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States' Rights or Federal Responsibility? The Abolition and Swift Reintroduction of the Death Penalty in 1970s America

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States' Rights or Federal Responsibility?: The Abolition and Swift
Reintroduction of the Death Penalty in 1970s America

Master's Thesis

North American Studies

Leiden University

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Introduction

The execution of Gary Gilmore on January 17, 1977, at Utah State Prison was the first time in nearly ten years a death row inmate was executed. A moratorium on executions had been in place in the US, and before Gilmore the last execution had been the one on Luis J. Monge on June 2, 1967 (Waxman, 2017). The US has employed the death penalty since the early settlement of the continent, but during a brief period in the late sixties and seventies, executions were halted, and the death penalty was temporarily deemed unconstitutional. This thesis will focus on the Supreme Court decisions that occurred in the 1970s that banned and later reintroduced the death penalty. The decision to ban the death penalty in 1972 came about because of a Supreme Court case titled *Furman v. Georgia*. The decision to reintroduce the death penalty also came about because of a Supreme Court case, this one titled *Gregg v. Georgia*. This thesis will examine these two cases, and the events leading up to them, homing in on how the state-federal divide impacted the decisions in these cases. This is an important part of the history, considering that a large amount of power is vested in the state legislature as far as implementing criminal justice goes (Barkow, 2011). As this thesis will show, within the history of the death penalty specifically, up until 1972 it was up to each individual state's discretion to set their own laws regarding the death penalty. Smaller parts of these procedures were ruled upon before 1972, such as in the case of *McGautha v. California*, in which for example the jury selection process for capital cases was discussed. However, with *Furman* abolishing the death penalty on a national level, the Supreme Court took away some of the state autonomy regarding criminal justice. Within the American political system, power and responsibility is divided between the federal government and individual states, and generally speaking criminal justice is dealt with on the state level with individual states having their own criminal justice system. There are very few crimes that are exclusively dealt with by the federal government, and with the states being responsible for their own criminal justice statutes there are a lot of differences on a state-by-state basis (Bureau of Justice Statistics, n.d.). With the *Furman* decision, there was a discrepancy between what states deemed acceptable, but what the Supreme Court deemed unconstitutional, which caused a schism between the states and the federal government.

This chapter will now introduce some of the major actors and concepts that will be discussed in this thesis, starting with the Supreme Court, which decided on the constitutionality of the

death penalty in *Furman* and *Gregg*. The Supreme Court of the United States is the highest court in the country, and has the final say on the interpretation of the constitution and federal law. The Supreme Court has the autonomy to decide which cases to review, which is done through a writ of certiorari. If granted the certiorari, the petitioner and respondent are allowed to present their case to the Court (United States Courts, n.d.). The main petitioner in the cases that discussed the death penalty during the 1960s and 1970s was the National Association for the Advancement of Colored People's (NAACP) Legal Defense Fund (LDF). The LDF was the primary actor that petitioned on behalf of individuals sentenced to death attempting to reverse the decision, and simultaneously move the legal jurisprudence to attempt to abolish the death penalty. The LDF was founded by Thurgood Marshall, with the specific goal in mind to end racial segregation through legal review (Legal Defense Fund, n.d.). The LDF found success in their legal battles, culminating in the *Brown v. Board of Education* decision, in which the 'separate but equal' doctrine was overturned, and the segregation of schools was deemed unconstitutional (*Brown v. Board of Education*, n.d.). When Marshall was nominated to the U.S. Court of Appeals in 1961, Jack Greenberg became the new director-counsel of the LDF. Greenberg was one of the litigators on *Brown* together with Marshall, and a staunch civil rights advocate. After the *Brown* decision, the LDF was inspired to deem the death penalty unconstitutional based on racial discrimination after Supreme Court Justice Arthur Goldberg dissented when the Court refused to review two death penalty appeals. The Goldberg dissent, written in part by his clerk Alan Dershowitz, questioned the overall constitutionality of the death penalty. Chapter 1 will discuss the importance of this dissent, but because of this the LDF had a new goal in mind by attempting to abolish the death penalty. Within the LDF Jack Greenberg and Anthony Amsterdam became the leading voices of this death penalty abolition movement, and they were assisted by Michael Meltsner, who wrote a book about the LDF proceedings against the death penalty (Meltsner, 1973). The cases in which the LDF petitioned for review of the death penalty of convicts were often argued against state prosecutors. Some of the states that were most active in the fight to keep the death penalty alive were Georgia, Florida, Texas, North Carolina, and California, as this thesis will show in chapter 2 and 3. A total of 35 states reintroduced the death penalty after the *Furman* decision and expressed their discontent with the situation. The individual state legislatures had the power to reintroduce the death penalty, as the *Furman* ruling left the door open to a certain extent, as will be shown in chapters 2 and 3. The decision to

reintroduce the death penalty validated the state's decisions and opinions regarding their responsibilities when it comes to the death penalty. This thesis will argue that the *Gregg* decision is in line with a change in the state-federal relations that originated during the 1970s and gained steam following the nomination of William Rehnquist to become Chief Justice in 1986. This change was a policy called New Federalism, which was introduced by Richard Nixon in the 1970s. New Federalism was first mentioned by Nixon in a speech six months into his first term, in which he laid out his plan of moving away from the New Deal tradition, which Nixon described as the process of transferring power to the federal government from the individual states (Katz, 2014). Nixon wanted to provide state legislatures with more power, responsibility, and a higher budget, through a new system of revenue sharing between the federal and state governments. The overarching goal of Nixon was to allow the states to have more freedom in solving the problems that happened within their own locale. New Federalism often expressed itself in the Supreme Court after William Rehnquist had been nominated as Chief Justice (McGinnis & Somin, 2004). While New Federalism is usually discussed in the context of economic and fiscal Supreme Court decisions, at its core Richard Nixon wanted to promote 'power, funds, and responsibility [flowing] from Washing to the states and to the people' (Katz, 2014). This can be applied to the criminal justice procedure as well, with the Rehnquist court for example deciding in the 1995 court case *United States v. Lopez* that criminal law should generally be decided at the state level, and not controlled by the federal government (Levinson, 2006). In this context both the decision to abolish and the decision to reintroduce will be analysed. This thesis will argue that the LDF wanted to move the decision to the federal level, to allow for the abolition to apply to every state, while the anti-abolitionists wanted to keep the autonomy at the state level/

Considering the 1972 decision to abolish the death penalty was taken by the Supreme Court which overruled the state statutes on the death penalty this thesis will examine the state response. Because of this, this thesis will attempt to answer the research question of 'To what extent did the state-federal political divide influence the 1972 Supreme Court decision to abolish and 1976 decision to reintroduce the death penalty?'. This thesis hypothesizes that because the states historically possessed the power to set their own agenda with regards to capital punishment legislation and considering the history of federalism and states' rights disputes in the United States, that the decision to abolish the death penalty were seen by states as the Federal government imposing their ideology on the states. Since the *Furman*

decision took power away from the states, while the *Gregg* decision validated the states' autonomy regarding death penalty legislation, it is interesting to examine the influence of state autonomy and federalism in the context of these two cases. This thesis will attempt to test the hypothesis by looking at the states and their responses in the state legislature and in the media to this decision. Examining this will let us understand how far the Supreme Court can go as a federal institution in deciding whether state law is acceptable under the constitution, and how states respond to this issue. This chapter will now discuss the rich body of literature that has been published on the death penalty, and on New Federalism and states' rights.

The death penalty in America is a topic that has produced a large amount of discussion and literature. The death penalty in the pre-twentieth century America has been written about by Stephen Hartnett (2010) in his two-volume piece, describing the relationship America has had historically with the death penalty. Similarly, Louis P. Masur (1989) described this era of death penalty legislation by discussing the death penalty as a tool of criminal justice and personal retribution between the seventeenth and nineteenth century. Paul C. Jones (2011) writes about the same period, looking at antebellum America and how prominent writers of that era petitioned for the abolition of capital punishment.

Henry Kamerling (2017) focusses on the issue of race and the death penalty in the immediate post-civil war and reconstruction era, comparing the penal developments of Illinois and South Carolina to analyse the differences between the death penalty, race, and the American North-South divide. Allen, Clubb & Lacey (2008) describe the entire history of the death penalty in America from 1786 to the post WW2 era, specifically focussing on the issues of race and class in this history. A similar topic is discussed by Mark D. Ramirez (2021), in an article that focusses on how the issues of race impact the public support for the death penalty. The issue of race and the death penalty is also analysed by James D. Unnever and Francis T. Cullen's (2007), R.J. Maratea (2019), and S.N. Archibald (2015)

The legal aspect of the death penalty is also often reason for discussion, as it will be in this thesis as well. An important piece on this is by Carol and Jordan Steiker (2016), who describes the history of all Supreme Court cases dealing with the death penalty. In the same vein many prominent academics have attempted to describe the future of the death penalty, and methods for the possible abolition of the death penalty in America, like Sarat, Malague & Wishloff (2019). Austin Sarat (1999) also wrote a book which tries to analyse why the United

States has so tenaciously held on to the death penalty in recent history. T.V. Kaufman-Osborn (2002) also tries to answer the question as to why the capital punishment is still so prevalent currently in the United States.

Regarding New Federalism, and the state-federal divide, many academic works has also been written. Orbach, Callahan & Lindemenn (2010) discuss the methods employed by private lawmakers to move the decision-making of federal policy to state legislatures. McGinnis & Somin (2004) discussed how judicial review of the Supreme Court impacts decision-making on a state and a federal level, specifically looking at Rehnquist Court decisions that promoted New Federalism and caused a devolution of power and responsibility. Ryan (2017) describes the impact of federalism and the impact of a call of secession on conflict within the United States and across the globe. Barkow (2006) specifically goes into the separation of powers in the US government, and how this separation influences law-making on a criminal law level. Barkow (2006) argues that the Supreme Court has historically allowed for more flexibility in the separation of power in criminal law compared to administrative law. Chippendale (1994) describes the 'emerging backlash' to the growth of the federalization of criminal law. This article argues that from 1971 to the early 1990s the federal government has severely enlarged its criminal code, including portions of the criminal law repertoire that were originally part of the individual states' responsibility.

A research gap in this body of literature has been identified in the history of these two cases in relation with the slow adaptation of reintroducing state autonomy, which has not been written about. This research is therefore valuable, as it could indicate that the process seen in the philosophy of New Federalism might see early roots in the proceedings of *Furman* and *Gregg*. Considering the impact of the *Furman* decision on the autonomy of the state legislature regarding death penalty legislation, the *Furman* decision broke a tradition being the first time the Supreme Court had decided on the overall constitutionality of the usage of the death penalty. The decision in *Gregg* then, to reintroduce the death penalty, could be seen in the philosophy of New Federalism, and this thesis will research this.

The first chapter will look at historical precedent of individual state's changes to the death penalty legislature. The primary focus will be on the progressive era, in the early twentieth century, in which ten states individually abolished the death penalty, only to reintroduce it a couple years later. This context shows that historically states have possessed the power to set their own agenda on capital punishment legislation. This chapter will show that the death

penalty was primarily a state affair until the 1960s. This chapter will then show that during and slightly after the civil rights era the NAACP Legal Defence Fund (LDF) sets up a campaign to address the issue of the death penalty on a national level, which earmarks a new era in death penalty legislation, attempting to move the power from the state to the federal government.

Chapter two will dive into the events leading up to the *Furman* case, and the cases that were important for the judicial precedent that surrounded death penalty legislation. This chapter will also discuss the strategy employed by the LDF to reach their goal, on top of analysing the arguments by the proponents and critics. One of the main arguments this chapter will try to make is that the *Furman* decision came about because of the judges realizing that racism was widespread in the application of the death penalty through its seemingly arbitrary usage. Three of the five plurality in the *Furman* case continued to reason that if this arbitrariness can be dealt with however, the death penalty could be considered constitutional. As a result of the *Furman* decision, all individual state statutes regarding the death penalty were invalidated, which meant the federal government overruled the state legislatures for the first time in the history of the death penalty in the US.

In Chapter three the responses to the *Furman* decision will be discussed, analysing the political reactions across the United States, specifically looking at the states that responded by attempting to revive the death penalty. This chapter shows that post-*Furman* 35 states supported and introduced new legislation in favour of the death penalty. Three specific states will be discussed in this chapter, starting with California, in which the death penalty was revived through a public referendum. Florida will be discussed as the very first state to reintroduce capital punishment, as well an example of a state in which the *Furman* decision was applied through a bifurcated trial. North Carolina will also be discussed as a state in which the *Furman* decision was applied through a mandatory statute for certain crimes. This chapter will argue that the *Furman* decision caused a lot of backlash as states such as Florida, California and North Carolina disagreed with the Supreme Court decision, and believed in the death penalty as an integral part of their criminal justice portfolio. This chapter shows that in the specific instance of death penalty legislation as part of their criminal justice system the states valued their autonomy heavily.

