

LITTLE *FURMANS* EVERYWHERE: STATE COURT INTERVENTION AND THE DECLINE OF THE AMERICAN DEATH PENALTY

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INTRODUCTION

In 1972, the California Supreme Court in *People v. Anderson*¹ and the U.S. Supreme Court in *Furman v. Georgia*² abolished the death penalty pursuant to state and federal constitutional law, respectively. Both decisions evoked enormous popular backlash in an era of rising violent crime rates, including the Charles Manson murders in California and an increased threat of airline hijacking nationwide (and worldwide). In California, the *Anderson* decision was superseded that same year by a ballot initiative that amended the California constitution to ensure the constitutionality of capital punishment.³ At the federal level, the U.S. Supreme Court revisited its *Furman* decision four years later in *Gregg v.*

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¹ 493 P.2d 880 (Cal. 1972).

² 408 U.S. 238 (1972).

³ See *California Proposition 17, Death Penalty in the California Constitution (1972)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_17_Death_

Georgia,⁴ re-authorizing the death penalty nationwide with its validation of new capital statutes that purported to guide the exercise of discretion by capital sentencers.

Such speedy about-faces might be seen as evidence of the limits of constitutional intervention, at least with regard to topics as “hot” as the death penalty. Under this view, if the political branches of government are not ready to act, courts cannot get out too far ahead without facing backlash, as observers have often commented with regard to other hot-button issues like school integration and abortion rights.⁵ And if the political branches are ready to act without a judicial mandate, then constitutional intervention by courts is superfluous.

For the first few decades after *Furman*, the U.S. Supreme Court continued to refine procedures for new guided-discretion capital sentencing regimes but left the substance of the death penalty alone. State courts largely followed suit under their own state constitutions. Death sentences and executions surged as the political branches continued to embrace the death penalty, with death sentences and executions both reaching their nationwide modern-era (post-1976) highs during the late 1990s.⁶

Starting around 2000, however, the trend reversed. Death sentences and executions dramatically declined nationwide over the course of the next two decades. Prosecutors sought the death penalty less often, juries returned fewer death sentences when it was sought, some governors imposed moratoria on carrying out death sentences, and numerous

Penalty_in_the_California_Constitution_(1972) [<https://perma.cc/9FXJ-NX69>] (last visited Aug. 20, 2022).

⁴ 428 U.S. 153 (1976) (upholding Georgia’s new guided-discretion capital statute).

⁵ See, e.g., Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994) (discussing the backlash to Brown v. Board); Emily Bazelon, *Backlash Whiplash: Is Justice Ginsburg Right that Roe v. Wade Should Make the Court Cautious About Gay Marriage?*, SLATE (May 14, 2013), <https://slate.com/news-and-politics/2013/05/justice-ginsburg-and-roe-v-wade-caution-for-gay-marriage.html> [<https://perma.cc/KPZ7-H2SY>] (describing Justice Ginsburg’s concern that the backlash to Roe v. Wade would help conservative opponents impede the abortion rights movement).

⁶ Death sentences reached their modern-era high of 315 in 1996. See *Death Sentences in the United States Since 1977*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year> [<https://perma.cc/CWN2-4365>] (last visited Aug. 20, 2022). Executions reached their modern-era high of 98 in 1999. See *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf> [<https://perma.cc/H8SH-BNYM>] (last updated Aug. 18, 2022).

states abolished capital punishment—most recently, Virginia, the first Southern state to do so and the state logging the largest number of executions in American history. This trend of radical diminution of the death penalty was so pronounced that many, ourselves included, predicted a hollowing out of the death penalty capped by a federal constitutional “*Furman II*” as a coup de grace that would sweep in outliers like Texas and Alabama.⁷ Despite the backlash that greeted the first generation of constitutional intervention, the newly weakened state of the American death penalty seemed to point to judicial abolition as the last, best hope for nationwide abolition.

But broadening the lens beyond the U.S. Supreme Court, which at this point in time seems extremely inhospitable to federal constitutional challenges to the death penalty, reveals that the situation is more complex. Judicial constitutional (and sometimes statutory) intervention promoting death penalty abolition is neither hopeless (because of backlash) nor the only hope (to sweep in political resisters); rather, it interacts in complex ways with the work of the political branches. We can see this interaction most clearly at the state level, where intervention by state courts has played an important role in the nationwide decline of the death penalty, but in many different and sometimes unexpected ways. In what follows, we explore some of the myriad scenarios in which state court intervention—only rarely involving full-blown, *Anderson*- or *Furman*-style abolition—has interacted with political reform or repeal efforts to accelerate the recent massive decline in the use of the death penalty across the United States.

