sentences in order to get BRW" (Brennan Case Histories, p. cxlix). *Collegial strategy*

Legalistic/Interpretive Institutional statement:

(1) "What 35 legislatures have done since 1972 was focused on why there should be a death penalty for specific, serious offenses. This established what evolving standards of decency are like in 1976" (Oral comments, *Gregg* conference). *Public Opinion*

iv. *The Brethren*

The Brethren attributes one attitudinal and one interpretive institutionalist statement to Justice Stewart.

Attitudinal statement:

(1) "Stewart…was still looking for a ground on which to base a decision striking the death penalty laws" (p. 260). *Results-oriented*

Interpretive Institutionalist statements:

(1) "When the states began passing the new death penalty laws right after the 1972 *Furman* decision, Stewart realized that he had miscalculated" (p. 525). *Public opinion*

v. Interviews

Interviews produce four legalistic, two attitudinal, one strategic institutionalist, and four interpretive institutionalist statements.

Legalistic statements:

(1) "Stewart never looked to upend law" and "relied greatly on precedent" (Jeffress). *Stare decisis*

(2) "[Stewart] may have wanted to end the death penalty but felt constrained by the law-being a good lawyer" (Jeffress). *Judicial restraint*

(3) "Stewart and White were always concerned about the overreach of judicial power…didn't want the judiciary 'mucking around'" (Deitz). *Judicial restraint*

(4) "Stewart had a very modest view of the Court's role in a democracy" (Stern). *Judicial restraint*

Attitudinal statements:

(1) "Stewart was affected strongly by the moratorium—he often discussed how many people were on death row and what the consequences of *Furman* would be" (Jeffress). *Results-oriented*

(2) Stewart came from conference and said he wanted to strike down the death penalty, but wasn't sure why" (Heineman, Jr.). *Results-oriented*

Strategic Institutionalist statement:

(1) "After Stewart talked to White he took on the due process position" (Heineman, Jr.). *Collegial strategy*

Interpretive Institutionalist statements:

(1) "Stewart was very cautious not to go too far" (Jeffress). *Public opinion*

(2) "Stewart would have been unlikely to go too far off the public radar" (Deitz). *Public opinion*

(3) "Stewart was particularly disturbed by the idea of mandatory sentencing; he refused to believe these adequately reflected their respective state's public opinion" (Stern). *Public opinion*

(4) "Stewart's opinion in *Gregg*…[followed] the legislative reaction in *Furman*" (Stern). *Public opinion*

Summary

Ten legalistic, six attitudinal, two strategic institutionalist, and six interpretive institutionalist statements can be attributed to Justice Stewart.

Justice Powell

i. Written Opinion

Justice Powell's decision in *Proffitt* is modeled after *Gregg v. Georgia* and therefore consistently legalistic.

Legalistic statements (summary):

(1) "Florida, like Georgia, has responded to *Furman* by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death" (pp. 259-260). *Stare decisis* (based on *Furman* precedent)

ii. Public Records

Public records reveal an outcome-based model of judicial decision making:

(1) "Only a handful of persons were executed in the United States last year and the number sentenced is decreasing each year. The problem is not one of large dimensions nor of first importance in terms of the administration of criminal justice" (Powell, Internal Memorandum, 6/25/26).

iii. Archival Accounts

Archival accounts produce two legalistic statements:

(1) "Eight of our previous cases we said it [capital punishment] was constitutional. Constitutional interpretation has given a wide sweep to the Constitution, but this has gone too *far*. The fact that the legislatures have abdicated responsibility is not our problem. It's not the Court's role to decide for the legislatures. In their own way juries have moved ahead of the legislature. I reject seeing this Court freeze the Eighth Amendment into banning the death penalty" (Oral Comments, *Furman* conference).

Stare decisis/Judicial restraint

(2) "*Furman* served a purpose. States have provided safeguards against systems that operated like bolts of lightning, so *Furman* served a salutary role by providing appellate review…I start with *Furman*" (Oral comments, *Gregg* conference). *Stare decisis (*based on *Furman* precedent)

iv. *The Brethren*

Two legalistic, two attitudinal, and one interpretive institutional statement can be gathered from *The Brethren*.

Legalistic statements:

(1) "[To Powell] it would be an extreme example of judicial activism to claim that the Constitution prohibited the death penalty…Striking down the death penalty would mean that the Court was substituting its conclusion for the decisions of the various legislatures. It would show a basic lack of faith in democracy" (p. 257). *Judicial restraint*

(2) "Powell remained convinced…that he had been right in 1972" (p. 525). *Judicial restraint*

Attitudinal statements:

(1) "If the Court reinstated the death penalty, Powell worried about the hundreds on death row. A wholesale slaughter would be just as awful as a sweeping annulment of the recent acts passed by thirty-five legislatures" (p. 525).

(2) "Powell said he favored the death penalty for heinous crimes. But he disliked the compulsory death sentence. 'What this country needs is for public executions to be reinstated,' he said. If the public had to witness executions, it would less likely to favor mandatory laws" (p. 527).

Interpretive Institutional statement:

(1) "Powell…viewed the thirty-five new state laws as convincing evidence that the people wanted a death penalty. Somehow the Court had to accommodate this trend without appearing to simply follow election returns" (p. 525).

v. Interviews

Interviews produce two legalistic statements and attitudinal statement.

Legalistic statements:

(1) "Powell knew very little about criminal law when first arriving on the Court…From the beginning Powell admitted he was weakly against the death penalty, and as a legislator would vote against its implementation. That being said, he also found no Constitutional grounds to justify its abolition, and mentioned this to me a number of times. Powell was most troubled by the idea of tampering with a penalty that that had not only been around since the Republic's founding but was also widely supported by the American public" (Hammond). *Judicial restraint*

(2) "I'm confident that if Powell had confronted the constitutionality of the death penalty before going to the Court, he would have thought it constitutional because of its long history and because of the language of the Due Process Clauses. But he never had occasion to confront the issue. So the constitutionality of capital punishment was for Powell—like many other constitutional issues was unexamined territory when he went on the Court. That's not to say that he wouldn't have had an instinct but only that he didn't have a settled opinion" (Jeffries, Jr.). *Judicial restraint*

Attitudinal statement:

(1) "Following *Furman* Powell thought *Gregg* could be used to temper problems he saw with the death penalty; he believed that by tempering aggravators and mitigators arbitrariness could be substantially reduced, and was therefore

proud to join with Stewart and Stevens…If defendants weren't going to receive the level of counsel he desired, he could at least try and make capital trials fairer by joining with Stewart and Stevens in order to reduce jury discretion" (Hammond). *Results-oriented*

Summary

Six legalistic, three attitudinal, one outcome model, and one interpretive institutional statement can be attributed to Justice Powell.