Chapter four discusses the details of the court case *Gregg v. Georgia* in which capital punishment is reintroduced in the United States. The argument this chapter makes is that the

Gregg decision was very much impacted by the backlash of the *Furman* decision. The Supreme Court felt a certain pressure, and despite leaving the door open for reintroduction after *Furman* the changes made by the states to comply with *Furman* seemed to be rather unsubstantiated if looked at in detail. In this chapter the 5-4 majority that struck down the mandatory statutes, and the 7-2 majority that approved the guided discretion and Texas statutes will be examined. This chapter will show that even though the arbitrariness was not necessarily taken away by the new statutes, there was still a large majority for the reintroduction of the death penalty because they realized that there was a lot of political pressure from the individual states regarding reintroduction. The issue of racism that caused the death penalty to be deemed unconstitutional still existed in the new statutes but two of the justices that voted in favour of *Furman* now voted for the reintroduction. This chapter argues that the backlash outweighed the issue of race that was initially seen of primary importance in *Furman*. The petitioners argued that there were also factors outside of the courtroom that were not dealt with by the new statutes, that still allowed for arbitrariness to take place in the sentencing, such as the prosecution having the freedom to choose when to prosecute for capital punishment, and the governor having discretion to grant clemency. This argument became a bigger critique on the criminal justice system, which the Supreme Court did not believe in. The states' rights argument, and the political backlash seen throughout the country, swayed the Justices who had been on the fence about the constitutionality of the death penalty.

Chapter 1 – The Context

Before focussing on the cases of *Furman* and *Gregg*, this thesis will first show how historically speaking the death penalty is an issue dealt with at the state level. This is especially important to show, considering the *Furman* decision broke this tradition. After discussing the state autonomy on the death penalty, this chapter will also discuss the early litigation of the LDF, and the attempt to move the standard of legislation from the state to the federal to achieve abolition on a national scale. The main argument this chapter tries to make to help answer the research question is that the responsibility to decide death penalty legislation has been held by the individual states throughout American history. At the same time, the abolitionists believed that the death penalty was not congruent with the national constitution, meaning that if they were able to convince the Supreme Court that they were right, the responsibility for the legislation of the death penalty would be taken away from the state.

Between 1897 and 1917 ten American states¹ would abolish capital punishment, but this change would only be temporary for eight of them. Most of the abolition laws were put in to place after the American entrance into World War 1. The economic windfall that happened because of this change might have impacted the decisions. Historically there is a pattern that shows good economic factors impact progressive death penalty legislation (Galliher, Ray & Cook, 1992). In seven states the death penalty was abolished through extensive support or campaigning by its governor. For example, the Kansas governor at the time said that the death penalty ‘cheapens life instead of magnifying it as its votaries have believed. The criminal usually takes life hurriedly without much deliberation, but the law takes plenty of time and does it deliberately.’ Governor Hoch even went out of his way to state that he would rather resign from his position than to sign a death warrant against a prisoner. Washington’s governor was another example of a state politician actively involved in the fight against capital punishment. He became the honorary vice president of the Anti-Capital Punishment Society of America² in 1914, before signing the legislation that would outlaw the death penalty in Washington state (Galliher, Ray & Cook, 1992).

¹ The ten states that abolished capital punishment in this era were: Colorado (1897), Kansas (1907), Minnesota (1911), Washington (1913), Oregon (1914), South Dakota (1915), Tennessee (1915), Arizona (1916), and Missouri (1917) (Galliher, Ray & Cook, 1992, 541).

² One of the first national leagues who campaigned for a country-wide abolition of the death penalty.

In Colorado it was a multitude of highly respected people that supported the fight for the abolition, and Colorado was the first of the progressive era abolitions. Governor Alva Adams and the *Rocky Mountain Daily News* both proclaimed opposition to the existence of the death penalty and came out stating they did not believe in the deterring effect of capital punishment. Another interesting state in this group of ten is Tennessee. It was the only southern state to temporarily abolish capital punishment and was the only state that had to fight significant opposition to the abolition. Especially from the state citizens who felt like they had no say in the matter, opposition was very clear. The opposition came in the form of white southerners, who had wanted to keep the death penalty alive in their state, as a tool of oppression against black Americans. Governor Rye received letters from citizens across the state with language like this one written by a citizen called D.J. Currie. He wrote about Tennessee counties “in which negroes are the thickest.... Now negroes fear nothing but death, and this law would increase the crimes of homicide among that race” (Galliher, Ray & Cook, 1992, 557). This quote shows us two trends that are traceable throughout the history of Capital Punishment. First off, that the death penalty was used and seen as a tool to repress black Americans and secondly, that proponents believe that capital punishment has a deterring effect. This deterrence argument comes with its own problems, because besides the fact that there is no evidence that the death penalty results in lower crime numbers, often it is implied that this deterrent effect is charged at black Americans like seen in the letter of the Tennessee citizen. For Tennessee the legislative change mostly came about because the governor failed to veto the bill. This meant it was relatively easy to overturn the decision four years later. Tennessee was not the only state to reinstate capital punishment soon after the abolition, however. Colorado led the pack by reinstating capital punishment in 1901, a mere four years after its abolishment, and before any of the other ten states had even started their abolishment. According to Galliher, Ray and Cook (1992) this was a clear case of a ‘populist racist sentiment triggered by economic forces’. These two elements were important in the decision-making of this era, with an economic recession being cited as the reason for the reinstatement in the case of Tennessee, Missouri, Washington, and Oregon as well. The economic recession caused a lot of discontent, which transformed into racism. Galliher, Ray and Cook (1992, 526) quote a man who explained his reasoning for voting to have all black citizens leave their Colorado town: “Many of the men brought here by railroad companies are illiterate and brutal. They have many of them been guilty of crime. [...] Let them leave the

country. There are enough white men to do the work". It could easily be conceived that because of the economic depression the white citizens felt their hierarchical position crumbling, and as a result wanted to reinstate the death penalty as a tool for oppression.

One last reason is also given that might explain these interesting developments, and that is that vehement opposition to abolition has historically waned in the years after the abolition of capital punishment (Galliher, Ray & Cook, 1992). The opposition that fought for the initial abolition might not have been as active when the repeal was up for debate, allowing this change to happen. The case study of the progressive era abolitions shows us that the debate regarding the death penalty and its legality can happen within a state and have no repercussions on a national level. These ten states had their own reasoning to abolish and, in some cases, reintroduce, and it was the state prerogative to decide on this.

The start of a nationwide movement

Come 1950 roughly a quarter of the US states had abolished capital punishment. Slowly but surely the yearly number of capital punishment cases went down (Latzer & McCord, 2010). The support for capital punishment was also slowly going down across the United States. From an absolute high of 68% support for capital punishment in 1953, support dropped to 53% in 1960 and as low as 42% in 1966. 1966 is also the only polling interval in which Gallup recorded a higher opposition to the death penalty than support (Gallup, n.d.). The civil rights era was the backdrop of the initial petitions to the Supreme Court challenging the death penalty. Individual states were figuring out where they stood on this issue, but on a national level it was not really discussed as a possibility for change. This chapter has given an example of capital punishment as primarily a state issue, and the popular sentiment was that the state legislature was the right body to deal with this (Steiker & Steiker, 2016). However, the Supreme Court was still the body to review a capital punishment sentence, if the circumstances under which the sentence was passed down with, could be proven to be unconstitutional.

The national battle started with a petition to the Supreme Court from a black man named Frank Lee Rudolph, because the petitioners believed that Rudolph's death sentence was not constitutional. Rudolph was sentenced to death for raping a white woman in Alabama (Steiker & Steiker, 2016). The case of *Rudolph v. Alabama* was denied a hearing before the Supreme Court, but Justices Goldberg, Brennan and Douglas attempted to construct the legality of the

death penalty for a rape charge. Goldberg wrote that he believed a court³ should consider reviewing death penalty cases, to discuss whether the Eight and Fourteenth amendment ‘permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life.’ (*Rudolph v. Alabama*, 1963). This was a unique occurrence, as justices often do not speculate on laws, and keep their opinions to cases that were up for review. This was the first time any member of the Supreme Court had even hinted to capital punishment being unconstitutional (Steiker & Steiker, 2016). This decision was deliberate by Goldberg, as he was vehemently against the death penalty. Goldberg had asked his clerk Alan Dershowitz to write a legal argument against the death penalty in 1963, and this became the basis of his dissent for *Rudolph v. Alabama* (Wegman, 2013). Despite not being able to oversee the abolition of the death penalty on the court himself, Goldberg’s legacy here is invaluable. The dissent and memorandum were picked up by the NAACP Legal Defense Fund (LDF) who wanted to make a case against the death penalty. They read Goldberg’s dissent and agreed with his argument that the Eight and Fourteenth amendment could be interpreted in a way that would deem capital punishment unconstitutional. They believed their best legal option was to question the constitutionality of the death penalty under the Eight and Fourteenth Amendment. The Eight Amendment states that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted” (U.S. Const. amend. VIII). The important part here is the ‘cruel and unusual punishments’, as the abolitionists believed that capital punishment in its modern application was cruel because it meant the government took the life of one of its citizens and unusual because it was applied in such a manner that mostly poor and/or black Americans were executed, while white and/or rich Americans often got different sentences for the same crime. The Fourteenth Amendment states that “[...] nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws” (U.S. Const. amend XIV). The abolitionists believed that in this case the racist application of the death penalty would be unconstitutional under the Fourteenth Amendment’s equal protection clause.

This specific fight against capital punishment became an important part of the LDF’s involvement in the civil rights movement, and the civil rights movement and the call for the

³ Goldberg called for a certiorari (*Rudolph v. Alabama*, 1963).

abolition of the death penalty are linked (Blevins & Minor, 2017, CPDL, n.d., Vandiver, 2017,). Throughout the civil rights movement it was shown that litigation and court cases could be used in favour of civil rights, and this was inspiring to the capital punishment abolitionists (Latzer & McCord, 2010). The LDF struggled with the capital punishment cases they took on, however. Often it would have to be seen as a victory if the defendant got a life sentence over a death penalty, but this was still a guilty verdict with a grim outlook for the defendant. Thurgood Marshall, however, argued that in cases with a black defendant and a white victim, a life sentence often meant the jury believed the defendant to be innocent, but total clemency was off the book for black Americans (Steiker & Steiker, 2016). The LDF believed their best chances were to limit the number of executions carried out by the individual states, hoping to eventually reach zero executions a year to show that the US can function perfectly fine without having capital punishment as a tool for criminal justice. They did this by helping defense lawyers across the nation who were counsel to a defendant who might be sentenced to death. The LDF would teach the counsel all the precedents set throughout history that could be used to delay the date of execution. This meant that while there were still criminals sentenced to death row, for a couple of years none would be executed. On top of this, the more inmates on death row, and the longer they had been waiting augmented the impact of the first execution, putting the eyes of the nation on the courts (Steiker & Steiker, 2016). Lastly, by moving the issue away from the state and towards the federal government, the LDF hoped to be able to avoid having to deal with powerful Southern racists in local government or judiciaries, who would want to keep their capital punishment statutes for repressive reasons. Similarly, the 1960's allowed for this, as the Supreme Court seemed willing to change and impose the law on the states, such as in *Brown v. Board*, while Southern states themselves seemed unwilling to make changes in that regard (Meltsner, 1973).

The first real position the Supreme Court took regarding capital punishment legislation happened in 1968 in the case of *Witherspoon v. Illinois*. The ruling in this case stated that a person cannot be sentenced to death if the jury selection had been done based on excluding those who had concerns regarding the death penalty. Only those who were so significantly principled in their anti-death penalty stance could be struck based on cause. This precedent was subsequently used in cases like *Davis v. Georgia* (1976) and *Adams v. Texas* (1980) (Bennett & Tecklenburg, 2019). The LDF employed a strategy of getting a lot of small victories before they wanted to petition for a complete abolishment of capital punishment. Their

strategy of slowly racking up precedents that allow for extensions on executions was working side-by-side with their strategy of slowly working up to complete abolishment (Steiker & Steiker, 2016). By 1968 no one had been executed for an entire year, with some successful petitions reverting death sentences in cases in which executions seemed likely (Denno, 2018). The longer the LDF managed to halt executions, the bigger the barrier became for an individual state legislature to resume executions. This was the first part of the LDF's strategy, and so far, it had worked (Latzler & McCord, 2010).

This chapter has examined the attempts to abolish the death penalty in America, which happened in ten states during the progressive era. However, an economic depression and an increased fervor to utilize the death penalty combined with underlying racist tendencies to repress the black Americans in these states meant that the death penalty was reintroduced in seven of the states within a short period of time. This period however, showed that the responsibility of writing death penalty legislation laid with the individual states, and the federal government did not get involved in this. At the same time, this period has also shown that the issue of racism and the death penalty are linked, and that repression of black Americans was a driver in reintroducing the death penalty during the progressive era. This chapter also examined the cases that led up to *Furman* which dealt with the death penalty in a legal context, with *Witherspoon v. Illinois* being the first Supreme Court case that dealt with the constitutionality of the statutes with which capital punishment was applied during the 1960s. Lastly, this chapter has shown how the LDF attempted to move the discussion from the state level to the federal level, in order to make sure that if abolition were achieved, it would be applied to the entire country.