Each one of these stories is unique, reflecting each state’s specific context and history. But these scenarios can also be seen as archetypes of dynamics that could play out in a broadly similar way in other contexts and, thus, provide important lessons for advocates in other jurisdictions. Moreover, the sum of the scenarios, when viewed in the aggregate, offers an important historical corrective. These dynamics between judicial and political action illuminate the importance of state court intervention in the story of the American death penalty’s precipitous decline, which has tended to foreground other institutional actors and to neglect the complex interactions among branches of government. State judicial rulings, though often highly technical and, therefore, less visible and accessible

⁷ See CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 255–89 (2016).

to the public, have been a pervasive and powerful force in the two-decade-long diminution of the practice of capital punishment across the United States.

Although we label state court decisions that hasten the demise of the death penalty as “little *Furmans*,” it is important to emphasize that the state judicial interventions we describe below, though diverse in their details, differ strikingly in their dynamics from *Furman*. *Furman* arrived at a time when state legislatures had paid scant attention to the death penalty. In fact, *Furman* arrived in large part *because* of state legislative inattention. The NAACP Legal Defense insisted that the extraordinary pre-*Furman* decline in capital sentencing and executions revealed that prevailing state capital statutes did not accurately reflect societal attitudes about the death penalty. And the refusal of state legislatures to revisit their statutes suggested that those statutes had fallen into desuetude, relics of an outdated morality that was evident in the infrequent, haphazard, and discriminatory use of the death penalty. Litigants in *Furman* argued that judicial intervention was required to put an end to a practice that had for all practical purposes run its course. But several of the Justices necessary to the result in *Furman* were not fully convinced and were unwilling to embrace the claim that the death penalty was inconsistent with societal standards of decency. So, *Furman*'s intervention proved to be essentially procedural, highlighting the absence of efforts by state legislatures to ensure that the death penalty was rationally and consistently applied, leaving open the door to state legislative efforts to tame the death penalty through more refined capital statutes.

Because *Furman* arrived at a time of legislative inactivity, it was widely perceived to be “counter-majoritarian”—imposing significant judicial limitations on (perhaps even abolition of) the death penalty despite scant political activity in that direction. Of course, that characterization could be disputed. Even though there was not a strong or successful political campaign to end the death penalty in the years before *Furman*, the manifest declines in death sentencing and executions suggested weakening political support. But whatever the valence of public or political support for the death penalty at the time, it is undoubtedly true that *Furman* was not building on or advancing the work of legislative bodies.

In contrast, the myriad state judicial interventions described below arrived at a very different time in the life of the American death penalty, and they were deeply connected to

and in conversation with the work of state political branches. In some cases, the state courts directly advanced moral commitments identified and embraced by the state legislatures (including legislative commitments to racial justice or even legislative efforts to move away from the death penalty). In other cases, the state courts imposed minimal restraints on the death penalty, leaving it to the state legislature to decide whether to navigate those restraints or to use the state court decision as an occasion to let the death penalty expire without the political visibility or costs of an outright legislative repeal. Unlike in *Furman*, the state courts in these scenarios acted *after* a period of extended public debate about the wisdom and appropriate shape of the death penalty and substantial engagement with the issue by the political branches. In this respect, the state court interventions are best understood as culminations of a dialogue with the political branches in contrast to the sudden, lightening-like, and widely unexpected intervention in *Furman*.

I

FLIPPING THE SCRIPT

When *Furman* was decided, many contemporaneous observers assumed that its constitutional invalidation of prevailing capital statutes marked the permanent end of capital punishment in the United States. As death penalty scholar Evan Mandery noted in his account of the *Furman* decision, “On the Supreme Court the [J]ustices believed that, for better or worse, the death penalty in America was over.”⁸ At a time of rising crimes rates and growing threats of international terrorism by hijacking, however, the decision evoked tremendous backlash among death penalty supporters in political office and the general public.⁹ As only two Justices among the five in the *Furman* majority regarded capital punishment as per se “cruel and unusual,” the door was left open for legislation to address the concerns about arbitrary sentencing that animated the other three Justices.¹⁰

⁸ EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 241 (2013).

⁹ See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY 267–68* (2002) (describing responses of state legislators, President Richard Nixon, and public opinion to the *Furman* decision).