Justice Stevens

i. Written Opinions

Jurek v. Texas

Justice Stevens's written opinion in *Jurek* is modeled after *Gregg v. Georgia* and therefore consistently legalistic.

Legalistic statements (summary):

(1) "By narrowing the definition of capital murder", "authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced", and "providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under the law" (p. 276). *Stare decisis (*based on *Furman* precedent)

Justice Stevens's written opinion in *Roberts* is modeled after *Woodson v. North Carolina* and is once again consistently legalistic.

Roberts v. Louisiana

Legalistic statements (summary):

(1) "This responsive verdict procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jury to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate…The Louisiana statute thus suffers from constitutional deficiencies similar to those identified in the North Carolina statute in *Woodson v. North Carolina*" (p. 335). *Stare decisis* (based on *Furman* precedent)

ii. Public Statements

No relevant statements

iii. Archival Accounts

Archival accounts produce one legalist statement and one attitudinal statement.

Legalistic statement:

(1) "*Furman* is law for me. That is my starting point, and therefore I think that the death penalty is permissible in some circumstances under an evolving standards concept" (Oral comments, *Gregg* conference). *Stare decisis* (based on *Furman* precedent)

Attitudinal statement:

(1) "The North Carolina statute has produced more penalties than it should, rather than cutting down on the number of executions. To have created a monster

like North Carolina, which increases the incidence of the penalty, is abhorrent" (Oral comments, *Gregg* conference). *Extralegal principles*

iv. *The Brethren*

The Brethren attributes one legalist (although unfulfilled) intention to Justice Stevens:

(1) "Stevens was uneasy. They (the plurality) were acting like a superlegislature, laying out a model law. Despite qualifying phrases that they were not requiring standards and separate sentencing procedures, no one could miss the point. It would have been clearer to overturn McGautha and state that standards and separate hearings were now constitutionally required" (p. 533). *Judicial restraint*

Summary

Four legalistic and one attitudinal statement can be attributed to Justice Stevens.

Justice White

i. Written Opinions

Justice White's written opinions in *Gregg* and *Roberts* consist of three legalistic statements and one attitudinal statement.

Gregg v. Georgia

Legalistic statement:

(1) "The threshold question in this case is whether the death penalty may be carried out for murder under the Georgia legislative scheme consistent with

the decision in *Furman v. Georgia*…it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that is loses its usefulness as a sentencing device" (pp. 222-223). *Stare decisis* (based on *Furman* precedent)

Attitudinal statements:

(1) "One of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder. I decline to interfere with the manner in which Georgia has chosen to enforce such laws" (p. 226). *Results-oriented*

Roberts v. Louisiana

Legalistic statements:

(1) "As I see it, we are now in no position to rule that the State's present law, having eliminated the overt discretionary power of juries, suffers from the same constitutional infirmities which led this Court to invalidate the Georgia death penalty statute in *Furman v. Georgia*" (p. 346). *Stare decisis* (based on *Furman* precedent)

(2) "Perhaps we would prefer that these States had adopted a different system, but the issue is not our individual preferences but the constitutionality of the mandatory systems chosen by these two states…The plurality claims that it has not forgotten what the past has taught about the limits of judicial review; but I fear that it has again surrendered to the temptation to make policy for and to attempt to govern the country through a misuse of the powers given this Court under the Constitution" (p. 362). *Judicial Restraint*

ii. Public Records

No relevant statements.

iii. Archival Accounts

Archival accounts produce one legalist, one attitudinal, and one strategic institutional statement.

Legalistic statement:

(1) "I think that North Carolina and Louisiana have met the test I had in mind in *Furman*" (Oral comments, *Gregg* conference notes). *Stare decisis* (based on *Furman* precedent)

Attitudinal statement:

(1) "A tiny proportion of people are put to death. I can't believe that they are picked on the basis of killing those who should be killed" (Oral comments, *Furman* conference notes). *Extralegal principles*

Strategic Institutional statement:

(1) "It soon became apparent to him [Potter Stewart] that something had to be done to get BRW [Byron R. White] to go along. Over and over PS [Stewart] said that BRW was about to join LP [Lewis Powell] if PS didn't come up with a narrower ground than an outright ban on the death penalty. So PS ended up with not reaching mandatory sentences in order to get BRW" (Brennan Case Histories, p. cxlix). *Collegial Strategy*

iv. *The Brethren*

One legalistic and two attitudinal statements can be gathered from *The Brethren*.

Legalistic statement:

(1) "White was not surprised by the overwhelming enthusiasm of state legislatures for the death penalty after the 1972 decision. He had predicted these new mandatory laws; and he was not about to have any role now in striking those laws. The standards of society were not evolving against the death penalty. Those new laws requiring juries to consider all mitigating circumstances also satisfied him. If that was what the states wanted, he found nothing unconstitutional about it" (p. 526).

Attitudinal statements:

(1) "White told his clerks that Amsterdam's oral presentation had been possibly the best he had ever heard. Still, he found only one argument even remotely persuasive—the contention that the infrequency of the sentence made it an ineffective deterrent. He was concerned with the State's interests, and with the benefit that the government might derive from certain punishments. There were two elements—deterrence and retribution. These interests justified the death penalty for White, even though he was willing to accept that it was inherently "cruel and unusual" (p. 253). *Extralegal principles/Results-oriented*

(2) "[To his clerks, White] said that he personally favored laws that imposed an automatic death sentence upon conviction for specific heinous crimes, such as the assassination of a President or a presidential candidate—crimes that had cost him two friends and the country two leaders, John and Robert Kennedy" (p. 263). *Extralegal principles*

v. Interviews

One attitudinal statement can be gathered from the interviews.

(1) "More than anything else, White was a common law judge, caring more for the consequences of his decisions…than the substance of the words themselves. This was likely the case in both *Furman* and *Gregg*" (Deitz). *Results-oriented*

Summary

Five attitudinal, five legalist, and one strategic institutional statement can be attributed to Justice White.