Chapter 2 – The Case

Before the Supreme Court would decide to abolish the death penalty in *Furman v. Georgia*, other cases concerning the death penalty were heard by the Court. The NAACP Legal Defense Fund (LDF) petitioned for a lot of cases and was hoping that by amassing a lot of small wins they could eventually attempt to abolish the death penalty with a big case regarding the overall constitutionality of the usage of the death penalty in the US. In this chapter a couple of these cases are examined, specifically looking at the impact of *Boykin v. Alabama*, *Maxwell v. Bishop*, and *McGautha v. California*. These cases were all brought to the Supreme Court by the LDF to convince the Court that a part of the sentencing process resulting in capital punishment for the defendant was unconstitutional. For example, in *McGautha* the decision revolved around setting standards for the judges that were supposed to decide whether the defendant would be sentenced to death. After examining these cases this chapter will look at the legal proceedings in *Furman* to attempt to understand what factors contributed to the decision that stated the death penalty was unconstitutional in its application in *Furman*. This chapter will also examine what the role of the individual state was, in these decisions, and how the individual states argued for their autonomy.

This chapter argues that the text of the constitution is not necessarily what caused the *Furman* decision to take place, but rather that the constitution was read by the five-man plurality to justify their decision of abolishing the death penalty based on other factors, such as the statistics that show a larger number of Americans of colour or of low social standing were executed by the US than white Americans or people of high social standing. This will be explained by analyzing the opinions of the Justices combined with the social and political context. Overall, this meant that this decision was taken in the post-World War 2 tradition of moving power and responsibility from the state to the federal government, which happened in *Furman*, with the Supreme Court overruling the individual state statutes.

Leading up to *Furman*.

The LDF had a clear strategy with the moratorium and seemed to be working. Zero executions took place in the US between 1968 and 1976. From 1965 onwards the LDF was supported by the American Civil Liberties Union (ACLU). Together they believed they could change the legislation regarding capital punishment by arguing that the founding fathers might have been pro-capital punishment, and that the constitution might have been written with that in mind,

but that the 'standards of decency' have changed over the almost two-hundred-year period (Haines, 1999). This is the argument that was developed by Goldstein and Dershowitz in the dissent in *Rudolph v. Alabama* that formed the basis for the LDF's argument, and this tied in with the 'cruel and unusual punishment' wording that is found in the Eight Amendment. As far as most of the justices on the Supreme Court were concerned, abolishing capital punishment was not really an option. Dershowitz said that both Chief Justice Warren and Justice Black, who were supposed to be part of the liberal bloc on the court, were unsure about the implications of abolishing the death penalty. They were concerned that it would destabilize public opinion and diminish the court's authority regarding the most pressing issue of the time, which was civil rights (Haines, 1999).

When Richard Nixon ran for president in 1968, he promised he would carry out the legislation the 'silent majority' wanted, which was a stronger emphasis on law and order. Nixon was an outspoken proponent of the death penalty and believed it to be an effective deterrent to serious crime (Bedau, 1973). Nixon believed that the death penalty served as a deterrent, an argument which was commonly used to defend the usage of capital punishment throughout history. There is no evidence that having a statute on the death penalty in criminal law proceedings deters criminals from committing crimes such as murder (Manski & Pepper, 2012, Radelet & Akers, 1996, Siennick, 2012). This was also well-known in the seventies, as sociological research by prominent criminologists such as Thorsten Sellin was often used by abolitionists to debunk this argument (Sellin, 1959). However, the proponents of the death penalty argued that rationality trumps statistics in this argument, and that the threat of execution should prevent a criminal from committing a crime (Vito & Vito, 2018). President Nixon wished to expand usage of capital punishment in the years leading up to *Furman*. Nixon's assistant Attorney General Henry E. Peterson was tasked with explaining to the Judiciary Subcommittee of the House of Representatives that the Nixon Administration believed that the death penalty should not be abolished in March 1972. Peterson argued based on research done by the American Bar Association. According to Peterson the research stated that criminals might not kill their intended target if they know they will be captured, and the death penalty would be imposed on them. In the situation where they would be captured, and they believed life imprisonment was their sentence they had to deal with they would kill their target (Bedau, 1973). Hugo Bedau (1973) asked Peterson for his source and Peterson responded by saying his referencing to an American Bar Association Study was

'somewhat imprecise'. This shows that the Nixon Administration was in favor of the death penalty but that their reasoning was not based on scientific research. If deterrence was the argument, they had no real scientific source to back this up. Bedau sums up the whole situation as follows:

"Thus, through plain error, carelessness, or possibly through a calculated appearance of carelessness, the death penalty issue in our country has become politicized, and the public misled by an official in the Attorney General's office. If the standard of accuracy and concern for informing the public on this very minor issue, where relatively little is at stake, is indicative of how the Nixon Administration handles the more important and volatile issues of crime and law enforcement, the public has ample cause for alarm" (Bedau, 1973, p. 563)

As a matter of fact, the Nixon administration did not only want to stop the abolition of the death penalty, but it also wanted to expand the scope of the death penalty. In a memorandum written for President Nixon by Chief Domestic Advisor John Ehrlichman, he wrote that Nixon wanted "a specific provision ... with regard to advocating the death penalty for certain crimes" (John Ehrlichman gives Nixon talking points, 1973). Nixon specifically wanted to expand the death penalty to bombing and kidnapping. (Robbins, 1972) In March 1970 Deputy Counsel Bud Krogh wrote a piece of legislation to put this into law. He described this to Ehrlichman as follows: "Use of explosives to damage/destroy building, vehicle or other property owned by or leased to the Federal Government is made a Federal Crime. Penalties will include the death penalty if a fatality occurs as a result" (Bug Krogh provides Ehrlichman with information, 1970).

Nixon was a staunch believer in states' rights and proposed an increase of power and responsibility for the state in his policy of New Federalism. Nixon believed in a decentralization of power, decreasing the role of the government, and increasing the role of the state. With the death penalty historically being an issue that the state was responsible for, and with Nixon being in favor of increased responsibility for individual states, Nixon believed in keeping the death penalty in the realm of the state (Robbins, 1972). This is especially obvious when considering Nixon's Supreme Court nominees. Nixon had the opportunity to nominate four Justices to the Supreme Court during his presidency, all of which he believed would keep the death penalty alive if capital punishment's constitutionality was reviewed at the Court. For example, Justice Blackmun had written an opinion against the Legal Defense Fund in a capital punishment case during his tenure on the Eight Circuit (Meltsner,

1973). Nixon nominee William Rehnquist was a staunch supporter of his New Federalism policy, arguing in favor of state autonomy where possible throughout his Supreme Court career (McMahon, 2011).

Notwithstanding the successful outcome of *Witherspoon v. Illinois*, which stated a member of the jury could not be excluded if they had concerns about the morality of the death penalty, the abolitionists also lost some cases leading up to *Furman (Witherspoon v. Illinois)*. For example, the case of *Boykin v. Alabama* in 1969 was a major setback for the LDF. The case was based around the convicted robber Edward Boykin, who had committed five minor robberies. During one of these Boykin shot a gun that ricocheted and caused a minor injury to one person. During another robbery Boykin also fired one shot which hit nothing (*Boykin v. Alabama*, n.d.). Boykin pleaded guilty, but the state of Alabama still imposed the death penalty for robberies, and Boykin was sentenced to death (Haines, 1999). The case was brought to the Supreme Court where the question became whether Boykin was aware of his rights (*Boykin v. Alabama*, n.d.). LDF lawyer Anthony Amsterdam wrote a legal brief referencing back to the idea of evolving decency, like Dershowitz did earlier, to argue that because most U.S. states had stopped executing criminals for robbery Alabama was lagging in this 'evolving decency' (Greenberg, 1969). On top of this, Amsterdam wrote that Boykin had pleaded guilty without knowing that even with a plea he could still be sentenced to death. The court agreed with the second part of Amsterdam's argument, and granted Boykin a retrial, but the LDF was disappointed their first argument regarding the changing standards was not cause for the Supreme Court to withdraw Boykin's death sentence. The outcome of *Boykin v. Alabama* worried the LDF and made them reconsider their strategy. They were not so sure anymore the argument based on the Eight Amendment description of 'cruel and unusual punishment' would hold water in a future case in which they would argue for full abolition (Haines, 1999). According to Meltsner the LDF interpreted the outcome of *Boykin* as follows:

"Judges could use it [the Eight Amendment] to strike down punishments only when the overwhelming majority of jurisdictions had abandoned a cruel penalty, but a few lagged behind; or when a few states introduced novel or inhumane punishments. It was all right for judges to use the Amendment to prohibit whipping by the one or two states that still occasionally employed it, but they were not authorized to prohibit an even more painful penalty that was more generally authorized by law" (Meltsner, 1973, 180).

Anthony Amsterdam was incredibly unhappy with the outcome of *Boykin*. Amsterdam did not understand how it was possible that 200,000 robberies took place in the year 1967, yet only a few of those criminals ended up being sentenced to death. Why did Boykins get the death sentence compared to the many other thousands convicted? (Greenberg, 1969) Amsterdam argued that if more criminals were put to death for robberies, it would cause huge outrage. Similarly, so with murderers, argued Amsterdam. If instead of hundreds out of the fifteen thousand convicted murders were put to death, the state gave the death sentence to thousands, Amsterdam speculated the support for capital punishment would go down (Meltsner, 1973). The argument that Amsterdam is trying to make here is the arbitrariness argument. This is an argument that sociologists, historians and criminal justice professionals have grappled with over the history of the United States (Antonio, 2006, Bright, 2000, Karamouzis & Harper, 2007). In this case Amsterdam argues that it appears that the arbitrariness of capital punishment translates to a situation in which poor and/or black Americans end up executed more often than should be possible if the statistics lined up with the general population. Steiker & Steiker (2015) argue that's precisely why the NAACP's LDF was so determined to continue their quest. For example, in the South most convicts sentenced to death for rape were black. The South sees a similar distribution when it comes to murder. Historically, from 1608 until 1945 most executions in the United States were carried out on black and minority convicts.⁴ The issue at hand was obvious to the LDF, but infuriatingly the Supreme Court was unwilling to speak out about that issue. Steiker & Steiker (2015) even go so far as to call the Supreme Court in this era 'willfully silent' on the issue of race and criminal justice.

Although in 1966 Gallup reported that the support for the abolition of the death penalty was higher than the support for keeping the death penalty, a year later this was reversed again. In 1967 Gallup reported 54% of Americans were in favor while 38% were opposed, and two years later in 1969 51% of Americans were in favor while 40% was opposed (Gallup, n.d.). So, while in 1966 abolition looked like it had public support, this support quickly waned. The combination of the waning support, and the disappointing outcome of *Boykin* meant that the LDF and the ACLU were looking to turn their luck.

⁴ This number even excludes lynch-mob executions (Steiker & Steiker, 2015).

After the *Boykin* decision a lot of death sentence cases reached the Supreme Court, since the moratorium meant no death row inmates had been executed since 1968, and there was pressure on the Court to decide on whether the death penalty should remain in use (Barry, 1979). The most important ones will be discussed here chronologically. In 1970 the Supreme Court took on a case related to *Witherspoon v. Illinois*, regarding jury selection and opposition to the death penalty. The case of *Maxwell v. Bishop* revolved around William L. Maxwell, who was convicted of rape and sentenced to death by the Supreme Court of Arkansas. The jury in the case agreed that he was guilty of rape, but according to Maxwell were not informed that their conviction would result in a death penalty charge (*Maxwell v. Bishop*, n.d.). Initially the LDF believed this case could be their trump card in the abolition debate. In the middle of this case however, Justice Fortas had to resign because of a conflict-of-interest debate, and Chief Justice Earl Warren decided he would retire. These two justices had to be replaced, and while Nixon quickly announced that Warren Burger would be the new Chief Justice, the other seat became a contested subject (Haines, 1999). The seat stayed vacant for 391 days, until it was finally filled by Harry Blackmun, a familiar face for the LDF (DeSilver, 2016). Harry Blackmun had previously turned back the *Maxwell* appeal in the Eight Circuit Court of Appeals, and as a result could not rule on the issue at hand at the Supreme Court. Regarding the overall issue of capital punishment, the bench was split 4-4, resulting in a 7-1 ruling that while Maxwell's due process rights were violated, they would not vote on the overarching issue of capital punishment (Haines, 1999). They upheld *Witherspoon v. Illinois* and added that the jury must be informed of all possible penalties by the trial judge before they pass their conviction (*Maxwell v. Bishop*, n.d.). The LDF was unhappy with this outcome yet again, because instead of dealing with the overarching issue of capital punishment sentences, the Supreme Court ruled on a single-verdict question (Meltsner, 1973). The case was even sent back to the presiding Judge in Arkansas for further review about the penalty (*Maxwell v. Bishop*, n.d.). It appeared that the Supreme Court was willfully silent about the grand issue again. Meltsner (1973) believed that *Maxwell* was a clear case in which the death penalty was unjustly granted. It was a "case of rape with great evidence of racial discrimination" (Meltsner, 1973, 228). Still, the Supreme Court could not break the 4-4 gridlock they found themselves in, and with the addition of Blackmun on the bench who had ruled against *Maxwell* in the Court of Appeals, it was not looking promising for future cases. Nixon deliberately choose two Justices who he believed would not vote in favor of abolition (McMahon, 2011). Burger had ruled on

capital punishment in his time on the D.C. Circuit Court of Appeals as well. In two separate cases Burger had ruled against interfering in capital punishment procedure by a judicial body such as the Court of Appeals or the Supreme Court (Meltsner, 1973).

