

Baumgartner, POLI 195 Spring 2013

How the death penalty came back
after *Furman* (1972)

Reading: Garland, ch 6

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Furman v. Georgia (1972)

- Death penalty, as currently practiced, is:
 - Arbitrary, capricious
 - Not allowed for the crime of rape
- Multiple, different, opinions by each of the justices, none with more than 3 agreeing to sign. 5-4 decision nonetheless creates a moratorium, but only a temporary one
- 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

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**.

“Evolving Standards of Decency”

- Many forms of punishment that were once common are now considered atrocious, abominable, or otherwise uncivilized: public executions, torture, the stocks, whipping...
- 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, was majority of state legislatures over-ruled.

Four dissenters

- 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”

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.

Analysis and reactions

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

“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, Vietnam, MLK assassination, riots, 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

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.