Justice Blackmun

i. Written Opinions

Justice Blackmun concurred with the plurality opinions in *Gregg, Proffitt*, and *Jurek,* and with the dissenting opinions in *Roberts* and *Woodson.*

ii. Public Records

Justice Blackmun's public records produce two (very telling) legalistic statements:

(1) "Although personally I may rejoice at the Court's result [in abolishing capital punishment], I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and it has achieved an end" (Written Opinion, *Furman v. Georgia, Id.* at 414). *Judicial review*

(2) "If I were a legislator having to vote on it [capital punishment] I would plump for its repeal", but the issue stands on "the legislative…side of our three-legged stool" (Yarbrough, 2008, p. 127). *Judicial review*

iii. Archival Accounts

Public records also reveal two (very telling) legalistic statements:

(1) "I…adhere to the concept that ordinarily punishment, including even the death penalty, is a matter for the legislature and not for the judiciary. It is in the former that public policy is expressed … one could say that the Court is being cowardly about this. I think, however, that this is the sound approach. I doubt if we are ready to abandon the death penalty for treason or for spying, and if we are not ready to abandon it across-the-board, then we encounter grave logical difficulties" (Conference preparatory notes, *Aikens v. California* (1972), 68-50827)." *Judicial restraint*

(2) "I would be willing to accept the challengers' argument against capital punishment were I a legislator or member of the Congress of the United States" (First Opinion Draft, *Gregg v. Georgia*). *Judicial Restraint*

iv. *The Brethren*

No relevant statements.

Summary

Four legalistic statements can be attributed to Justice Blackmun.

Chief Justice Burger

i. Written Opinions

Chief Justice Burger joined Justice White's concurrence in *Gregg, Proffitt,* and *Jurek,* and his dissent in *Woodson* and *Roberts*.

ii. Public Records

Public records reveal one legalistic (but very telling) statement of Chief Justice Burger's:

(1) "If I were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall, or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes. Our constitutional inquiry, however, must be divorced from personal feelings as to the morality and efficacy of the death penalty, and be confined to the meaning and applicability of the uncertain language of the Eighth Amendment" (Written Opinion, *Furman v. Georgia, Id.* at 375). *Judicial Restraint*

iii. Archival Accounts

Archival accounts produce three legalistic statements:

(1) "States have the power to impose a death penalty. I affirm. There is no equal protection here. Only the Eighth Amendment can restrict capital sentences" (Oral comments, *Furman* conference).

(2) "On the basic question, my view remains that this [capital punishment] is primarily a legislative prerogative. My view is as it was. If I was in Congress, I'd probably vote against capital punishment! Since I could have sustained in

Furman, I would a fortiori sustain here" (Oral comments, *Gregg* conference). *Judicial restraint/Stare decisis (*based on *Furman* precedent)

(3) "After circulating his opinion Brennan was met by the Chief Justice, who ("apparently with sincerity") expressed regret that the death penalty had not been struck down completely. He said that even though he thought it was constitutional and that the Court was wrong in holding otherwise, either partially or completely, in fact he was really rather relieved when he thought it would be gone forever. Rightly or wrongly, he said, the problem would be over and the issue finally settled. But now, he said, given PS's and BRW's opinions, the problem would be right back—he said Congress and the state legislatures will enact mandatory death sentences for certain crimes and the Court would sustain them…I had hoped it was all behind us, and even though I think the decision would be wrong, I was really relieved—but now we will get it all back" (Brennan Case Histories, p. cli). *Judicial Restraint*

iv. *The Brethren*

One strategic institutional statement can be gathered from *The Brethren*:

(1) "He [Burger] was tempted to take the decisions himself, or give them to Rehnquist. But White was the key. He was for upholding all five state laws, but given his 1972 rationale against the death penalty, his vote had to be guarded. The assignment would probably hold him" (p. 528). *Collegial Strategy*

Summary

Five legalistic statements can be attributed to Chief Justice Burger.

Justice Rehnquist

i. Written Opinion

Woodson and Waxton v. North Carolina

Justice Rehnquist's written opinion contains two legalistic statements:

(1) "It is…worth noting that the plurality opinion repudiates not only the view expressed in *McGautha,* but also, as noted in *McGautha,* the view which had been adhered to by every other American jurisdiction which had considered the question" (p. 321). *Stare decisis*

(2) "The respects in which death is 'different' from other punishment which may be imposed upon convicted criminals do not seem to me to establish the proposition that the Constitution requires individual sentencing" (p. 323). *Textualism*

ii. Public Records

No relevant statements.

iii. Archival Accounts

Archival accounts reveal one attitudinal statement from Justice Rehnquist:

(1) "I won't overturn it. We crossed the bridge in *McGautha*. If it is a good law I will follow it. As a legislator, I would keep it. I have no trouble and I affirm" (Oral comments, *Furman* conference).

iv. *The Brethren*

One legalist statement can be gathered from *The Brethren*.

(1) "[Rehnquist thought] human error might result in some men being sentenced to death for no particularly good reason, perhaps even for an absolutely bad one. But the human error of wrongfully depriving a man of his constitutional rights was less severe than mistakenly striking down an otherwise constitutional statute" (p. 264). *Judicial restraint*

v. Interviews

Interviews produce one legalistic and one outcome model statement.

Legalistic statement:

(1) "Justice Rehnquist believed that capital punishment, like so many other matters, was purely a legislative rather than a judicial concern" (Bradley). *Judicial restraint*

Outcome Model statement:

(2) "He (Rehnquist) never discussed the death penalty with any of his law clerks" (Bradley).

Summary

Four legalistic, one attitudinal, and one outcome model statement can be attributed to Justice Rehnquist.

Justice Brennan, Jr.

i. Written Opinion

Justice Brennan's opinion in *Gregg* contains one legalistic and one attitudinal statement.

Gregg v. Georgia

Legalistic statement:

(1) "The fatal constitutional infirmity in the punishment of death is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity" (p. 230). *Textualism*

Attitudinal statements:

(1) "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 society" (p. 229). *Extralegal principles*

(2) "The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity…An executed person has indeed lost the right to have rights" (p. 230). *Extralegal principles*

(3) "Justice of this kind is obviously no less shocking than the crime itself, and the new 'official' murder, far from offering redress for the offense committed against society, adds instead a second defilement of the first" (p. 230). *Extralegal principles*

ii. Public Records

Justice Brennan's public records contain two legalistic and two attitudinal statements.

Legalistic statements:

(1) "I have been persuaded that death is unconstitutional by the arguments of lawyers who, I am convinced, have made the better—and I mean the better reasoned—case. This is not to suggest that underneath the robes, I am not, that we are not, a human being with personal views and moral sensibilities and religious scruples. But it is to say that above all, I am a judge" (Brennan, 1986, p. 331).

(2) "Some have argued the view that the death penalty is cruel and unusual because it treats humans as objects to be hurt and then discarded is based on little more than personal opinion. But I have always attempted to justify my position by means of reasoned argument about the meaning of the vague words of the Eighth Amendment. I submit that it was the dissenters in *Furman* who failed to explore what values underlie their feelings and what values the Eighth Amendment was intended to serve" (Brennan, 1994, p. 8). *Textualism*

Attitudinal statements:

(1) "I am convinced that law can be a vital engine not merely of change but of …civilizing change" (Brennan, 1986, 331). *Extralegal principles*

(2) "On this issue, the death penalty, I hope to embody a community striving for human dignity for all, although perhaps not yet arrived" (Brennan, 1985). *Extralegal principles*

iii. Archival Accounts

No relevant statements.

iv. *The Brethren*

No relevant statements.