With these two new justices, a new case revolving around the death penalty also appeared before Court. The case that was up for discussion now was *McGautha v. California*. This case revolved around whether states should set standards for the jury in the case of a possible death sentence (*McGautha v. California, n.d.*). Considering Burger and Blackmun were now part of the Supreme Court, this case was not particularly favorable for the death penalty abolitionists. The case dealt with Dennis McGautha, who had viciously murdered the husband of the owner of a market stand during a robbery. The jury passed a guilty sentence and sentenced him to death. Dennis McGautha was represented by Herman L. Selvin, who made the argument that it is problematic that it is one singular procedure in which guilt is determined and a sentence is passed (Blevins & Minor, 2018). Selvin argues in the case that

“There can be no question about the fact that a link between the community and the jury is an important part of our judicial system, but that link must be maintained and that conscience must be exercised within the limits of the Constitution and the jury must have those limits, explained to it and those limits must be fixed to the extent that they need to be made specific by the law” (*McGautha v. California, n.d.*).

California was represented by Ronald M. George, a state deputy attorney general (*McGautha v. California, n.d.*). George argued that the case does not revolve around the general constitutionality of a jury passing a capital judgement, but rather whether ‘the standards which are provided by California are constitutionally adequate’ (*McGautha v. California, n.d.*) The case was decided 6-3 that due process according to the Fourteenth Amendment do not require states to have standards written in law for the jury if they were to fix the sentence. The majority opinion was written by Justice Harlan, who wrote that instructing the jury about the implications of a death penalty sentence would make no difference. On top of this, it would be an impossible task to write all rules the jury would have to know, abide by, and realize if they were to impose a death sentence (Blevins & Minor, 2018, Steiker & Steiker, 2016). *McGautha* was a disappointing case for the LDF, despite not being directly involved. The outcome of *McGautha* made the abolitionists a lot more unsure about the possibility of petitioning for abolition under a Fourteenth Amendment Due Process case. Since in *McGautha* a due process case did not even win with a focus purely on the jury, it would be a

lot harder to win a due process case focussing on the constitutionality of the death penalty. The precedent set by the opinions as written in *McGautha* stated that the discretionary power the Jury harbours, in their responsibility to decide whether a defendant gets sentenced to death, was not 'offensive to anything in the Constitution' (Bessler, 2018).

Post-*McGautha* the LDF held an emergency conference in New York City to strategize. Anthony Amsterdam wanted to change the messaging in a PR-campaign from talking about abolishing capital punishment to the implications for the US if capital punishment resumed. Considering the moratorium was still ongoing, and there was no clear situation in which the executions would start back up, Amsterdam felt this message would resonate with the citizens more (Meltsner, 1973). This plan never came to fruition, as later that year, on June 28, 1971, the Supreme Court announced they would review four capital punishment cases in one combined case. The reasoning for this was that Justice Black wanted to resume executions and stop the moratorium (Steiker & Steiker, 2016).

The Supreme Court decides on the constitutionality of capital punishment.

The cases that were up for petition at the supreme court were *Aikens v. California*, *Branch v. Texas*, *Jackson v. Georgia*, and *Furman v. Georgia*. These cases were taken on specifically to answer the question 'Does the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?' (*Furman v. Georgia*, n.d.). Anthony Amsterdam would take on both *Aikens* and *Furman*, Jack Greenberg, the Director-Counsel of the LDF would take on *Jackson*, and *Branch* would be defended by Melvin Carson Bruder, who was not part of the LDF. *Aikens* and *Furman* were both murder cases, *Jackson* and *Branch* were rape cases. All cases revolved around a black perpetrator and a white victim (Haines, 1999). By the time these cases were argued, Nixon had appointed two new Supreme Court Justices, William Rehnquist, and Lewis Powell. The LDF believed they could count on three justices: Brennan, Douglas, and Marshall. They also believed that Burger, Blackmun, and Rehnquist were not voting for abolition. Powell, Stewart, and White were the three remaining justices, of which two would need to vote in favour of abolition (Haines, 1999).

Aikens was sentenced for the murder of a white woman in her sixties named Mary Eaton, and the murder of a white woman in her twenties named Kathleen Dodd. The details of the case were vicious, as it involved the rape of a pregnant woman, and as *Aikens* murdered both

women with a bread knife. According to Meltsner (1973) the Aikens case aroused an intense disgust from everyone involved, because of the manner with which the case happened. *Aikens v. California*, despite being argued before the Court, was deemed unnecessary because of a decision in the California Supreme Court, after the oral arguments but before the ruling, that ruled the death penalty unconstitutional in the state of California (Mallicoat, Vogel & Crawford, 2018).

William Henry Furman was also involved in a murder case, but one way less vicious. He entered the Micke household with the intent of robbery, got caught red-handed by William Joseph Micke and Furman started to flee. During the fleeing attempt Furman tripped, which discharged his firearm, shooting a bullet through a solid plywood door which killed Micke (*Furman v. Georgia*, n.d.).

On the 17th of January 1972 oral arguments began. Anthony Amsterdam was the first to speak on behalf of Furman. Amsterdam started by arguing that the abolition of the death penalty won't take away anything from the State, seeing as how it is used rarely to begin with, and the people that end up being executed seemingly have bad luck with being selected randomly (*Furman v. Georgia*, n.d.). Chief Justice Burger however pivots the discussion to the implications of abolition. Burger asks how Amsterdam felt about James Bennett, the former Director of the Federal Bureau of Prisons. Bennett was staunchly opposed to the death penalty as a matter of policy but wanted to keep it specifically for cases in which a person imprisoned for life murders a prison guard or fellow inmate, according to Burger. Justice Marshall interjected to say that New York already has such a statute, and Amsterdam added that California does as well. Amsterdam quickly goes back to his main argument dismissing those statutes and arguing:

“The essence of our submission here, I think it is perfectly coined that we have had a very considerable experience with general statutes punishing the crime of murder or the crime of rape with death. And what we find when those statutes are applied, actually applied by juries in particular cases is that almost never is the penalty of death in fact inflicted” (*Furman v. Georgia*, n.d.)

The argument Amsterdam here uses is the low application rate argument. Because so few Americans get sentenced to death, it appears that it is completely unnecessary for the state to function. Amsterdam compares the US to the rest of the world by saying:

“We are not talking about a progressive trend which has brought virtually every nation in the western hemisphere with a possible exception of Paraguay and Chile to abolish the

death penalty. We are talking about a progressive trend which has caused all of the English-speaking nations of the world except some of the American States and poor states in Australia to abolish the death penalty” (*Furman v. Georgia*, n.d.).

The state does not need capital punishment, and because of the moratorium it has seen that it does not need capital punishment. The second argument Amsterdam poses is the arbitrariness argument, in which he describes who gets the death penalty (Burnett, 2018). Amsterdam states:

“The very fact that capital punishment comes to be as rarely and is infrequently and is discriminatorily imposed as it is, takes the pressure of the legislature quite simply to do anything about it. ... when there are only a very, very few people and those predominantly poor black, personally ugly and socially unacceptable, there simply is no pressure in the legislature to take it off” (*Furman v. Georgia*, n.d.).

After Amsterdam’s plea, it was up to Jack Greenberg to convince the court about the issue of arbitrariness and race. Since Greenberg represented Jackson, his oral arguments dealt with the death sentence for a rape charge. Greenberg starts out by stating outright that ‘Infliction of capital punishment for rape is indeed the most unusual of punishments for any crime in the United States or indeed in the world’ (*Furman v. Georgia*, n.d.). The reason for this according to Greenberg is that overwhelmingly black Americans in the South have gotten executed for a rape charge. Greenberg states that out of the 445 men executed for rape since statistics were logged, 405 were black. Out of the 73 on death row for the crime of rape at the time of oral arguments, 62 were black (*Furman v. Georgia*, n.d.). Speaking specifically on the state of Georgia Greenberg argues that 58 black men were executed for rape, with a total number of 61 executions for this crime since statistics were logged. This amounts to a rate of over 95%. On top of this Greenberg argues that in a rape case where a black man is the perpetrator and a white woman is the victim, 38% of cases end in a capital punishment sentence. In rape cases in which the victim is not a white woman and the perpetrator is not a black man less than 1 percent of cases ended in a capital punishment sentence (*Furman v. Georgia*, n.d.) Greenberg’s plea boils down to the following argument:

“Capital punishment for rape is authorized only in South Africa, Malawi and Taiwan. That is throughout the entire world, certainly across the entire western world which shares our culture, that the entire English-speaking world which hears our jurisprudence, throughout the entire United States, throughout the southern part of the United States with the exception of black men, there is slight exception for some small ants and the white ants who suffered death penalty. Capital punishment for rape is a penalty so rare that I think the word “unusual” is perhaps an understatement of the frequency which it appears

difficult to think of a punishment which is more unusual than capital punishment for rape” (*Furman v. Georgia*, n.d.).

The LDF’s argument is twofold, initially focussing on the rate of usage and not-usage during the moratorium showing that the United States has no use for capital punishment, and on top of that, when capital punishment is applied it often targets black Americans, seemingly arbitrarily. As a result of this, the administering of the death penalty was inconsistent with evolving standards of decency, particularly so when comparing the US to the rest of the world (Bohm, 2018, Griffin et al, 2018, Haines, 1999).

The state of Georgia was represented by Dorothy T. Beasley of the Georgia Attorney General’s office in both the *Furman* and the *Jackson* hearings. Charles Alan Wright, a law professor at the University of Texas represented the state of Texas in *Branch*. Their initial argument was that this case in no way applied to the Fourteenth Amendment (*Furman v. Georgia*, n.d.). The Fourteenth Amendment was passed in 1868, when the death penalty was already recognized and could only apply to capital punishment if there was no due process. Beasley goes on to argue that a constitutional amendment would be needed if the general argument would be that the state cannot take the life of a citizen in no context. Without a constitutional amendment Beasley reads the current constitution like there is room for any punishment that is deemed decent, if due process has taken place. Beasley states that representatives for individual states

“would submit that a State may impose a punishment so long as it is not out side of what we regard in our concept of ordered liberty and fundamental fairness and I think that is exactly where the standards come in” (*Furman v. Georgia*, n.d.).

The standards that Beasley touches on are the same as Amsterdam and Greenberg tried to describe as the evolving standards of decency. Beasley disagrees however, stating that the meaning of unusual has not changed since the Eight amendment was written (*Furman v. Georgia*, n.d.). On top of this Beasley believes that no discrimination has taken place in Georgia with regards to who gets sentenced to death, but even if there was discrimination it would not violate the Eighth amendment but rather the Equal Protection Clause of the Fourteenth Amendment, which according to her does not apply to this case.

The Courts' Opinions

The Supreme Court was disjointed in their opinions regarding *Furman*. Blackmun, Powell, Rehnquist, and Burger dissented. Douglas, Brennan, Stewart, White and Marshall concurred, to abolish the death penalty with a 5-4 decision. Every single judge wrote their own opinion, as the majority could not agree on an overall rationale. The dissent was relatively uniform, with the four justices⁵ agreeing on the argument that a law that is present in roughly 80% of the states in the US cannot be against an evolving standard of decency. Chief Justice Burger wrote in his dissent, which was joined by Blackmun, Powell, and Rehnquist, that if he

“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” (*Furman v. Georgia*, n.d., 375).

Despite his personal feelings on Capital Punishment, in his reading of the constitution he sees no base for the abolition of capital punishment. Burger writes that the question regarding the unconstitutionality according to the ‘cruel and unusual’ phrasing of the Eight Amendment, he is “unpersuaded by the facile argument that, since capital punishment has always been cruel in the everyday sense of the word, and has become unusual due to decreased use, it is, therefore, now ‘cruel and unusual’ ” (*Furman v. Georgia*, n.d., 379). The four dissenters capture the general feeling regarding the abolition of capital punishment. Why does it have to happen now, and on what basis? These four justices saw no constitutional basis for the abolition, and considering there was a majority support from citizens, and almost every state in the union still had capital punishment laws, it really made no sense to abolish capital punishment. It would also mean that the federal government imposed this ban on individual states, who wholeheartedly still supported the death penalty. Lastly, considering there were 613 inmates still on death row, the decision also had big implications for the states that were still sentencing people to death during the moratorium (*Furman v. Georgia*, n.d., Marquart & Sorensen, 1989). In the end, the 5-4 majority voted in favour of abolition. The majority was split up in two groups, and overall, the five were unable to write a majority opinion that satisfied all.