¹⁰ Only Justices William Brennan and Thurgood Marshall wrote opinions rejecting the death penalty as a constitutionally permissible punishment in all cases. Justices William O. Douglas, Potter Stewart, and Byron White wrote

The challenge of responding to *Furman's* concerns about the lack of capital sentencing standards was a daunting one. Only one year prior to the *Furman* decision, the Supreme Court had rejected an identical challenge to “standardless” capital sentencing discretion that had been brought under the Due Process Clause of the Fourteenth Amendment rather than the Cruel and Unusual Punishment Clause of the Eighth Amendment.¹¹ Justice John Marshall Harlan II’s majority opinion explained that providing meaningful capital sentencing standards was simply an impossible undertaking:

Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by [history]. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.¹²

Despite this warning, in the years immediately following *Furman*, thirty-five states and the federal government enacted new capital statutes that tried in various ways to limit capital sentencing discretion and guide capital sentencing deliberations. In 1976, the Supreme Court considered five of the new generation of capital statutes, striking down two statutes that prescribed mandatory death sentences for certain crimes as too inflexible, but upholding three statutes that sought to guide the capital sentencing decision through consideration of aggravating and mitigating evidence.¹³ Justice Harlan’s admonition of impossibility notwithstanding, the American death penalty was back in business.

In recent decades, two state supreme courts have handed down opinions that present an ironic inversion of the *Furman* story. *Furman* involved a constitutional infirmity—unbridled capital sentencing discretion—that seemed impossible to fix,

opinions focusing on the unconstitutionality of the death penalty as it was then applied under prevailing statutes.

¹¹ *McGautha v. California*, 402 U.S. 183, 203 (1971) (describing challenges to “standardless” capital sentencing discretion).

¹² *Id.* at 204.

¹³ See *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding guided discretion statute); *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding guided discretion statute); *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding guided discretion statute); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (striking down mandatory statute); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (striking down mandatory statute).

leading many to predict that the Court's invalidation of prevailing statutes would permanently doom the practice of capital punishment. But the vast majority of states went ahead with a fix anyway, which the Supreme Court accepted, and the death penalty roared back to life. More recently, in New York and Delaware, state courts invalidated their states' capital statutes on highly technical, eminently fixable grounds that, nonetheless, have proven to be stumbling blocks to reauthorization of the death penalty, leaving both states in the abolitionist camp. These two episodes, explored in more detail below, demonstrate the power of "flipping the script" on the death penalty through constitutional intervention. Judicial invalidation of a capital statute can lead to abolition simply by shifting the burden of proof. Even when there is not sufficient legislative will for *repeal* of an extant capital statute, there may be sufficient political resistance to prevent *re-enactment* of the death penalty after constitutional invalidation. Of course, such resistance remains politically contingent, but it has proven to offer a thus-far durable path to abolition.

A. New York

In the first few decades after the Supreme Court's resurrection of capital punishment in 1976, the New York legislature repeatedly sought to pass legislation that would have reinstated the death penalty, only to face vetoes from Democratic governors Hugh Carey and Mario Cuomo.¹⁴ Political winds decisively shifted in 1994, when Republican George Pataki defeated Cuomo, a three-term incumbent. To contemporary observers, it was apparent that the death penalty played a crucial role in the upset. After decades of rising violent crime and homicide rates in New York, Pataki had "made instituting the death penalty a critical component of his successful drive to unseat Gov. Mario M. Cuomo."¹⁵ At his exuberant inauguration, the newly minted governor received

¹⁴ *State and Federal Info: New York*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-york> [https://perma.cc/ZBN6-SAWX] (last visited Aug. 20, 2022). The New York legislature did pass a narrow mandatory capital statute in 1973 authorizing the death penalty for the murder of a police officer or a correctional officer or for murders committed by inmates serving life sentences. *Id.* That law was invalidated by court rulings, which paved the way for repeated efforts by death penalty supporters to pass a broader, non-mandatory death penalty statute. *Id.*

¹⁵ Michael Slackman & Marjorie Connelly, *Pataki's Ratings Decline Sharply in Poll of State*, N.Y. TIMES (Feb. 15, 2005), <https://www.nytimes.com/2005/02/15/nyregion/front%20page/patakis-ratings-decline-sharply-in-poll-of-state.html> [https://perma.cc/VH7H-55WQ].

his largest ovation when he repeated his campaign pledge to bring the death penalty back to New York:

‘When a society does not express its own horror at the crime of murder by enforcing the ultimate sanction against it, innocent lives are put at risk. . . . Not out of a sense or [sic] vindictiveness, then, but a sense of justice—indeed, a sense of compassion for those who otherwise might become victims of murder—I will ask the Legislature to pass and I will sign and enforce the death penalty.’¹⁶

In short order, the legislature followed the governor’s lead and passed a comprehensive new death penalty statute by a wide margin in March of 1995, which Pataki signed into law “with the pens of murdered police officers.”¹⁷