Summary

Five attitudinal and three legalist statements can be attributed to Justice Brennan.

Justice Marshall

i. Written Opinion

Justice Marshall's *Gregg* opinion contains one legalistic claim:

(1) "In *Furman* I concluded that the death penalty is constitutionally invalid for two reasons. First, the death penalty is excessive. And second, the American people, fully informed to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable" (p. 231). *Stare decisis* (based on *Furman* precedent)

ii. Public Records

Public records reveal one attitudinal statement:

(1) "On something like that [capital punishment], you can't give up and you can't compromise. It's so morally correct I wouldn't think of giving it up" (*Washington Post,* 1983). *Extralegal principles*

iii. Archival Accounts

Archival accounts reveal one interpretive institutional statement:

(1) "The Court has the power to reverse the death penalty. The death penalty is available to anyone low…The Eighth Amendment should be in line with contemporary beliefs" (Oral comments, *Furman* conference). *Public opinion*

iv. *The Brethren*

One attitudinal statement can be gathered from *The Brethren*:

(1) "Marshall was opposed to the death penalty in any form. He considered it the most conspicuous example of the unfairness of the criminal justice system. It almost seemed a penalty designed for poor minorities" (p. 247). *Extralegal principles*

v. Interviews

Interviews produce four attitudinal and one outcome model statement.

Attitudinal statements:

(1) "Marshall had seen too many black men executed to support a death penalty" (Diskant). *Extralegal principles*

(2) "Marshall was interested in how he voted and what the outcomes were—it had to represent his views" (Diskant) *Results-oriented*

(3) "*Gregg* was a political case" (Diskant)

(4) "He [Marshall] made it no secret that he was totally against the death penalty" (Seidman)

Outcome Model statement:

(1) "For Marshall, ones [cases] he cared about and ones he didn't, and for those he cared about he knew his stance" (Diskant)

Summary

Six attitudinal, one legalistic, one interpretive institutional, and one outcome model statement can be attributed to Justice Marshall.

C. Frequency Tables

By summing and then charting the preceding findings (see Table IV-3) each justice's respective model of judicial decision making becomes easier to discern.

IV-3. Justices' Statement-Model Frequencies

Justice	Legalistic	Attitudinal	Strategic Institutional	Interpretive Institutional	Outcome Model
Stewart	10 (50%)	6 (30%)	2 (10%)	2 (10%)	0
Powell	6 (60%)	3 (30%)	0	1 (10%)	0
Stevens	4 (80%)	1 (20%)	0	0	0
White	5 (45.5%)	5 (45.5%)	1 (.09%)	0	0
Blackmun	4 (100%)	0	0	0	0
Burger	4 (80%)	0	1 (20%)	0	0
Rehnquist	4 (66.7%)	1 (16.7%)	0	0	1 (16.7%)
Brennan	3 (37.5%)	5 (62.5%)	0	0	0
Marshall	1 (11.1%)	6 (66.7%)	0	1 (11.1%)	1 (11.1%)
Total	56.2%	37%	5.5%	5.5%	2.7%

These results are somewhat deceptive, as justices' written opinions will (almost) always be legalistically skewed. Controlling for this variable therefore produces a more accurate account of each justice's decision making model (see Table IV-4).

IV-4. Justices' Statement-Model Frequencies (Excluding Their Written Opinions)

Justice	Legalistic	Attitudinal	Strategic Institutional	Interpretive Institutional	Outcome Model
Stewart	4 (30.8%)	5 (38.5%)	2 (15.4%)	2 (15.4%)	0
Powell	5 (55.6%)	3 (33.3%)	0	1 (11.1%)	0
Stevens	2 (66.7%)	1 (33.3%)	0	0	0
White	2 (28.6%)	4 (57.1%)	1 (14.3%)	0	0
Blackmun	4 (100%)	0	0	0	0
Burger	4 (80%)	0	1 (20%)	0	0
Rehnquist	2 (50%)	1 (25%)	0	0	1 (25%)
Brennan	2 (28.6%)	5 (71.4%)	0	0	0
Marshall	0	6 (75%)	0	1 (12.5%)	1 (12.5%)
Total	41.7%	41.7%	6.7%	6.7%	3.3%

In controlling for each justice's written opinion, the content analysis's results nicely complement this study's larger findings (see Section IV, II: "Findings: Justice by Justice", IV: "Overall Court Analysis"). As indicated in Table IV-4, Stewart and Powell's opinions incorporated a mix of models, Blackmun and Burger decided (almost exclusively) legalistically, and Brennan and Marshall (largely) attitudinally. Although Rehnquist and White's motivations are more difficult to determine, the latter seemingly acted both legalistically, attitudinally, and based upon outcome model concerns, and the former was affected by attitudinal, legalistic, and outcome model criteria.

Also important to note is the Court's overall decision. The *Gregg* opinion was remarkably split between legalistic and attitudinal motivations (41.7% each). This does not paint the whole picture, however, as strategic and interpretive models also explain a combined 13.4% of the Court's decision. And while the outcome model played a

considerably more minor role (3.3%), this motivated two of the justices' opinions. As argued throughout this project, *Gregg v. Georgia* clearly represents a mixed model of judicial decision making.

Section V:

Discussion, Recommendations, and Conclusion(s)

I. Discussion and Recommendations

Recognizing that the *Gregg* Court acted legalistically, attitudinally, *and* institutionally engenders a series of obvious (and not so obvious) considerations. As explored earlier, a single test case cannot and should not be used to construct an overarching theory of Supreme Court decision making. Such case studies *can* discredit supposedly universal theories, however, and highlight important and telling aspects of judicial behavior.

A. Discussion

Most clear is the flawed simplicity of purely attitudinal and legalist accounts. As *Gregg* demonstrates, neither model can be taken seriously as a universal theory of judicial decision making. The majority of justices incorporated a variety of models, sometimes in direct conflict with their own legalist philosophies or personal beliefs. For example, Justice Rehnquist, a supposed pillar of judicial restraint, openly expressed an attitudinal justification in *Furman* conference. And Justice Blackmun, while faithfully textualist in *Furman* and *Gregg*, candidly admitted the (possibly inescapable) appeal of political concerns when judging.

Perhaps even more surprisingly, individual justices' models even shifted from case to case. While Stewart's opinion in *Furman* was attitudinally driven, his *Gregg* decision was dominated by legalist concerns. Powell followed the opposite course, deciding legalistically in *Furman* but more attitudinally in *Gregg*. Purely legalist or attitudinal accounts therefore fail not only to describe the plurality decision, but even individual actors' judicial behavior.