Justices Marshall and Brennan believed that capital punishment was generally unconstitutional. Marshall argues that “The elasticity of the constitutional provision under

⁵ Blackmun, Powell, Rehnquist, and Burger were all appointed by Nixon.

consideration⁶ presents dangers of too little or too much self-restraint" (*Furman v. Georgia*, n.d.). Still, Marshall believes that capital punishment is unconstitutional under the Eighth Amendment per definition, because there are alternatives to capital punishment that have a similar deterrent effect. Marshall argues that the supposed higher deterrent rate of the death sentence is a 'logical hypothesis devoid of evidentiary support, but persuasive nonetheless'. To support his argument Marshall points to states that have abolished and/or reinstated capital punishment, in which most statistics show that these legislative actions have not resulted in a change in the rate of crimes that are punished capitally. So, because an alternative exists, capital punishment should be classified as 'cruel and unusual' and should therefore be unconstitutional (*Furman v. Georgia*, n.d.). Brennan followed a similar line of thinking, believing that no matter which way you look at capital punishment, it cannot be constitutional if alternative methods of punishment are available to reach the same goal. The most interesting opinions in this case are of the three remaining Justices, Stewart, White and Douglas. They did not agree with the analysis of Brennan and Marshall and did not believe the death sentence was unconstitutional as a punishment but did believe that in this case the death penalty was applied unconstitutionally. For example, Potter Stewart argues that this case does not even discuss the actual constitutionality of capital punishment as a concept, because the two states that are discussed, Texas and Georgia, did not have a statute of mandatory capital punishment for all incidents of rape and/or murder. The specific cases that are petitioned however, do fall under the 'cruel and unusual' statute of the Eight Amendment. Stewart writes that he believes it is "clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare" (*Furman v. Georgia*, n.d.). Stewart finishes his opinion by stating "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed" (*Furman v. Georgia*, n.d.). Justice Stewart's opinion is important because it foreshadows the direction death penalty legislation might go. Mann (1992) argues that Stewart is not so concerned with the arbitrariness of the outcomes of death penalty cases but is rather concerned with the carelessness with which the state looks at the personal circumstances of the defendants. This thesis argues that this can be interpreted as a clear

⁶ Referring to the vague language of 'cruel and unusual' in the Eight Amendment

invitation for states to amend their statutes, and resolve this issue that Stewart poses. After that resolution, the death penalty should be constitutional according to Stewart's opinion. Justice Douglas, also voted with the majority that capital punishment was applied unconstitutionally in this case but agreed with Stewart that capital punishment was not unconstitutional per se. Douglas really focusses on the racial discriminatory aspect of the death penalty. Because it impacted non-white Americans in such a significant degree compared to white Americans, that iteration of capital punishment could be seen as 'cruel and unusual' (*Furman v. Georgia*, n.d.). Mann (1992) argues that in the way Douglas reads the Eight Amendment, it could be seen as a 'context-specific application of the Equal Protection Clause', which is problematic because it removes the important issue of cruelty of punishment. Douglas deliberately leaves the door open for a discussion about the constitutionality for a mandatory death penalty, showing that even during *Furman* he could have been persuaded to keep the death penalty legal.

The last of the three justices with a less definitive opinion on the death penalty was justice Byron White. White based his argument on the fact that 'the death penalty is exacted with great infrequency even for the most atrocious crimes, and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not' (*Furman v. Georgia*, n.d.). White states that the original goal of capital punishment in jury-based trials, to bring in 'community judgement to bear on the sentences as well as guilt or innocence', has run its course. He also did not believe in the deterrent effect of the death penalty if its application was arbitrary, however, if this were resolved, White could see a way in which the death penalty could be constitutional.

In conclusion, this chapter has shown rise of abolitionist rhetoric and its culmination in the case of *Furman v. Georgia*. The US abolished the death penalty in a shaky 5-4 decision, which left the door open for challenges (Haines, 1999). The chapter has argued that changing the abolitionists argument from purely discussing the changing standards of decency, to the arbitrariness argument in combination with the racist history has allowed the LDF to convince the three judges that were on the fence about the ruling. This chapter also argued that, despite the LDF believing they had a strong argument, there was a lot of opposition in the United States to the abolition of the Death Penalty. President Nixon was against this development and attempted to pack the court with justices that would vote in line with his vision (McMahon, 2011). Popular support for capital punishment went up between 1966 and

1972, and despite the justices that dissented on the *Furman* ruling saying they were personally opposed to capital punishment, their opinions showed that they truly believed that the constitution allowed for capital punishment (Haines, 1999, Gallup, n.d.) However, the lack of conviction in the 5-man majority, and the fact that the three centrist Justices, Stewart, White and Douglas, left the door open for states to adapt their statutes and to reintroduce the death penalty, can be seen as a discouragement of the federal government getting involved in this issue. This thesis argues that while these three Justices joined the plurality to abolish the death penalty, they also realized they were imposing on states' rights in their decision. These Justices realized that allowing their decision to be interpreted as advice for states to work on, would mean states would use this to reintroduce the death penalty. Therefore, this thesis argues that the *Furman* decision could be an early indicator of the court moving away from the federalization of issues that originally were state organized. On the face of it, it appears that LDF were successful in their attempt to abolish the death penalty. When analysing the *Furman* decision in the context of federalization, it becomes clear that the *Furman* decision, through Stewart, White and Douglas' opinion, was not a decision that moved the issue of the death penalty to the federal level in its entirety, but rather a decision that kept the states autonomy to reintroduce the death penalty if they had that desire. Only cases in which the court trial could end up arbitrarily sentencing defendants, were deemed unconstitutional. Therefore, rather than framing *Furman* as a case in which the death penalty was abolished, this thesis would describe the *Furman* opinions of Stewart, White and Douglas as an invitation for individual states to amend their existing death penalty statutes so they are up to constitutional scrutiny. So, Stewart, White and Douglas unofficially joined the four dissenting opinions in arguing that individual states do have the authority to reintroduce the death penalty. This is vitally important in considering where the *Furman* decision fits in the discussion on New Federalism and states' rights, and this chapter would argue that the *Furman* decision fits well within the ideology of states' rights because seven of the nine justices allowed for states to amend their laws on capital punishment.

Chapter 3 - The Fallout

As a result of the decision in *Furman v. Georgia*, all pending death penalty cases were annulled, and all death row prisoners had to be resentenced. The decision of *Furman v. Georgia* shook the United States. Of the 41 states that still had the death penalty in their state

legislature, 35 passed new capital punishment laws in the four years after *Furman*. The day after *Furman* five states already started working on reintroducing capital punishment legislation. The Supreme Court decision deliberately left room for states to change and amend their death penalty statutes to comply with the Court's reading of the constitution, which could lead to an eventual continuation of executions (Lain, 2007). Many state legislatures attempted to discern what they would need to change to their statutes to reintroduce the death penalty. This includes states like Florida and Georgia, who led the campaign to reintroduce capital punishment legislation in their respective states, and eventually to the national reintroduction in *Gregg v. Georgia*. In answering the research question, this chapter will argue that the individual states were unhappy with the *Furman* decision, as seen in the overall response throughout the country. The fact that the Supreme Court took away part of state responsibility, capital punishment law, was seen as a federalization of the issue. The state-federal divide can be clearly traced here, and this thesis argues that the fact that so many states showed discontent with the Supreme Court decision, shows that the federalization of criminal justice legislature had a significant impact on the debate regarding the death penalty.

Political responses

At the time of the *Furman* decision there were 613 inmates on death row, in 30 states. Their capital punishment sentence was set aside (Marquart & Sorensen, 1989). Simultaneously, important political figures like Georgia's lieutenant governor Lester Maddox called the decision "A license for anarchy, rape and murder", while Alabama's lieutenant governor Jere Beasley said that "A majority of this nation's highest court has lost contact with the real world" (Meltsner, 1973). The decision had some supporters as well, such as the Texas Prison Director George Beto who responded to the ruling by saying "The death penalty some years ago lost its deterrent effect . . . only swiftness and sureness of punishment are deterrents to crime; severity is not" (Meltsner, 1973). President Richard Nixon had hoped *Furman* would not get a majority in the Supreme Court and was disappointed when it did (Bedau, 1973). Nixon was briefed on *Furman* and its legal implications by White House intern Peter Baugher and Presidential Counsel John Dean III. They wrote clearly about the opportunity for the reinstatement of capital punishment and instructed Nixon that there was an alternative that would allow capital punishment constitutionally and that was not dealt with by the decisions

in *Jackson* or *Furman*. They believed that if certain ‘particularly heinous crimes’ were automatically punished with the death sentence, they would get around the provision that judges or juries are not allowed to sentence a criminal to death. The brief does add to this that it is a change to the law that could be described as ‘regressive and of an antique mould’. Still, the brief states that “For such crimes as assassinating the President – to cite the most extreme example – this resolution would not appear wholly unwarranted” (Peter Baugher provides John Dean III with judicial background, 1972). In the public debate the *Furman* decision was not supported by most American citizens. According to Gallup the support for capital punishment rose from 50% in March 1972 to 57% in November 1972, while opposition decreased from 41% to 32% (Gallup, n.d.) A Harris Survey stated that in 1973 public support for the death penalty was at 59% while opposition was at 31% (Harris, 1973).

California

One state truly showed that the nation had not responded to the *Furman* decision with kindness. In California, Governor Reagan had publicly opposed the decision, and in the wake of *Furman* had announced that Californians would be allowed to vote on the reintroduction of the death penalty in their State. Proposition 17 would revert the legislation regarding capital punishment to the situation pre-*Anderson*, the California Supreme Court decision that would deem capital punishment unconstitutional in the state and would remove *Aikens* from the *Furman* docket (Mallicoat, Vogel & Crawford, 2018). Anthony Amsterdam immediately went to California to campaign for the no-vote but was met with cynicism (Amsterdam, 1972). The California Abolitionists believed that there was no way Proposition 17 would not pass. As a result of the ruling in *Anderson*, in which the death penalty was deemed unconstitutional under the California Constitution, criminals like Charles Manson and Sirhan Sirhan were taken off death row, which was met with wide public opposition (Mandery, 2013). On the 7th of November 1972 Proposition 17 was approved with 67,5% of the vote, allowing the state legislature to reintroduce capital punishment to its laws (Mandery, 2013). California showed that public opposition to the *Furman* decision was commonplace and could result in the reintroduction of the death penalty across the country.

Florida

In the state assemblies *Furman* caused a lot of discussion. In Florida the response was immediate and swift. First off, all death row inmates were resentenced to a lifetime prison

sentence effective immediately (Ehrhardt & Levinson, 1973). Initially *Furman* was upheld in Florida in the Florida Supreme Court case *Donaldson v. Sack*. The Florida Supreme Court stated that “Florida no longer has what has been termed a ‘capital case’ and accordingly jurisdiction of such formerly designated ‘capital cases’ now vests in the applicable courts of record of this state...” (*Donaldson v. Sack*, n.d.) However, Florida Chief Justice B.K. Roberts said it is not impossible that the law does allow for the reintroduction of the death penalty and says that the ‘sharply divided ruling could easily change’ when discussing *Furman* in his opinion for *Donaldson v. Sack*. Despite this ruling however, Florida lawmakers started looking for a way to reintroduce capital punishment. A few days after *Furman* Governor Askew was asked whether a special legislative session to consider reinstating capital punishment could be convened in the State House. Askew promised that he would allow a session like such to happen, after the general election of November ‘72. Meanwhile, Governor Askew set up a ‘Committee to Study Capital Punishment’ to research the implications of *Furman*, whether capital punishment could and/or should be reinstated, and what alternatives to capital punishment existed within the law (Ehrhardt & Levinson, 1973). The committee consisted of advisors to the governor and legal professionals, who tried to carry out all-encompassing research on the effectivity of capital punishment. The document is an interesting and useful source to understand why people would be in favour of the death penalty, or why they would be opposed to it.

For example, the committee considered a letter by a citizen named Bill R. Parnell who wrote to the Supreme Court about his frustration with the *Furman* decision. Parnell writes that his brother was murdered, and the convict responsible for this was removed from death row because of the ruling. Parnell goes on to say that his brother “...was murdered violently and senselessly by armed robbers in the act of robbing our place of business - when he came to the aid of our Mother, who was being brutally beaten by said robbers. The murderer who fired the bullet which killed my young brother was convicted by ‘twelve good men and true’ who saw fit not to recommend mercy for his crime” (Committee to Study Capital Punishment, 1972, 60). Parnell believed that by removing capital punishment there was no valid repercussion for men who violated the lives of other human beings. Parnell’s impassioned letter shows how the debate regarding capital punishment changes in the 1970s. Whereas previously pro-capital punishment discourse mostly revolved around politicians and public intellectuals talking about deterrence, the discussion slowly moved towards whether

retribution is a valid argument after the *Furman* decision. But the document also considers anti-death penalty arguments. For example, Garth C. Reeves, activist, and editor of the *Miami Times* had written a statement regarding capital punishment. He tried to convince the committee by outlining the issue of race and the death penalty. He wrote that in the history of Florida no white man had ever been sentenced to death for the rape of a non-white woman, whereas the rape of a white woman by a black male almost consistently got punished with capital punishment. Reeves poses the question whether white womanhood garners a higher sanctity than black womanhood. While opposed to the reinstatement of the death penalty Reeves goes on to say that if it were to be reinstated it “should be reinstated to include those persons who would by premeditation and design effect the death of a rich man, poor man, beggar man, thief, doctor, lawyer or Indian chief” (Committee to Study Capital Punishment, 1972, 99). Reeves, being a black activist, understood what would happen if capital punishment was reinstated. He realized that arbitrariness could not be removed from capital punishment legislation, unless it became a mandatory sentence for a specific crime, which would be seen as criminal justice regression. Reeves believed that the reinstatement of capital punishment would again disproportionately hit black Floridians. Reeves and Parnell identify the two major issues with capital punishment legislation in 1970s America. The absence of capital punishment legislation meant that citizens lost their opportunity for a slight amount of retribution and revenge. The reinstatement of capital punishment legislation meant that executions would resume, arbitrarily, without standards set in place because this would be an ‘impossible task’ as decided on by the Supreme Court in *McGautha*.