In 2004, while Pataki was serving his third term in office, New York’s highest court struck down the statute as unconstitutional on its face under the state constitution in *People v. LaValle*.¹⁸ At that time, prosecutors had sought the death penalty in fifty-eight cases, ultimately yielding only seven death sentences, none of which had yet been carried out.¹⁹ Unlike the wide-ranging concerns expressed by the U.S. Supreme Court in *Furman*, the grounds for the New York constitutional ruling were narrow and technical. The New York statute contained a “deadlock” provision that applied when a capital sentencing jury was unable to reach unanimity on the two choices available to it—death or life imprisonment without parole. The provision required trial judges to instruct sentencing juries at the outset of their deliberations that if they deadlocked, the judge would sentence the defendant to a life sentence *with* parole eligibility after a minimum sentence of twenty to twenty-five years.²⁰ The New York Court of Appeals held that this provision violated the state constitution’s Due Process Clause and rendered the entire statute invalid. The *LaValle* court’s 4-3 majority reasoned that the deadlock instruction might “coerce” jurors holding out for a sentence of life without parole to vote for a death sentence rather than risk

¹⁶ Kevin Sack, *The New Governor: The Overview; Pataki Pledges a Renewal of a ‘Revolutionary Spirit of Saratoga’ as Governor*, N.Y. TIMES (Jan. 2, 1995), <https://www.nytimes.com/1995/01/02/nyregion/new-governor-overview-pataki-pledges-renewal-revolutionary-spirit-saratoga.html> [<https://perma.cc/Y6RB-8MA2>].

¹⁷ Marnie Eisenstadt, *10 Years Later—Death Penalty On the Books, Off the Agenda*, POST-STANDARD (Sept. 25, 2005).

¹⁸ 817 N.E.2d 341 (N.Y. 2004).

¹⁹ See James R. Acker, *Be Careful What You Ask For: Lessons from New York’s Recent Experience with Capital Punishment*, 32 VT. L. REV. 683, 686 (2008).

²⁰ N.Y. CRIM. PROC. LAW § 400.27(10) (McKinney 2020).

an offender's release on parole if the jury deadlocked.²¹ Although some criticized the New York high court's decision as politically motivated, a majority of the judges sitting on the case had been appointed by Governor Pataki.

Unlike the daunting task of statutory drafting that legislators faced after *Furman*, a legislative fix for the constitutional infirmity in the New York statute could not have been simpler. Changing the deadlock provision to give the judge the same sentencing options as the jury—a statutory route taken by most other states—would have solved the problem. But a fix was not forthcoming. The state Senate was quick to act, passing a new provision almost immediately.²² But the state Assembly was a different story. Assembly Speaker Sheldon Silver announced that three committees of that body would jointly hold public hearings on the subject of reauthorizing the death penalty. Although Silver had voted for the 1995 death penalty law and claimed that he continued to support the death penalty, he explained that “many people have questions” and “are willing to accept life without parole, which was not an available remedy before 10 years ago.”²³ The hearings proved to be lengthy, emotional events, with 170 witnesses,²⁴ eighty-seven percent of whom opposed restoring capital punishment.²⁵ Despite this strong show of opposition, Republicans believed that the death penalty bill would pass if it made it to the Assembly floor.²⁶ But the bill never made it to the floor; the powerful Codes Committee refused by a margin of 11-7 to vote it out of committee, and the bill died.²⁷

²¹ *LaValle*, 817 N.E.2d at 358–59.

²² The Senate's solution was actually to give the jury more lenient options than the judge. See JOSEPH LENTOL, HELENE WEINSTEIN & JEFFRION AUBRY, *THE DEATH PENALTY IN NEW YORK* 56 (2005) <https://nyassembly.gov/comm/Codes/20050403/deathpenalty.pdf> [<https://perma.cc/KPJ5-F3FL>].

²³ Al Baker, *Effort to Reinstate Death Penalty Law Is Stalled in Albany*, N.Y. TIMES (Nov. 18, 2004), <https://www.nytimes.com/2004/11/18/nyregion/effort-to-reinstate-death-penalty-law-is-stalled-in-albany.html> [<https://perma.cc/8D7H-VCVD>].

²⁴ JEFFRION L. AUBRY, *SESSION 2005 . . . AT A GLANCE* (2005), https://www.assembly.ny.gov/member_files/035/20050708/ [<https://perma.cc/4XZL-ZAMT>].

²⁵ See Diana N. Huffman, *To Act or Not to Act: Will New York's Defeated Death Penalty Be Resurrected?*, 35 FORDHAM URB. L.J. 1139, 1154–55 (2008).