Second, the strategic model of judicial decision making is considerably more complicated than its advocates have often presented it to be. While a number of justices certainly acted strategically in *Gregg,* others refused to compromise or even discuss their votes in conference. This most clearly resembles H.W. Perry's "outcome model", where justices' behavior supposedly varies depending upon their interest in a particular case. According to Perry, the greater a justice's interest, the more likely he or she is to vote attitudinally. Capital punishment was very important to Justices Stewart and Powell, and these actors formed an alliance relatively quickly. Rehnquist was less bothered by the death penalty, and neither tried to influence nor engage the other justices.

Advocates of the strategic model could conceivably argue that the justices were still acting tactically, just employing discrete tactical methods. This would over-explain the issue, however, and tell us relatively little. While some justices attempted to convince and even cajole their brethren, such obvious strategizing clearly fails to accurately characterize the Court as a whole.

Third, as explored in the previous section, Powell and Stewart were triumphant due to their legal pragmatism; both men approached each case in context, and were willing to alter their opinions as long as certain core principles were upheld. While this indicates the effectiveness of judicial pragmatism in deciding case outcomes, it would be premature to posit this as any sort of universal principle. More centrist justices *could* conceivably have a natural advantage in shaping Court majorities, being more likely to attract those only weakly drawn to either the right or the left. Yet any greater proof for this contention is impossible to gauge from a single study. For example, if the majority of justices were to act ideologically in a certain case, pragmatism would logically give way

to politics. Good quantitative research could be useful here, analyzing how frequently political moderation controls overall case outcomes.

Fourth, while the "winning" hypothesis could be read to support Judge Richard Posner's pragmatic theory of judicial decision making, this model contains some profound flaws of its own. According to Posner, justices decide based on a variety of discrete but interconnected factors, including their personal preconceptions, individual attributes, strategic constraints, and legalist inclinations. While this mixed theory is stronger than any blanket appeals to attitudinalism or legalism, it suffers from weaknesses similar to those of purely strategic accounts: The model simply explains too much. Certainly, justices decide based upon the factors Posner identifies, but this tells us very little. Rather than presenting a rote list of potential variables, the scholar should identify those he finds most influential. This certainly means qualitatively and quantitatively analyzing the judicial "marketplace", but also narrowing and clarifying his totalizing claims.

Fifth, and perhaps most significantly, these findings demonstrate the overarching importance of context. Although quantitative models may reveal crucial patterns of human behavior, their methodological distance ignores the subtleties and complexities of individual and group dynamics. As case studies illustrate, humans do not decide in a vacuum, but are continually affected by situational influences and environmental constraints. Justices are little different. Proposing a single model of judicial decision making is thus akin to constructing a universal narrative of human behavior. While such theories may be intuitively pleasing, they misunderstand both the strengths and

limitations of social scientific research (explored at greater length in the following subsection, Conclusion(s)).

A final point of interest, and one undoubtedly more relevant for a dissertation rooted in history or political science, is the importance of individual actors in shaping historical events. Justice Stewart and White's *Furman* compromise single-handedly instituted and shaped the modern death penalty. In drastically altering capital sentencing, the two men were making a long-term bet that legislatures would either abandon capital punishment or restore it with much stricter sentencing standards. When the latter resulted, White must surely have felt triumphant: Not only had he gotten his desired mandatory sentencing, but legislatures also indicated that they were serious about capital punishment. Stewart's ambitions were not thwarted so easily, however, as his alliance with Stevens and Powell forced the Court to occupy a nebulous middle ground. Neither justice was consequently victorious; Stewart would have preferred capital punishment abolished rather than conditionally resurrected, while White's support for mandatory sentences was considered and rejected. Yet neither justice was entirely defeated either: Both could claim some credit for "rationalizing" capital sentencing,[39] although the nature and consequences of this "rationalization" undoubtedly looked very different from each justice's perspective. Had either man decided otherwise in this pivotal case, the recent history of capital punishment would undoubtedly look quite different.

Of course, it is impossible to speculate on the nature of this difference. Perhaps discretionless sentencing would have remained standard, or capital punishment,

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[39] Of course, whether they actually did rationalize capital sentencing is an entirely different debate (see Steiker and Steiker, 1995).

dwindling in popularity until *Furman,* would have been slowly abolished.[40] One certainty exists, however: A single compromise has resulted in the execution of over 1,100 persons (and counting), an estimated government expenditure of over $1 billion (and counting), and continuous condemnation by much of the international community (DPIC.org, 2010). Those who still view the study of Supreme Court decision making as a relatively marginal or purely academic topic should keep this awesome fact in mind.

B. Recommendations

There are few (good) sayings about social scientific research, but a personal favorite is that such studies always end the same way: with the rather unenlightening conclusion that more studies are needed. Yet what kinds of further studies are needed, and what should they specifically focus upon?

First, there is a surprising dearth of qualitative case studies, and further accounts would be of significant value. These should not only shed light on the entire process of judicial decision making, but reveal the different ways justices mediate between their legalist and attitudinal inclinations. Such studies should also utilize a variety of data sources, including both extensive archival research and a number of interviews with clerks and other relevant parties. Since this will only be possible for a certain number of cases, the pool of such studies will be limited. There are still plenty to choose from, however, and the following four may hold particular potential:

Roe v. Wade (1973): Probably the most controversial decision of the Burger Court, *Roe* not only remains incredibly contentious but continues to affect public policy. Of

[40] This is ironic, of course, since this was likely Justice Stewart's goal in the first place.

particular interest is the majority opinion of Justice Blackmun, who decided legalistically in *Furman* and *Gregg* but perhaps more attitudinally in this pivotal case.

Miller v. California (1973): The leading obscenity case of the Burger era, *Miller* not only featured a 5 to 4 decision and established a detailed test for outlawing pornographic materials, but led a number of justices (including Justice Stewart) to criticize precedent that they themselves had previously established (Woodward and Armstrong, 1979).

Buckley v. Valeo (1976): Another controversial Burger decision, this case was described by former Marshall clerk Gregory L. Diskant as even more important than *Gregg* (9/22/09). Not only was *Buckley* a bitterly divided decision, but revolved over an issue (relatively) underexplored in studies of judicial decision making: the limits of free speech, and how these limits could be understood in relation to campaign contributions.

Bowers v. Hardwick (1986): Although more recent, this case focused on a politically controversial and timely topic (anti-sodomy laws), and featured a bitterly divided Court, led by Justice White on one side and Justices Blackmun and Stevens on the other.

A collection of case studies would likely be most desirable; not only would multiple analyses more extensively complement the existing literature, but they could potentially identify issues that could not be discerned in single studies of judicial decision making.