After the Committee had finished their research, the legal professionals of the Committee recommended against reinstating capital punishment in Florida until a comprehensive all-encompassing study about the criminal justice system in Florida was undertaken. They believed that any new capital punishment law would not pass constitutional challenge unless it removed arbitrariness entirely, which was seemed incredibly difficult to do (Erhardt et al, 1973). If capital punishment were to be reinstated, it would have to be under a bifurcated trial, in which the guilty verdict is passed independently of the sentence. The sentence would be decided by a panel of three judges after a separate hearing specifically to deliberate whether capital punishment was prudent. Despite the recommendation against the reinstatement, on December 8, 1972, Governor Reubin Askew signed a new capital punishment act, restoring capital punishment for the state of Florida, as the first state in the

US (Ehrhardt & Levinson, 1973). The law included the bifurcated trial provision, and the Florida State Attorney General Robert Shevin was convinced of its constitutionality (Florida Becomes First to Reinstate the Death Penalty, 1972).

In an analysis of the new Florida Capital Punishment Act Thornton (1974) states that capital punishment has no mandatory component, meaning it is not so different from pre-*Furman* capital punishment legislation. Despite Shevin's conviction that the new law meets constitutional guidelines as written by Justices Stewart and White in their opinions after *Furman*, Thornton (1974) disagrees. A new capital punishment act must eliminate arbitrariness and/or infrequency⁷ according to Thornton (1974), if it were to be deemed constitutionally acceptable by Stewart and White. The Florida Capital Punishment Act does not eliminate arbitrariness, and the bifurcated trial does not remove the arbitrariness and racialized component of capital punishment. The new law was based on the ruling in *McGautha*, stating that capital punishment legislature does not require standards for the jury according to the constitution. Because *McGautha* did not discuss the constitutionality of capital punishment, the ruling still held precedent in a court of law and was not overruled by the *Furman* (Thornton, 1974). As a result of this, the new Florida Capital Punishment Act did not discuss standards for the jury in capital cases. The question then becomes, what was different about the Florida Capital Punishment Act besides the bifurcated trial? And in what way would it convince Stewart and White that this method of application was constitutional? Thornton (1974) believes that it is not different enough for it to hold up constitutionally. Ehrhardt & Levinson (1973) also believe that even if arbitrariness was somehow eliminated, it would still not hold up in court. They argue again that the only constitutional basis on which arbitrariness can be removed is mandatory sentencing, which has no real support. Ehrhardt & Levinson (1973) state that in their opinion "any effort to reinstitute capital punishment on a mandatory basis for certain heinous offenses by eliminating jury discretion to recommend mercy is unlikely to be upheld under the *Furman* decision" (Ehrhardt & Levinson, 1973, 5). This idea was prevalent for a few years after *Furman*, despite popular support for the reintroduction of capital punishment growing.

⁷ Infrequency in this context refers to a situation in which the application is so low it makes no difference whether capital punishment is constitutional by law.

North Carolina

Whereas Florida opted not to introduce mandatory sentencing in capital cases, North Carolina decided that this would be the best way to remove arbitrariness. In *State vs. Waddell* the North Carolina Supreme Court attempted to bypass the issues discussed in *Furman* by imposing a mandatory death penalty for specific crimes (*State v. Waddell*, n.d.). The North Carolina Supreme Court effectively removed the authority for the jury to recommend life imprisonment in four capital crimes, rape, murder, burglary, and arson. Justice Huskins wrote the majority opinion, which stated that the state statutes that covering capital crimes are not invalid because of *Furman*, only the added amendment of the jury having the chance to recommend life imprisonment was deemed invalid. The minority opinion written by Chief Justice Bobbitt argues that the jury is still involved in the process by having to pass a guilty sentence, removing the ability of recommending life sentence irrelevant. Chief Justice Bobbitt wrote that with the *Waddell* decision the North Carolina Supreme Court has decided to act as a legislator rather than an adjudicator (Adams, 1973). North Carolina was not alone in their mandatory death penalty statute, however. Idaho, Indiana, Nevada, New Mexico, Oklahoma, and Wisconsin all also introduced mandatory capital punishment for a certain set of crimes. For example, Idaho introduced a statute requiring the death penalty for “first degree murder defined as murder by poison, lying in wait, torture or other wilful and deliberate killings; or murder of an on-duty law enforcement officer; or if the defendant was under sentence for murder” (Moore, 1973, 25). Similarly, New Mexico required the death penalty for “First degree murder, defined as wilful and deliberate killing by lying in wait, torture, or perpetrated during an attempt to commit a felony; by an act endangering the lives of others; and by kidnapping when the victim suffers great bodily harm” (Moore, 1973, 26).

With a total of 35 states attempting to revive the death penalty, it appeared that throughout the United States this was a hot-button issue. This chapter has discussed a west coast state, a southern state, and a state on the north-south borderline, to show that this issue was discussed nearly everywhere in the United States. Important here is that according to Zimring (2003) only states that had death penalty statutes pre-*Furman* responded by reintroducing the death penalty. This might seem obvious, but it shows that the rejection of their state laws by a federal body such as the Supreme Court was cause for response, considering in almost all cases the reintroduction went swiftly and without much political discussion within the

state legislature regarding the death penalty as part of the state criminal law repertoire (Zimring, 2003).

What was next?

The future of the death penalty appeared to be going down two paths. There were states that reintroduced the death penalty with mandatory sentencing, which meant that there was no room to recommend mercy from the death penalty, and as a result theoretical arbitrariness was removed. On top of this, mandatory death sentencing also meant that the Justice White's concern of the limited use-case of the death penalty would fall because mandatory death sentencing would likely mean more executions each year. Lastly, it would send a significant signal to the legislatures that those in favour of death penalty were ready to double down on their commitment, with the most rigorous death penalty legislation yet seen in the United States (Steiker & Steiker, 2016). Other states introduced new death penalty statutes that were not mandatory but would then use a bifurcated trial. They would also feature a system of aggravating and mitigating factors to make death penalty sentences more like a mathematical sum of crimes. This would then hopefully reduce the arbitrariness of the previous system. The American Law Institute endorsed this framework⁸, and became an important contributor (Thaxton, 2016).

Dorothy Beasley, the deputy Attorney General who argued for Georgia in *Furman*, also made sure that the state of Georgia would feature a bifurcated trial in their attempt to reintroduce capital punishment (Mandery, 2013). It seemed almost inevitable that the death penalty would return, and the *New York Times* was discussing it in early 1973 (Flint, 1973). They said that the 'rebirth of death' was a break with over forty years of liberal momentum resulting in the decision of *Furman*. However, as argued in chapter 2, while *Furman* was seen as the end of the death penalty, this thesis has argued that *Furman* was merely a suggestive decision that with relatively minor changes the death penalty could be deemed constitutional. Considering popular support for abolition never reached higher than 47%, and most states still had death penalty statutes prior to *Furman*, this thesis argues it is not such a surprise that a movement would originate to revert the decision. The movement for reintroduction was also seen in the progressive era, as shown in Chapter 1, showing that historically the abolition

⁸ The ALI withdrew their endorsement for this statute in 2009 because did not have the desired effect on arbitrariness & bias (Thaxton, 2016).

of the death penalty has resulted in public backlash in the United States. This however does not mean that all states that attempted to reintroduce capital punishment planned on using it in a widespread manner. It appears that the near ubiquitous support for the reintroduction was not so much people in favour of execution, but rather disappointment that the law no longer merely allowed the death penalty to be passed on criminals. Michael Meltsner described the movement in the *New York Times* as “Restoration May be as much a response to the raft of executions as a desire for more” (Meltsner, 1974). Criminologist Hugo Bedau told *Time Magazine* that “while more people want the legal possibility of capital punishment, it is unclear that the public wants executions. What they want seems to be an occasional execution” (The Law: Reconsidering the Death Penalty, 1976). The public sentiment in the years after *Furman*, and the movement for the restoration of capital punishment was puzzling but not wholly unexpected. The court, in a way, was lagging compared to public opinion. Criminologist and penal researcher Franklin Zimring has stated that culturally speaking the *Furman* decision fit in perfectly with 1968 but felt out of place in the 1970s (Mandery, 2013). It became inevitable for the Supreme Court to have to deal with the issue of capital punishment again. The public and most States seemed adamant in their support for death penalty legislation, irrespective of usage (Zimring, 2003). Leading up to a new case in which constitutionality was discussed were the oral arguments for *Fowler v. North Carolina*, a petition to review a death sentence in North Carolina. Jesse Fowler was a black man who got into a fight with John Griffin, another black man. Fowler got punched in the nose and as revenge decided to shoot Griffin (in the presence of his children) later that night (Mandery, 2013). North Carolina had reinstated the death penalty in *Waddell*, and Fowler got sentenced to death. The case made it to the Supreme Court and was a good opportunity for both sides to feel what the public reaction would be to a change in legislation regarding capital punishment. Fowler was represented by Anthony Amsterdam, who was aware of the changing tides. North Carolina was represented by Jean Benoy, who was a staunch supporter of the death penalty (Mandery, 2013). Solicitor General at the time, Robert Bork, filed an amicus brief in the case, showing that the federal government wanted to involve itself in the death penalty case, which was new compared to *Furman* and any previous cases dealing with capital punishment. Robert Bork himself was also a staunch supporter of capital punishment and wrote that he believed in the deterrent effect and that it should be up to the individual states to decide whether capital punishment was constitutional or not (Haines, 1999).

Anthony Amsterdam had a grave challenge between both Benoy and Bork (Kobylka & Epstein, 1992). The oral arguments took place on April 21, 1975, and Amsterdam believed that his best shot in *Fowler* was to widen the scope of *Furman* rather than to focus specifically on the unconstitutionality of the North Carolina law (*Fowler v. North Carolina*, n.d.). If Amsterdam was successful, mandatory death sentence statutes would also be deemed unconstitutional, meaning the death penalty would be even more difficult to revive (Mandery, 2013). The risk was, that the court would want to shift to focus to the North Carolina law specifically, which would make Amsterdam's argument moot. Still, Amsterdam and the LDF had a case, specifically looking at the arbitrariness argument. Because, even in a mandatory death sentence situation, arbitrariness still takes place specifically from the public prosecutor. He can decide who to indict, which crime to charge a defendant with, and whether to offer a plea bargain (Bennet & Tecklenburg, 2018, Fulkerson, 2018, Mandery, 2013). Benoy responded that the idea of capital punishment not abiding by evolving standards of decency is nonsensical, considering the response of many states and citizens to the *Furman*. On top of that, Benoy opens by saying that the state of North Carolina, through its new laws, has not done anything that was deemed unconstitutional through *Furman*. They did not sentence one person to death and another person to life, if they had been found guilty of the same crime or crime at the same degree (*Fowler v. North Carolina*, n.d.). This line of reasoning immediately disqualified the argument Amsterdam posed, seeing as how Amsterdam critiques the whole system of prosecution, and Benoy simply states that within the courtroom nothing unconstitutional happened. As a result of this line of reasoning however, Benoy did admit to the constitutionality of the *Furman* decision. The case of *Fowler v. North Carolina* therefore could not overturn *Furman* as a whole. With the involvement of Bork however, this issue became even more unclear. Bork starts out by arguing that irrespective of the outcome of *Fowler* the court should clear up the constitutionality of capital punishment, which in his reading of the constitution is allowed. Bork believed that the *Furman* decision was not valid, since the reasoning for *Furman* in his words was empirical and not judicial (*Fowler v. North Carolina*, n.d.). The *Fowler v. North Carolina* case in the end got nowhere, as in deliberations the vote was split 4-4 and the remaining justice Douglas had become ill and weak to the point where his arguments were not prudent. The case was pushed over to the following term, but Douglas did not want to give up his seat on the Court (Kobylka & Epstein, 1992). At the end of 1975 Douglas finally decided to retire, and he was replaced with John Paul Stevens by Ford

(Mandery, 2013). *Fowler v. North Carolina* was consolidated in the case of *Gregg v. Georgia* in which the Court granted certiorari⁹ to four cases regarding capital punishment, to discuss the constitutionality of capital punishment yet again in America (*Gregg v. Georgia*, n.d.). The Court would consist of the same justices who decided *Furman* except for Douglas who was replaced by John Paul Stevens.

Following on from chapter 2, this chapter has tried to make sense of the changing ideology regarding capital punishment and has also tried to unearth why and how states and citizens responded to *Furman* taking capital punishment away as a punishment for carrying out a crime. This chapter has shown that eminent researchers have commented on the backlash of the *Furman* decision as a way of showing not that there is unanimous support for the death penalty, but rather that the absence of capital punishment legislation caused discomfort (Zimring, 2003). In California an overwhelming majority showed that they did not appreciate that Charles Manson and Sirhan Sirhan were taken off death row for example. In the Gallup and Harris polls there was a clear indication that public support for the abolition of the death penalty was lessening. This chapter argues that the public and political backlash, as shown explicitly in North Carolina, California, and Florida, but which also happened in 32 other states in the country, is a clear example of states responding to the *Furman* decision on the state-federal line. They believed that they should harbour the responsibility and power to decide on their own death penalty laws, and the *Furman* decision gave them room to do this. With 35 out of 50 states responding by amending their death penalty statute, the death penalty was not gone because of *Furman*. With regards to answering the research question of to what extent the state-federal divide impacted these decisions, it is clear that the individual states are in favour of keeping their autonomy and responsibility with regards to criminal justice. These states want to keep the death penalty as an option, and because they were given the opportunity through the *Furman* decision, the 35 states acted upon this swiftly and decisively. This thesis sees this as the state level rejecting the federal level making decisions about this part of the criminal justice repertoire.

