

Baumgartner, POLI 203 Spring 2016

The Brief Death of the Death Penalty in 1972
(Furman), its Rapid Resurgence, then
Confirmation in 1976 (Gregg)

Reading: Furman, Gregg, Garland, ch 9

January 13, 2016

Constitutional issues

- The constitution explicitly refers to capital punishments, so therefore we can assume that the founders understood **we would have capital punishment** and that they were comfortable with that. Current “original intent” legal theorists point this out commonly.
- On the other hand, the court has made arguments about “evolving standards of decency” and there are other elements in the constitution that **appear to rule out** capital punishment in some circumstances.

5th Amendment

- No person shall be held to answer for a **capital, or otherwise infamous crime**, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in **jeopardy of life or limb**; nor shall be compelled in any criminal case to be a witness against himself, nor **be deprived of life**, liberty, or property, without **due process of law**; nor shall private property be taken for public use, without just compensation.

8th Amendment

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

14th Amendment

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

The Framers Clearly Envisaged Capital Punishment

- Common punishments in 1790:
 - Slice off parts of the ear, cut off a hand
 - Boil in oil
 - Stockade, blocks, 50 lashes
- We don't allow those punishments anymore.
- But with the constitution explicitly referring to capital punishment, this is a hard sell.
- The justices argued explicitly about this in 1972.

“Evolving Standards of Decency”

- Trop v. Dulles (1958) – can they strip your citizenship for desertion? Or is that “cruel and unusual” because it is disproportionate to the crime?
- Chief Justice Earl Warren, in his majority opinion, stated, “The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”
- This phrase comes back again in Atkins v. Virginia (2002) relating to mental capacity and in Roper v. Simmons (2005) relating to executing minors.
- Interesting: trends in laws passed by state legislatures used there to justify decisions. Here, (1972) the vast majority of state legislatures were being over-ruled. (However, use had declined.)

Furman v. Georgia (1972)

- Furman, a black man, was convicted of killing a white homeowner during a burglary. The jury had complete discretion to impose death or not, and it sentenced him to death.
- Multiple, different, opinions by each of the justices, none with more than 3 agreeing to sign. 5-4 decision nonetheless invalidates every existing law, empties the nation's death rows (700 inmates spared).
- Only two justices say the death penalty is, in all circumstances, unconstitutional

“Wonton and Freakish”

- One justice’s opinion focuses on the capricious and arbitrary nature of the punishment
- Many of those given the death penalty are NOT guilty of the most heinous crimes.
- Concern about impact of race here, but no clear finding that race drives it.
- No Procedural safeguards to guarantee fairness
- Extreme rarity of the punishment: who gets selected, it is like being struck by lightning
- Note: One solution to this freakishness would be to make the death penalty mandatory. North Carolina did this, in fact, in response to the ruling.

Brennan's 4 part test

A punishment does not “comport with human dignity” if it is:

- Unusually severe
- Inflicted arbitrarily
- Substantially rejected by contemporary society
- No more effective than a less severe punishment
 - (We will come back to this idea of “penological value” later in the term)

Deterrence

- Is it acceptable to punish on person more severely just to “make an example”?
 - Does that mean that we are treating a human life as an object, merely a means to an end?
 - Is it constitutionally acceptable to treat a person as an object, or is that inhumane?
- Given the low rate of usage of capital punishment, is there any deterrent value, anyway?
- Note that the first two concerns apply even if there is a deterrent value.

Five Justices, Five Reasonings

	Brennan	Stewart	White	Marshall	Douglas
Capricious	X	X	X	X	X
Racially Biased		X		X	X
No Deterrent Value	X		X		
Cruel / inhumane	X	X	X	X	
Retributive only	X		X	X	
Would eliminate capital punishment in the abstract	X			X	

Four dissenters, including the Chief Justice (Warren Burger)

- Elected officials have passed these laws, this is clear judicial over-reach
- 14th amendment clearly mentions “deprive of life” – so the constitution assumes that capital punishment is possible.
- (5th amendment also refers to capital crimes)
- All four appointed by Pres. Nixon
- Clearly foreshadow the “original intent” argument that the constitution does not “evolve”

Analysis and reactions

- Garland: judicialization of the process
- “Southern way of life”
- Partisan implications
- Massive response by 37 state legislatures

Impeach the Chief Justice



“Judicialization”

- Other countries: straightforward decisions **by the political leadership** to abolish.
- US, unelected judges rule state laws in a large majority of states to be unconstitutional, using an “evolving standards” argument
- Results
 - political backlash
 - issue is very convoluted in terms of constitutional rules, arcane, frustrating for next many years.
 - Supreme Court itself becomes the continuing battle ground for arcane arguments about federalism

Political Reactions

- Pres. Nixon, within 24 hours.
- Gov. Reagan urges support for Prop. 17
 - Feb 1972 CA State Supreme court invalidates DP
 - Nov 1972 voters support reinstatement by referendum, 70/30
- Phila DA Arlen Specter (later chair of the US Senate committee on Judiciary, confirms Justice Thomas)

A Pro-Death Penalty Movement

- No pro-death penalty organizations, including law enforcement or the US DOJ, filed amicus briefs in Furman
- Suddenly, and new political movement

Linkage to “traditional values”

- 1972, just after earth day (1970)
- Woodstock (1969), Vietnam, MLK assassination (1968), riots (1966-1968), Black Panthers
- Supreme Court: 1954 Brown, 1966 Miranda, 1973 Roe v. Wade
- Congress: 1965 Voting Rights Act

State legislatures

- “Southern Way of Life”
- Coded messages
- But also frustration that the Court and the national government were on the side of rioters, criminals, etc.