The second and final recommendation, and one explored previously in greater depth,[41] is to better recognize the limits of purely quantitative models. Such studies do not necessarily yield "truer" information than qualitative accounts, but rather data of a

[41] See "A. The Case Study" in Section III.

different order. Whereas quantitative studies can identify important situational patterns, case histories reveal the complexity of individual and group decision making. Research is valuable from both the bottom up and the top down, and any greater conclusion should come from somewhere in the middle. Justices Stewart, Powell, and Stevens's "middle way" thus holds a valuable lesson here: Rather than blindly endorsing a single methodological extreme, it may be best to first identify the strengths and weaknesses of each one, and then use these strengths and weaknesses to temper one's larger determinations. While this may fail to yield a single, universal model of judicial decision making, it will ultimately allow a more honest accounting of judicial behavior.

II. Conclusion(s)

> There is no formula that can deliver all truth, all harmony, all simplicity. No Theory of Everything can ever provide total insight. For to see through everything would leave us seeing nothing.
>
> J. D. Barrow

As the preceding sections illustrate, the search for a single theory of judicial decision making is a fundamentally flawed and ultimately fruitless endeavor. Justices do not operate according to a single decision making paradigm, but rather act within a variety of complex and often competing narratives. As Court scholar Barry Friedman (2006) correctly observes, "Judicial behavior may vary court by court, by judge, and by case, or even by time period in which decisions are rendered" (p. 271). While attitudinal accounts may accurately describe one justice's behavior in a particular case, another may be driven by strict legalism or collegial strategy. By treating the Court as a uniform organism, scholars of judicial behavior fail to account for the full subtlety and complexity of Supreme Court jurisprudence.

The cases of *Furman* and *Gregg* cast specific light on this phenomenon. Attitudinalists firmly deny the impact of institutional concerns, declaring all judicial decisions motivated solely by political interests. Yet while this model may explain the diverse, attitudinal opinions of Justices Marshall, Brennan, White, and Rehnquist, it offers no adequate explanation for the more institutionally motivated decisions of Justices Stewart and Powell. This is further complicated by the originalism of Justices Blackmun

and Burger, who politically opposed but nevertheless upheld the constitutionality of capital punishment.

If no model is entirely correct, why have so many scholars pledged allegiance to a single paradigm? There are likely a number of reasons for this flawed essentialism. First, it is difficult enough to fit the breadth of Supreme Court decisions within a single quantitative model, never mind attempting to map out the behavior of individual justices. Doing so would require studying justices' behavior in each and every case, a practically impossible feat. Breaking justices' voting patterns into basic conservative and liberal categories is quantitatively necessary, regardless of what motivated or influenced each individual decision. Simply declaring justices Democrat or Republican overlooks any position that may not traditionally correspond with either party, however, and skews one's larger conclusions.

Second, and perhaps more damagingly, instead of recognizing the partial truths of each model, scholars have seemingly refused to look beyond their own theoretical frameworks. Denying that any single model could be universally applicable may cast doubt on the social sciences' more "scientific" aspirations. As philosopher and social scientist Bent Flyvbjerg has identified, the "natural sciences' intuitive simplicity" and "impressive material results" are undoubtedly appealing for social scientists[42] (Flyvbjerg, 2001, p. 26). Yet, a theory of social science that mimics the natural sciences, that makes possible fixed "explanation and prediction, requires that the concrete context of everyday human activity be problematically excluded". The exclusion of any context makes understanding human behavior itself impossible, for any

[42] The desire to attain grant money also cannot be ignored here, as the more "scientific" projects have traditionally garnered the greatest amount of funding (Kagan, 2009).

> Attempt at a context-free definition of an action, that is, a definition based on abstract rule or laws, will not…accord with the pragmatic way an action is defined by the actors in a concrete social situation (p. 26).

Context is vital for understanding what qualifies as an action in the first place, something the (supposedly) context-free natural sciences do not have to consider (p. 42). Any universal theory of jurisprudence is prima facie incoherent; human skills like judging are context-dependent and simply cannot be reduced to universal rules.

If such behaviors resist being concisely systematized, the impulse is to compose more complex models rather than probing these "messy" cases in any greater depth. But by acknowledging this messiness, is the quest to understand justices' behavior revealed as a fruitless endeavor? Must we surrender to a sort of social scientific relativism and epistemic nihilism?

Intellectual historian Jerome Kagan (2009) provides a possible answer, ironically rooted back in the natural sciences. According to Kagan, there are actually two types of scientists—physicists and biologists. Whereas the former hunger for a unified theory to explain the world around them, the latter have no totalizing schema, but recognize the "specificity and contextualized constraints that accompany every inference" (p. 250). In Kagan's view, social scientists must choose to be biologists, "assuming dynamic changes in contextual constraints" rather than assuming that one model fits all. This argument reaffirms the value of case study research in particular. Such studies reject grand explanations of human behavior, and ask us to learn from situational accounts. The Court's opinion in *Gregg* highlights this lesson.

Exploring *Gregg* not only provides insight into how justices actually decide, but perhaps offers some insight into how they should. Many legal theorists have demanded a

"universal method of interpretation" that will allow judges and justices to easily settle any looming constitutional dispute (Farber and Sherry, 2002). Yet cases like *Gregg* demonstrate the Court's inability to adhere to any particular theory, and hint at the fruitlessness of requiring some single foundation for judicial behavior. Legal scholars may assert a confusion of normative and descriptive claims here: Just because justices fail to follow any single legal theory hardly invalidates the theories themselves. But if such normative claims fail so strikingly to mesh with reality, it may be time to reevaluate (and perhaps seriously revise) their underlying claims. Separating theory so thoroughly from practice benefits neither.

Indeed, doing so not only risks misconstruing the very nature of law, but also potentially confuses the general public regarding what the law is capable of. This was recently seen in the Sonia Sotomayor and Elena Kagan confirmation hearings, where the future justices were continually criticized for their (seemingly) nonlegalist inclinations. Yet if legalism is ignored anyway, the law itself is rendered schizoid, with justices (and judges) expected to perform tasks they are institutionally incapable of fulfilling. This may explain Justice Antonin Scalia's (in)famous comment that legal realists like Holmes, while correct, harmed the law by pointing out legalism's incoherence (Farber and Sherry, 2002). According to the justice,

> I never thought Oliver Wendell Holmes and the legal realists did us a favor by pointing out that all these legal fictions were fictions: Those judges wise enough to be trusted with the secret already knew it (p. 38).

Scalia presumes that if people realize that judges (and justices) cannot be constrained by some definitive text or original intent, the law seemingly risks losing its

institutional legitimacy. This potentially breeds disillusionment and apathy, and endangers the very foundations of a constitutionally entrenched order.