⁹ To allow the case to be presented at the Supreme Court.

Chapter 4 – The Reintroduction

With 35 states reintroducing the death penalty in their state legislature in less than four years after the *Furman* decision, and public support growing for this reintroduction, the supreme court realized it became unavoidable to delay their decision any longer. With the *Fowler* decision still on the docket, they decided it was better to broaden their mandate and answer the question of constitutionality, again. This chapter will go over the proceedings of *Gregg v. Georgia* and will argue that the reintroduction of the death penalty because of *Gregg* made a lot of sense considering the public sentiment throughout the United States. This chapter will also argue that *Gregg* made a lot more sense in historic context than *Furman*, and that the outcome and decision of *Gregg* was a lot more absolute than *Furman* because of the 7-2 majority.

Another attempt

After *Fowler v. North Carolina* was put on hold because of Justice Douglas' health the supreme court decided to increase the scope of this next case on the death penalty. The Court consolidated five cases into the *Gregg* case, to specifically be able to discuss both mandatory death penalty statutes and the guided-discretion (non-mandatory) death penalty statutes (Steiker & Steiker, 2016). The five cases were *Gregg v. Georgia*, *Proffitt v. Florida*, *Jurek v. Texas*, *Woodson v. North Carolina*, and *Roberts v. Louisiana*. The cases of *Woodson* and *Roberts* concerned the mandatory death penalty, while the cases of *Gregg* and *Proffitt* concerned the guided discretion death penalty. Texas had implemented a different set of statutes altogether, in which the state had the burden to argue an aggravating factor in the initial phase of a court case, and if that was deemed enough the jury could then sentence the defendant to death if they answered 'yes' to a set of three questions to determine whether the defendant was seen as a threat to society (Steiker & Steiker, 2016).

Woodson v. North Carolina revolved around James Woodson and Luby Waxton who robbed a convenience store. Luby Waxton shot and killed the owner of the store but got a plea deal to testify against James Woodson. With Waxton's testimony Woodson got the death penalty in North Carolina under the mandatory death penalty statute (Mandery, 2013). *Gregg v. Georgia* discussed the case of Troy Leon Gregg, who robbed and murdered Fred Edward Simmons and Bob Durwood Moore together with an accomplice, after they had hitched a ride from Simmons and Durwood (Baker, 2016). *Jurek v. Texas* discussed the case of Jerry Lane

Jurek, who was convicted of the killing and attempted rape of 10-year-old Wendy Adams. The Jurek case became a test case in Texas, to see how the newly written law would work after the old law was struck down under *Furman* (Chammah, 2021). *Roberts v. Louisiana* was one of the mandatory death penalty cases, in which Harry Roberts shot and killed police officer Dennis McInerney, a criminal act that would always result in the death penalty according to the new Louisiana capital punishment statutes (*Roberts v. Louisiana*, n.d.). The last case discussed in this group of 'death penalty cases' was that of *Proffitt v. Florida*, in which Charles William Proffitt petitioned to the court that his death sentence for burglary and murder was not constitutional under the Eight Amendment and the *Furman* ruling (*Proffitt v. Florida*, n.d.). These cases are usually divided in to the three categories previously mentioned: *Woodson* and *Roberts* as mandatory death penalty cases, *Gregg* and *Proffitt* as guided discretion cases, and *Jurek* on its own. The LDF's goal was to convince the court that all three new methods of applying the death penalty still breached the constitutional guidelines as laid out in the Eight Amendment and the *Furman* ruling, however, the LDF also realized that it would be an uphill battle to keep the moratorium going (Kobylka & Epstein, 1992). Their goal in these cases was to make sure that executions did not restart, or if possible, to abolish the death penalty in a broader way than *Furman*. Anthony Amsterdam specifically believed that none of the three frameworks would in any way be satisfactory a strict reading of the constitution (Steiker & Steiker, 2016). The LDF's goal in these cases was to present the idea that 'death is different'. Anthony Amsterdam argued that with the idea that arbitrariness still existed in the statutes, the persistent issues of racism and discrimination would hit even harder when the punishment is the death penalty (Harmon & Falco, 2018, Mandery, 2013,). The three types of cases will now be discussed separate from each other, because the implication of the outcomes of the cases are different enough to warrant a separate discussion.

For *Woodson v. North Carolina* this was specifically important, because the mandatory death sentence was imposed on someone who was an accomplice to murder, while the murderer got a plea deal. The defendant argued that the uncontrollable discretion of the pre-trial proceedings still results in arbitrariness. For example, the prosecutor and the governor can decide not to pursue the convict of a crime, which will then absolve them from the death penalty even if it was a crime that would be sentenced to death if the defendant were to be found guilty in a court of law. North Carolina responded by arguing that this is a grander critique on the justice system, and it is necessary for the prosecutor, the governor and anyone

else in the process to make 'good faith' judgement calls or else the entire system would be moot (Barry, 1979, *Woodson v. North Carolina*, n.d.). In *Roberts v. Louisiana* a similar case was argued by the defendant. The jury has an increased importance in cases like these because a guilty sentence automatically translates into the death penalty, meaning an extra burden is put on the jury. Similarly, these types of statutes increased the bargaining power of the public prosecutor, which in turn increased inequality in the courtroom according to *Roberts*. Louisiana responded to this by arguing the jury must agree unanimously that the defendant is guilty before a death sentence is passed, and therefore they would all be on the same page. As a result, with a unanimous decision discretion is taken away from both the judge and the jury, which lowers the arbitrariness. Lastly the state of Louisiana argued that the fact that the governor has the executive ability to pardon convicts sentenced to death is a statute in favour of the defendant, and therefore does not invalidate the statute (Barry, 1979, *Roberts v. Louisiana*, n.d.).

The cases of *Woodson* and *Roberts* were deemed unconstitutional in a 5-4 decision. The plurality opinion was written by Potter Stewart, who also voted with the plurality in *Furman*. The 5-man majority was split into a group of 3 and a group of 2, just like in *Furman*, with Marshall and Brennan stating their moral opposition to capital punishment, believing that the entire practice was unconstitutional, and Stewart, Powell, and Stevens believing that the mandatory part of the statute was unconstitutional. Stewart's opinion stated that the mandatory death sentence provision had three constitutional issues. It did not align with modern standards of decency, and the American public had spoken out about this. On top of this, there were no guides for juries involved in death penalty cases, and as a result the law did not abide by *Furman* but also not by *McGautha* (Blevins & Minor, 2018). Lastly, the mandatory death sentence statutes did not take into consideration the defendants' personal circumstances, which would be aggravating or diminishing to the sentence (*Woodson v. North Carolina*, n.d.). This decision showed that, while public opinion in favour of death penalty grew, and while many states had changed their legislation to reflect this, there were still federally imposed boundaries in place regarding how they applied the death penalty.

In *Jurek v. Texas* the issue at hand regarded whether the discretion applied by the Texas legislature, to have a bifurcated trial in which the jury answers three specific questions that

measure whether aggravated sentencing should apply¹⁰, was enough to satisfy the *Furman* ruling. The argument by the Jurek was the same as the defence in *Woodson* and *Roberts*, stating that despite these added levels of discretion, the steps before and after the court case, in which the governor and the public prosecutor hold absolute executive power, would mean that arbitrariness still exists in practice. On top of this Jurek argued that the death penalty is unconstitutional, since it there is no rationality involved in sentencing someone to death, especially if other options are available in the legal system. Texas' argument consisted of the prosecutor trying to convince the court that despite the arguments made by the defence, there was an overwhelming societal support for the death penalty, through judicial precedent, public opinion polling and the wave of states reinstating the death penalty post-*Furman*. Texas also argued that the rationality of the death penalty can be seen in the deterrent factor of the death penalty, especially if applied to those that committed premeditated murder (Barry, 1979, *Jurek v. Texas*, n.d.). *Jurek v. Texas* resulted in a 7-2 decision stating that the provisions added by the state of Texas do abide by the Eight and Fourteenth Amendment and the *Furman* ruling. Justices Marshall and Brennan voted against; all the other seven Justices voted in accordance with the Texas statute. The majority opinion written by Justices Stewart, Powell and Stevens stated that

“the Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death. The Texas law has thus eliminated the arbitrariness and caprice of the system invalidated in *Furman*” (*Jurek v. Texas*, n.d.).

This slight change of moving to a bifurcated trial was enough to convince 3 judges that had voted against the mandatory statutes of North Carolina and Louisiana, and convinced Stewart and White who had voted with the majority in *Furman* (Trahan, Laird & Evans, 2018). On top of this, it could be argued that the Texas statute was not so different from the mandatory death sentencing of North Carolina and Louisiana, as the three questions posed to the judges

¹⁰ The three questions were: “1) whether the conduct of the defendant causing the death was committed deliberately and with the reasonable expectation that the death would result; 2) whether it is probable that the defendant would commit criminal acts of violence constituting a continuing threat to society; and 3) if raised by the evidence, whether the defendant's conduct was an unreasonable response to the provocation, if any, by the deceased” (*Jurek v. Texas*, n.d.)

could be answered positively in any case in which a premeditated murder took place. Despite this the statute was satisfactory according to the 7-man majority on the Supreme Court.

The final two cases, *Proffitt v. Florida* and *Gregg v. Georgia* both consisted of cases in which a bifurcated trial happened with discretion as described by the American Law Institute (Costanzo & Costanzo, 2018). The petitioner in both cases argued that despite the extra layer of discretion, there was still room for ‘uncontrolled judgements’, like those by the prosecutor, judge, and jury that were not taken away by these statutes (Burnett, 2018). The aggravated and/or diminishing standards were vaguely defined, and the executive power for processes like clemency were not laid out in law, meaning that the arbitrariness as described in *Furman* was still ongoing (Burnett, 2018). The state of Georgia argued that the statute means there is less room for the Jury to manoeuvre, and the prosecution only allows for the death penalty to be charged for the most severe types of crime. On top of this, Georgia argued its state has a very well-functioning appellate process to make sure that even if there would be a wrongful conviction, an appeal could overturn this (Barry, 1979, *Gregg v. Georgia*, n.d.). Florida responded to these arguments by stating that in their statutes the jury determines whether the crime has enough aggravating factors compared to its enumerated factors, and then passes down a sentencing advice to the court who makes the final call. Florida also argued that because of the social and political impact of this case it should be up to the legislature rather than the judiciary to decide on this issue (Barry, 1979, *Proffitt v. Florida*, n.d.). The decision in this case was the same as the *Jurek* decision, a 7-2 majority confirming this statute complied by the constitution and would be allowed as a blueprint for death penalty legislation. The majority opinion written by Justice Stewart argues that the reinstatement of the death penalty in 35 states weighed heavily in the Court’s attempt to construct ‘contemporary standards of decency’ (Kobylka & Epstein, 1992). On top of this, ‘retribution and the possibility of deterrence of capital crimes’ were also cited as a reason for their decision, with the death penalty as a criminal sentence now being considered similarly proportionate as premeditated murder in the vision of the Court (*Gregg v. Georgia*, n.d.). This opinion, which was joined by Justice Powell and Justice Stevens, shows that the Eight and Fourteenth Amendment do not explicitly state that the death penalty is unconstitutional in the vision of the Court. It also shows however, that because of the broad interpretation of these Amendments the Court can decide on cases like this without particularly considering the framing of the constitution, but rather by considering the consensus opinion of

legislatures around the countries and its citizens (Haines, 1999). By using the possible deterrent effects as a reasoning for the reinstatement, the Court shows that it did not use academic research as its basis for decision-making in this case. At the time, it was clear that capital punishment had no deterrent effect. For example, in a study done by prolific criminologist Thorsten Sellin published in 1959 by the American Law Institute he concludes that “Any one who carefully examines the data is bound to arrive at the conclusion that the death penalty exercises no influence on the extent or fluctuating rates of capital crime” (Sellin, 1959). The decision in *Gregg* appears to have been made, in a similar vein to *Furman*, based on a broad reading of the constitution, being influenced by legislative and social changes. The arguments used by the Court seem like a reaction to societal changes in 1970s America. Haines (1999) analysed the *Gregg* decision as a ‘surrender to vox populi’, which would usually be seen as an ‘abdication of judicial responsibility’. However, because both *Furman* and *Gregg* at its core discussed ‘evolved standards of decency’, both public and state-support were a good basis to measure the standards of decency of the US (Haines, 1999). *Gregg v. Georgia* and its accompanying cases reverted the *Furman* decision, and as a result allowed states to resume executions. The issue of arbitrariness and racial discrimination in the death penalty were not resolved because of the *Gregg* decision (Barry, 1979, Fulkerson, 2018, Thaxton, 2016). The Justices opinions read that if changed to the statutes related to the death penalty made the sentencing process fair and consistent, the death penalty is not constitutional under the ‘cruel and unusual’ clause of the Eight Amendment (Bennett & Tecklenburg, 2018). Therefore, this thesis argues, there must be another explanation for this decision to have taken place. The justices that had invited states to amend their statutes in *Furman* were satisfied with the changes and voted with the four Justices who had voted against *Furman*. The 7-2 majority was a lot stronger than the 5-4 in *Furman*, and as a result death penalty abolition was off the agenda. A lot had changed in the four years, and *Gregg* was truly a sign of the times, in which conservative thinking and specifically strong criminal legislation became dominant. Considering the context of New Federalism, this thesis argues that based on the opinions of the judges, and the legal analysis that the *Gregg* decision did not solve the primary reason that *Furman* was decided on, the *Gregg* decision could be seen as an early adoption of the New Federalism philosophy in which the states’ autonomy and rights were respected and augmented. The *Furman* backlash had shown the Justices that the nation-wide abolition as imposed by the federal level was not appreciated on the state-level.