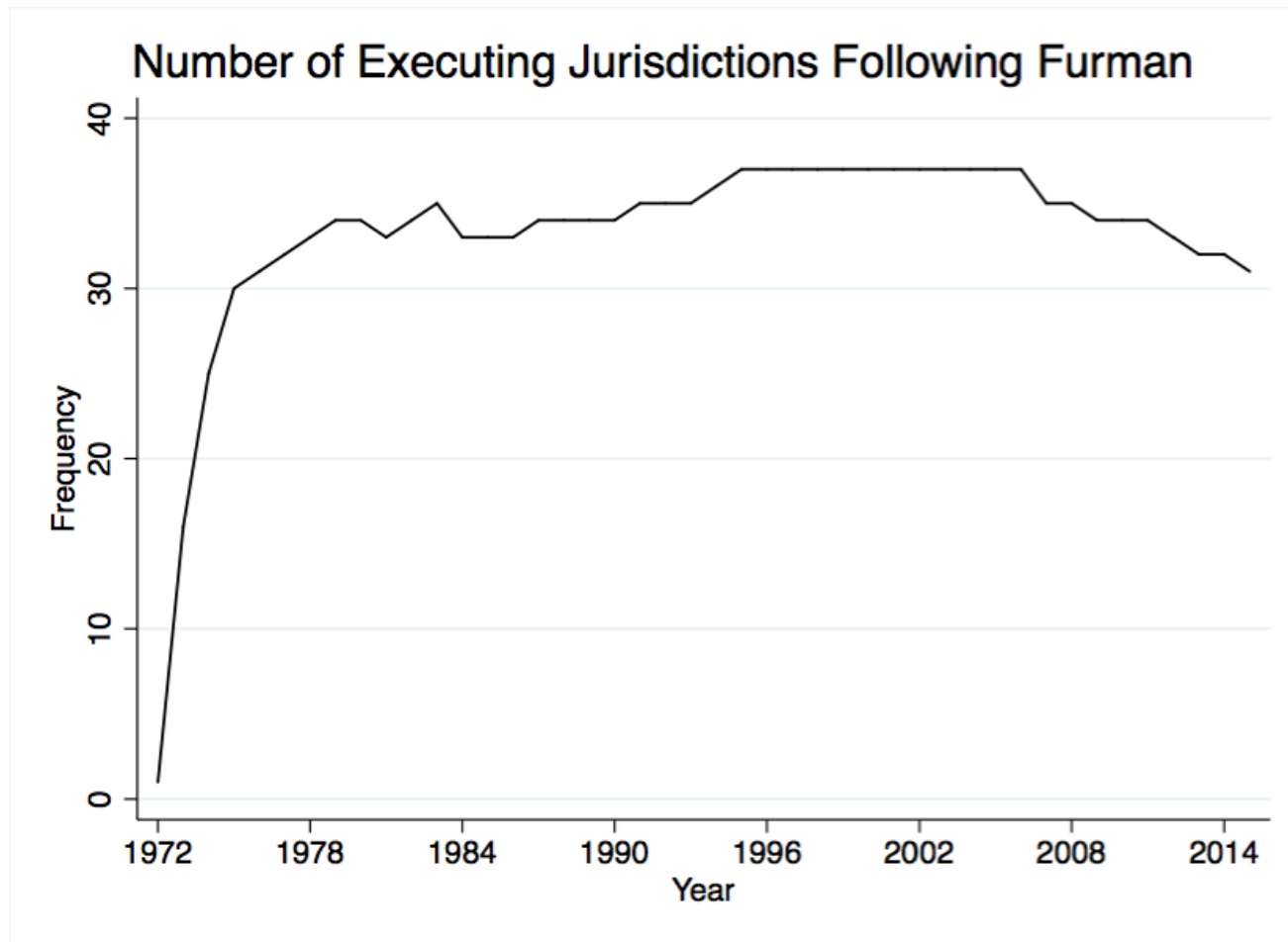
Partisan consequences

- Democrats portrayed as the party of criminals, rioters, defense attorneys, murderers
- “Southern Strategy” of Pres. Nixon
- Huge consequences:
 - South goes Republican, eventually
 - Democrats get tough on crime, eventually

The Resurgence

- Death penalty laws re-enacted in 37 states within 4 years
- NC not uncommon: law here was that if Furman ruled it was capricious and rare, then they would simply make it mandatory for all cases of first degree murder
 - (Woodson v. North Carolina (1976) rendered this law unconstitutional. NC responded by making it mandatory that prosecutors SEEK death, and this remained the law until 2001)

A Rapid Return of the Death Penalty



Gregg v. Georgia (1976)

- Bifurcated trials
 - Guilt phase, Penalty Phase
- “Proportionality review” = make sure it is reserved for the “worst of the worst”
- Enumerate the aggravating and mitigating circumstances.
- Avoid the completely random and arbitrary nature of it from Furman.
- Question for the term: have we done this?

The Irony

- Subsequent debate about arcane issues of constitutional law, federal oversight of states, judicial oversight of legislative branch
- What is more boring than federalism and separation of powers!?
- What is more compelling than arguments about life and death, right and wrong?
- We never had that clear argument, only the arcane, confusing, boring one.