But is the disingenuous perpetuation of legalism truly a noble lie? Like all noble lies (at least in the Platonic sense), it demands that a wise and manipulative elite lead an ignorant public. In democratic societies, a duly represented public is supposed to determine the law, however, and must therefore be aware of how legal statutes are actually constructed, interpreted, and applied. This is fundamentally corrupted by the illusion of legalism, which argues that good justices always view the law as both objective and (at least foundationally) transparent. Scalia's legalist myth is profoundly antidemocratic,[43] purposely confusing how the law should be decided with how it actually is. Perhaps more than anything else, the social sciences could do legal studies a great favor by exposing the dangers of notions such as Scalia's, and shed light not only on the descriptive, but also on the normative aspects of judging.

[43] Ironic, since he is strong advocate of judicial restraint and its underlying support of representative democracy.

Appendices and Bibliography

Appendix A:
The Current State of Capital Punishment

Although this study focuses on death penalty jurisprudence in the 1970s, the current state of capital punishment is certainly worth some attention. Since the death penalty's reinstatement in 1976, nearly 1,200 people have been executed ("Facts about the Death Penalty", Deathpenaltyinfo.org, 2010). The number of executions reached a peak of ninety in 2000, before declining to forty-eight in 2009. As of January 1, 2010, 3,261 people sit on death row, and have been there for an average of approximately twelve years. The United States is the only Western nation to currently practice capital punishment, and only one of two post-industrialized nations (alongside Japan) that allow its imposition. This has resulted in official condemnations from the European Union and the United Nations, and even influenced the Supreme Court to consider international norms when reviewing capital cases (*Roper v. Simmons,* 2005).

Thirty-five states,[44] plus the U.S. military and the federal government, currently allow capital punishment. Only twelve states have executed anyone within the last two years, however, as various state legislative and judicial disputes have engendered a number of unofficial moratoriums. In the landmark 1977 case of *Coker v. Georgia* the Supreme Court banned executions for the rape of an adult, restricting capital punishment's imposition for murder and child rape alone. Executing convicts for the latter offense was further declared unconstitutional in the 2008 case of *Kennedy v. Louisiana*. This followed a number of other high-profile cases, in which both the

[44] As of January 1, 2009, California has the highest number of death row inmates (678), followed by Florida (402), Texas (358), Pennsylvania (226), and Alabama (207). State rates differ dramatically regarding the number of actual executions since 1976, however, with Texas leading the pack at 446, Virginia with 105, Oklahoma with 91, Missouri with 67, and Florida with 68.

mentally handicapped (*Atkins v. Virginia,* 2002) and juveniles (*Roper v. Simmons,* 2005) were rendered constitutionally ineligible for the death penalty.

The latest Gallup Poll (2009) reports that approximately 65 percent of Americans currently support the death penalty, while 57 percent believe capital punishment is fairly applied (Deathpenaltyinfo.org, 2010). The vast majority of people support capital punishment for retributive rather than deterrence purposes (Finckenauer, 1988). The issue of deterrence has proven especially controversial; although a number of recent studies have found that capital punishment prevents future offenses (in one example supposedly deterring between three and thirty-two murders), the overall data remains mixed (Weisberg, 2005).

Capital punishment provokes a number of debates, generally focused around issues of race, innocence, and cost. While the majority of those executed since 1976 have been white (56 percent), blacks have undoubtedly been put to death in numbers disproportionate (35 percent) to their total in the overall population (12.8 percent) ("Facts about the Death Penalty", Deathpenaltyinfo.org, 2010). Further, studies have shown that killing a white victim is more likely to result in a capital sentence: Although approximately 50 percent of annual murder victims are white, about 80 percent of those on death row had white victims. Perhaps even more troublingly, since 1973 over 130 people on death row have been exonerated. This number has increased significantly in the past few years, due principally to the increased prevalence of DNA testing. Although 59 percent of Americans believe an innocent person has been executed within the last half decade, neither the federal government nor any state government has officially acknowledged the occurrence of this event.

The cost of the death penalty varies from state to state, almost exclusively based upon their particular appeals process. Although figures have not been released for each and every jurisdiction, capital sentences generally cost significantly more than life imprisonment. For example, California estimates that death row inmates cost taxpayers $114 million more per year than those serving a life sentence and Texas has reported that death penalty cases cost an average of $2.3 million, or about three times the cost of imprisoning someone for life.

Although the 2008 financial crises led many states to review the death penalty's economic toll, its complete abolition seems unlikely. Capital punishment remains popular among the voting public, and is rarely opposed by either Republican or Democratic politicians.[45] Further, the current Supreme Court has openly declared the practice constitutional, and has given no indication of an *in toto* review. While recent rulings have limited the scope of the death penalty's implementation, a more sweeping verdict seems to lie well outside current legislative and judicial concerns.

[45] With the recent exception of New Jersey, which in 2007 became the first state to legislatively ban capital punishment since its 1976 reinstatement.

Appendix B:
A "Skeletal Framework" of the Interviews

Since these questions are primarily substantive, they were asked throughout the course of the interview rather than at its beginning. Those that seem leading were predicated upon views previously and unambiguously expressed by the interviewee him- or herself and were primarily intended to focus (or refocus) the conversation.

Justice Marshall, *Furman* clerks

- Do you believe Justice Marshall's personal antipathy toward the death penalty partly determined his decision in *Furman*?
- Do you think Justice Marshall believed a reasonable distinction could be drawn between bad policy and bad law?
- Do you believe Justice Marshall saw justices' as legislators?
- Do you think Justice Marshall was entirely immune from Court politics in *Furman*?
- Does the *Furman* decision teach us anything deeper about Supreme Court decision making?

Justice Marshall, *Gregg* clerks

- Do you believe Justice Marshall's person antipathy toward the death penalty partly determined his decision in *Gregg*?
- Do you think Justice Marshall believed a reasonable distinction could be drawn between bad policy and bad law?
- Do you believe Justice Marshall saw justices as legislators?
- Do you think Justice Marshall was entirely immune from Court politics in *Gregg*?

- What was Justice Marshall's stance toward Stevens, Powell's, and Stewart's compromise?
- Does the *Gregg* decision teach us anything deeper about High Court decision making?

Justice Brennan, *Furman* clerks

- Do you believe Justice Brennan's personal antipathy toward the death penalty partly determined his decision in *Furman*?
- Do you think Justice Brennan believed a reasonable distinction could be drawn between bad policy and bad law?
- Do you believe Justice Brennan saw justices as legislators?
- Do you think Justice Brennan was entirely immune from Court politics in *Furman*?
- Do you think Justice Brennan was entirely unaffected by public opinion in *Furman*?
- Do you think Justice Brennan agreed with the Marshall Hypothesis (that the more people were educated on the death penalty the more likely they would be to oppose it)?
- Does the *Furman* decision teach us anything deeper about Supreme Court decision making?