Conclusion

In this thesis the abolition and reintroduction of capital punishment in America during the 1970s was analysed. This thesis attempted to examine how these came about in the Supreme Court, looking specifically at the role played by the state-federal divide in the United States. In this chapter the findings of this thesis will be briefly summed up, to assess whether the hypothesis can be accepted or rejected. This chapter will also discuss the limitations of the research and will end with possible further avenues for research.

The overall contribution of this thesis is the argument that the 1972 *Furman* decision to abolish the death penalty, while initially seems like a transfer of responsibility to the Federal level of government, could be analysed as a decision in which the autonomy of states is respected. With the four dissenting opinions believing in the constitutionality of the death penalty, and three justices in the plurality arguing that states can amend their statutes for the death penalty to be constitutional, there is a 7-man majority that respects the state autonomy to write their own law on the death penalty. Similarly, in the *Gregg* decision, a 7-man majority states that with the changes made to the death penalty statutes, if applied fairly and consistently, the death penalty was considered constitutional. Especially examining the death penalty statistics from 1976 until now as shown that this has not happened, and that African Americans are still overrepresented in these statistics (Archibald, 2015, Howard & Clubb, 2008, Maratea, 2019). This was also realized by legal scholars at that time, who argued that the new statutes did not in fact remove arbitrariness and inconsistency in the death penalty (Barry, 1979, Bedau, 1985).

In chapter two this thesis assesses that the *Furman* decision was decided on a specific reading of the constitution, in which the arbitrariness, inconsistently and wantonly applied death penalty in its pre-1972 statutes was deemed 'cruel and unusual' as described in the Eight Amendment. All nine justices admitted to being against the death penalty privately and stated that if they were legislators, they would vote to abolish the death penalty. Despite this, four of the nine justices argued that according to their reading of the constitution the death penalty should be allowed. Chief Justice Burger and Justices Powell, Blackmun and Rehnquist, all Nixon nominees, dissented in *Furman*. Justices Marshall and Brennan were morally opposed to the death penalty, and believed it fit in the 'cruel and unusual' description in principle. Justices White, Stewart and Douglas, while deeming the death penalty

unconstitutional in *Furman*, explicitly discussed the why the Eight Amendment does not necessarily deem capital punishment unconstitutional in the grander scheme. Their opinions are the most interesting, because their reasoning allowed for the political backlash that occurred after *Furman*. This thesis argues that their decision was based on their disagreement with the application of the death penalty in the United States at the time, rather than the death penalty as a tool of criminal justice. The NAACP Legal Defence Fund, arguing for the petitioner, attempted to prove that the arbitrariness with which the death penalty statutes could be applied meant that in many cases the defendant in capital cases was either poor, black, poorly educated or all those combined. White, Stewart and Douglas agreed with this in their opinions, stating that a condition on which the death penalty is 'cruel and unusual' is this arbitrariness. The primary reason appeared to be the racist element that the death penalty was associated with, and this had to be resolved for capital punishment to be a valid constitutional tool in the criminal justice system. Simultaneously, White, Stewart and Douglas gave the individual states an opportunity to resolve this, stating that they did not believe that the death penalty as a tool in the criminal justice repertoire was unconstitutional. This thesis argues that these three justices effectively joined the four-man dissent in the fact that all seven Justices respected the states' autonomy to decide their own criminal justice laws and did not want to impose a federal-level ban on the death penalty as a tool for criminal justice. This is important in the state-federal divide, as it shows hesitancy from seven out of nine Supreme Court Justices to fully remove state-level death penalty legislation.

The *Furman* decision to effectively abolish the death penalty in the US caused political backlash from the legislatures in individual states that wanted to keep the option of the death penalty open. Almost immediately after the decision political leaders in states that had been pro-death penalty responded, such as Georgia's lieutenant governor Lester Maddox, who called the decision "A license for anarchy, rape and murder". People like Maddox were very passionate about the right of states to write their own statutes on issues such as criminal justice legislation and the death penalty. Within the same calendar year that *Furman* was decided Florida already approved a new death penalty statute, and more than thirty states followed suit, showing their discontent regarding the abolition of the death penalty. There were three different types of statutes that were created to satisfy the opinions of the three swing-judges in the *Furman* opinion. The first was a bifurcated trial, in which a capital crime would get a separate courtroom procedure in two steps. First a trial would take place to assess

whether the defendant was guilty, and then a separate trial would take place to determine whether there were any aggravated or mitigated factors that should or should not be punished by death. This type of statute was supported by the American Law Institute and was seen to reduce arbitrariness to the point where it should satisfy the swing Justices and abide by the Eight and Fourteenth Amendment. States like Florida and Georgia used this method to reintroduce capital punishment in their state law. The second type was a mandatory statute, in which any criminal deemed guilty of committing a pre-arranged set of crimes would immediately qualify to be sentenced to death. States like North Carolina and Louisiana used this statute, arguing that because there is no discretion there could also be no arbitrariness. The last attempted method of complying by *Furman* was a specific statute only used in Texas, in which three general questions were asked after a defendant was deemed guilty, which, if answered yes, would deem the defendant guilty of a capital crime and they would be sentenced to death. The Texas statute came eerily close to mandatory, since the questions were so general that the answer would almost certainly be yes in any situation a premeditated murder took place. These three statutes were all deemed to be compliant with the ruling of *Furman* by the state legislatures that adopted them, but they were challenged in the Supreme Court by those in favour of keeping the moratorium going. In *Gregg v. Georgia* and its accompanying cases these three statutes were all reviewed. The bifurcated trial statute and the Texas statute were deemed as constitutional by the Supreme Court, reintroducing the death penalty in a 7-2 decision. Only the mandatory statute was deemed unconstitutional in a 5-4 decision. The 7 majority was made up of the four original dissenters, the newest Justice on the court, Justice Stevens who replaced Justice Douglas, and Justices White and Stewart who had voted in favour of *Furman*. White and Stewart, together with Stevens, deemed the new statutes to be compliant with the *Furman* ruling and the Eight and Fourteenth Amendment. Even with these new statutes there was still a lot of discretion for prosecutors, governors, local judges, and other influential people to confidently state that arbitrariness still exists in the death penalty processes, however. The petitioners attempted to establish this in *Gregg*, but it was not enough to convince White, Stewart and Stevens. This thesis argued that the primary reason for the opinions of these Justices was the backlash from the states. The constitution had not changed, and the issue that was found in *Furman* had also not necessarily been resolved, yet the solution was deemed constitutional by the same Justices who had voted against it four years earlier. As Haines (1999) argued, because the

discussion revolved around the idea of 'evolving standards of decency', public opinion and state backlash are drivers in the decision and basing their decision on this should not be considered a rejection of judicial precedent. The political pressure of 35 states wanting reintroduction, combined with general popular support measured through Gallup opinion polls and a referendum in California to reintroduce the death penalty which was won with 67.5% of the vote might have been enough to convince the Justices to join the camp of the four Justices who believed in the constitutionality of the death penalty.

As a result, answering the research question of 'To what extent did the state-federal political divide influence the 1972 Supreme Court decision to abolish and 1976 decision to reintroduce the death penalty?' this thesis would answer that this political issue was paramount in both decisions. For the 1972 decision the state-federal divide was seen in the fact that the state autonomy to amend their statutes was respected, in order to abide by the constitution, with the three justices in the majority stating that they believe that the death penalty can be constitutionally applied by the states if done fairly and consistently. For the 1976 decision the state-federal divide is even more clear, in its support of the individual state statutes that were adapted based on the opinions of Justices White, Stewart and Douglas in *Furman*. The state-federal divide had a significant impact on both decisions, especially considering that post-*Gregg* the states kept the autonomy to decide their own death penalty statutes, with federal guidance in post-*Gregg* Supreme Court cases, but still on a state-by-state basis the statutes were written (Bennett & Tecklenburg, 2018). As far as New Federalism goes, which is one of the frameworks with which this thesis examined the case decisions, this thesis would argue that despite the LDF efforts to move the issue of death penalty legislation to the federal level, both *Furman* and *Gregg* renewed support for individual state autonomy to decide on whether they want to employ the death penalty or not. Ultimately, it was and remains the states' decision, if they abide by the constitution. This, this thesis argues, is in line with the philosophy of New Federalism, which attempted to revert the post-World War 2 ideology of moving decision-making, power, and responsibility from the state level to the federal level (Levinson, 2006, Barkow, 2006). These decisions, showing reluctance to move capital punishment's legal status to the state level in a nationwide abolition, could be considered an early Supreme Court decision in accordance with the New Federalism philosophy, in line with later Rehnquist Court decisions that had a similar goal such as *United States v. Lopez*, in which the Court deliberately

curbed Congress power in encroaching on state autonomy regarding criminal justice (Levinson, 2006).

The response from the 35 states showed that states still believed in this efficacy of the death penalty (Bessler, 2018). In both cases the interpretation of the Eight and Fourteenth Amendment allowed the justices to decide on both legal and extra-legal factors, one of which was the political pressure from the state legislatures to resume executions. The fact that the Texas statute was also approved, despite this statute almost mandatorily applying the death penalty, showed that the actual changes to the application did not really matter as much as the fact that it was not a mandatory statute in name. The mandatory statute was struck down because that would be a reversal of the standards of decency and was seen as more barbaric. So, if the new statute would impose the death penalty separately from the sitting in which the defendant was deemed guilty, it was seen as a more humane system in which at the very least mitigating and aggravating factors were tested to see whether the death penalty should be applied. This discrepancy, the rejection of mandatory death sentence statutes, but the acceptance of the Texas statute, shows inconsistency in the Supreme Court's decision in *Gregg*.

The fallout of the decision to resume executions has been clearly shown over the past years, with executions resuming almost immediately after *Gregg* and with the US brandishing a death row population of 2455 as of October 2021. For the past 45 years, since executions resumed in 1977, an average of 35 executions took place every year in the United States, with the highest number of executions taking place in Texas, under the same statute that was reviewed and deemed constitutional in *Jurek*. In the post-*Gregg* era black Americans are still executed and sentenced to death at a higher rate compared to the national population than any other racial or ethnic group in the United States, meaning that the issues raised in *Furman* were not solved in *Gregg* (Archibald, 2015, Howard & Clubb, 2008, Maratea, 2019). It is telling that Justice John Paul Stevens, who voted to uphold the Texas statute in *Jurek* and the guided discretion statute in *Gregg* and *Proffitt* has later expressed severe regret in this decision. Especially the Texas decision weighed heavily on Stevens as he wrote in his memoir considering that "the Texas statute has played an important role in authorizing so many death sentences in that state". He also told *New York Times* journalist Emily Bazelon in 2015 that he believed the death penalty was 'a relic of the past' (Bazelon, 2019). Similarly, Harry Blackmun, who voted to uphold the death penalty in both *Furman* and *Gregg* expressed his severe

discontent with the death penalty in the US in 1994. Blackmun wrote that 'the death penalty experiment has failed' and more importantly perhaps that the Court should 'abandon the delusion that capital punishment is consistent with the constitution'. Most importantly for Blackmun was the realization that the death penalty cannot and will not be able to be administered fairly and consistently (Greenhouse, 1994).

In 1994 Lewis Powell also expressed his discontent with the death penalty in America, stating that the death penalty discredits the entire American criminal justice system, with many Americans being sentenced to death but never carried out because of the appeal process. The provisions added in *Gregg*, have clearly not worked in the manner that the 7-man majority had hoped they would, and looking backwards it has become increasingly clear that the death penalty, even with guided discretion and due process, is not and will not be fair in the American criminal justice system. And yet, the death penalty still stands, and executions still resume in the United States.

This study has its limitations, specifically in scope. For example, specific states had to be chosen to analyse the response to *Furman*, because there are not enough resources to include all states in this research. If this period is researched again, it might be interesting to look at more states to see where the nuances are in the application of the new statutes, as for the purposes of time constraints the three categories might be slightly generalised. For example, while the idea of the Georgia and Florida statutes were based on the same blueprint there were some nuances in how they were applied. It could be interesting to look at the differences in that regard, if more resources would be available. Considering the limitations of this study, a recommendation for further research would be to aggregate all states that reintroduced the death penalty after *Furman* to do a comparative analysis of what their primary reason for reviving their capital punishment statute was.

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