Justice Brennan, *Gregg* clerks

- Do you believe Justice Brennan's personal antipathy toward the death penalty partly determined his decision in *Gregg*?
- Do you think Justice Brennan believed a reasonable distinction could be drawn between bad policy and bad law?
- Do you believe Justice Brennan saw justices as legislators?

- Do you think Justice Brennan was entirely immune from Court politics in *Gregg*?
- Do you think Justice Brennan was entirely unaffected by public opinion in *Gregg*?
- Do you think Justice Brennan agreed with the Marshall Hypothesis (that the more people were educated on the death penalty the more likely they would be to oppose it)?
- What was Justice Brennan's stance toward Stevens's, Powell's, and Stewart's compromise?
- Do you think Justice Brennan at least thought the *Gregg* decision would reduce arbitrariness and capriciousness? That it was a small victory?
- Why do you think Justices Stevens, Stewart, and Powell chose to take a middle course in *Gregg*?
- Does the *Gregg* decision teach us anything deeper about Supreme Court decision making?

Justice Rehnquist, *Furman* clerks

- Do you think Justice Rehnquist's personal stance toward the death penalty motivated his decision in *Furman*?
- Was Justice Rehnquist deeply bothered by the *Furman* decision?
- Does the *Furman* decision teach us anything deeper about Supreme Court decision making?

Justice Rehnquist, *Gregg* clerks

- Do you think Justice Rehnquist's personal stance toward the death penalty motivated his decision in *Gregg*?
- Was Justice Rehnquist deeply bothered by the *Gregg* decision?

- What was Justice Rehnquist's stance toward Stewart, Stevens, and Powell's compromise?
- Does the *Gregg* decision teach us anything deeper about Supreme Court decision making?

Justice White, *Furman* clerks

- Do you believe Justice White was personally for or against the death penalty?
- Do you believe Justice White's personal stance on capital punishment motivated his opinion in *Furman*?
- Do you believe Justice White's stance in *Furman* and *Gregg* was consistent? Did it surprise you?
- Do you think Justice White's opinion in *Furman* was motivated by internal Court politics?
- Does the *Furman* decision teach us anything deeper about Supreme Court decision making?

Justice White, *Gregg* clerks

- Do you believe Justice White was personally for or against the death penalty?
- Do you believe Justice White's personal stance on capital punishment motivated his opinions in *Gregg* and *Furman*?
- Do you believe Justice White's stance in *Furman* and *Gregg* was consistent? Did it surprise you?
- Do you think Justice White was affected by the sudden popularity of capital punishment following the Court's decision in *Furman*?

- Do you think Justice White's opinion in *Gregg* was motivated by internal Court politics?
- As far as you know, did Justice White come to regret his decision in *Gregg*?
- Does the *Gregg* decision teach us anything deeper about Supreme Court decision making?

Justice Powell, *Furman* clerks

- Do you believe Justice Powell was personally for or against the death penalty?
- Do you think this personal stance motivated his decision in *Furman?*
- Do you think Justice Powell was affected by public/external pressure?
- Does the *Furman* decision teach us anything deeper about Supreme Court decision making?

Justice Powell, *Gregg* clerks

- Do you believe Justice Powell was personally for or against the death penalty?
- Do you think this personal stance motivated his decision in *Gregg* to carve out a middle ground? To vote against *Woodson* and *Roberts*?
- Do you think Justice Powell was affected by public/external pressure?
- Do you think this decision was motivated by internal politics? A wish to align with Justices Stewart and Stevens in order to dictate Supreme Court policy in this matter?
- In your view why did Justice Powell come to regret his decision in *Gregg*?
- Does the *Gregg* decision teach us anything deeper about Supreme Court decision making?

Justice Stewart, *Furman* clerks

- Do you believe Justice Stewart was the pivotal player in *Furman*?
- Do you think Justice Stewart was personally for or against the death penalty at the time of *Furman*?
- Do you think this personal stance motivated his decision in *Furman* to carve out a middle ground?
- Do you think Justice Stewart felt stuck between his own decision in *Gregg* and his previous concurrence with Harlan in *McGautha*?
- Do you think the *Furman* decision was motivated by internal Court politics?
- Does the *Furman* decision teach us anything deeper about Supreme Court decision making?

Justice Stewart, *Gregg* clerks

- Do you believe Justice Stewart was the pivotal player in *Gregg*?
- Do you think Justice Stewart was personally for or against the death penalty at the time of *Gregg*?
- Do you think this personal stance motivated his decision in *Gregg* to carve out a middle ground?
- Do you think Justice Stewart felt stuck between his own decision in *Gregg* and his previous concurrence with Harlan in *McGautha*?
- How deeply do you think Justice Stewart was affected by public pressure?
- Do you think *Gregg*'s middle ground was problematic for Justice Stewart, and if so, how so?
- Do you think the *Gregg* decision was motivated by internal Court politics?

- As far as you know, did Justice Stewart come to regret his decision in *Gregg*?
- Does the *Gregg* decision teach us anything deeper about Supreme Court decision making?

Justice Douglas, *Furman* clerks

- What was the mood of the Court during the *Furman* proceedings?
- Do you think the plurality was affected by internal Court politics?
- Do you think the plurality was affected by external Court politics?
- Does the *Furman* decision teach us anything deeper about Supreme Court decision making?

Appendix C:
E-mail to Justices' Family Members

Below is a copy of the e-mail sent to Thurgood Marshall, Jr., William Brennan, IV (grandson), Lewis F. Powell III, Potter Stewart, Jr., Sally A. Blackmun, Charles Byron White, James Rehnquist, and Janet Rehnquist:

Hello Mr./Ms. ____,

I am a doctoral student at John Jay College of Criminal Justice and writing my dissertation on the Supreme Court and capital punishment throughout the 1970s. As your father [grandfarther] was on the Court during this time period, I was wondering if you could offer some insight into his jurisprudence. I'm not trying to 'dig up dirt' or solicit gossip; my intentions are purely academic, and my dissertation will only be circulated within the university. Further, it should only take an hour of your time, and everything said will be treated with the utmost confidentiality. You can contact me at this e-mail address (baronshemtob@gmail.com), or call me anytime at 973-879-4418. You re undoubtedly quite busy, but any insight you could lend would be deeply and truly appreciated.

Thank you and best regards,

Zachary Shemtob
PhD Candidate
John Jay College of Criminal Justice
899 Tenth Ave.
New York NY 10019

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