²⁶ See Patrick D. Healy, *Democrats Say Death Penalty Is Likely to Fail*, N.Y. TIMES (Apr. 5, 2005), <https://www.nytimes.com/2005/04/05/nyregion/democrats-say-death-penalty-is-likely-to-fail.html?searchResultPosition=8> [<https://perma.cc/BRK5-WBEV>].

²⁷ Patrick D. Healy, *New York Assembly Democrats Close Off Death Penalty for 2005*, N.Y. TIMES (Apr. 13, 2005), <https://www.nytimes.com/2005/04/13/>

The bill's death in committee reflected a shift in the politics surrounding the death penalty in New York and beyond. New York, like many other states, had adopted life without parole as an alternative to the death penalty, which some former supporters of the death penalty viewed as a sufficiently severe and protective option, as Assembly Speaker Silver noted. In addition, the recent revolution in the use of DNA to exonerate people wrongfully convicted of serious crimes, including capital murders, caused many to have new doubts about the reliability of capital convictions.²⁸ Unlike the context in which Pataki's bill was enacted, by 2005 there had also been a sharp drop in crime in New York and many other places.²⁹ And the counterintuitive fact that imposing the death penalty cost more than life imprisonment without parole received substantial play in testimony before the New York legislative committees and in the final joint committee report.³⁰

Despite these changed circumstances, attempts to revive capital punishment in New York did not end with the 2005 legislative defeat. The following year, Anthony Horton stood trial for the murder of a state trooper. His accomplice testified that Horton had said "he was going to shoot the cop. He said New York doesn't have a death penalty."³¹ In urging renewed efforts to reinstate the death penalty, one state Senator described this testimony as a "stark rebuke" to the claim that the death penalty does not deter crime.³² But as outraged as many might have been by that story, the 2006 elections effectively closed the door on death. The "Democrats essentially swept all statewide elections."³³ And they have not relinquished control of the Assembly since.³⁴ Three years after *LaValle*, the New York high court once again had the chance to rule on the statute. "[W]e are ultimately left exactly where we

nyregion/new-york-assembly-democrats-close-off-death-penalty-for-2005.html [https://perma.cc/P4AR-BVJK].

²⁸ See Jay D. Aronson & Simon A. Cole, *Science and the Death Penalty: DNA, Innocence, and the Debate over Capital Punishment in the United States*, 34 L. & SOC. INQUIRY 603, 605 (2009) ("The issue of innocence played a central role in the New York State legislature's failure to reinstate the death penalty . . .").

²⁹ See Slackman & Connelly, *supra* note 15.

³⁰ See LENTOL, WEINSTEIN & AUBRY, *supra* note 22, at 27–30.

³¹ Deborah L. Heller, *Death Becomes the State: The Death Penalty in New York State—Past, Present and Future*, 28 PACE L. REV. 589, 609 (2008).

³² *Id.*

³³ *Id.* at 611.

³⁴ See *New York State Assembly*, BALLOTPEDIA, https://ballotpedia.org/New_York_State_Assembly#Historical_party_control [https://perma.cc/F86V-GNHG] (last visited Aug. 20, 2022).

were three years ago[,]” said the Court in *People v. Taylor*.³⁵ “[T]he death penalty sentencing statute,” it concluded, remained “unconstitutional on its face and it is not within [the Court’s] power to save the statute.”³⁶ In 2008, Governor David Paterson ordered all execution equipment removed from state facilities.³⁷ Although that decision does not prevent legislative reauthorization of the death penalty, it remains a potent symbol of the intended finality of the state’s rejection of the punishment.

New York’s story reflects the power of inertia once the script is flipped on the death penalty. It is much easier to block the passage of a new statute restoring the death penalty than it is to generate the political will to pass a measure repealing it. Pataki remained in office until 2006, but death penalty proponents could not overcome the legislative hurdles to reinstatement in the years preceding his exit even with the governor’s strong support and no threat of a veto. Part of the challenge for proponents was that the political cost to legislators of opposing the death penalty—already diminished by the changed circumstances described above—was even lower for the low-profile move of killing a bill in committee rather than voting against it on the floor. And paradoxically, the very ease of the legislative fix that was needed proved to be a liability because it left death penalty proponents asleep at the wheel. One local scholar explained that death penalty supporters failed to mobilize more aggressively in favor of the reinstatement bill because they were “sure that the legislature [would] revise the law.”³⁸

If its high court had not intervened in 2004, it is likely that New York would have eventually joined the long list of states that have legislatively repealed their capital statutes since then, including neighbors New Jersey in 2007 and Connecticut in 2012.³⁹ But constitutional intervention accelerated that

³⁵ 878 N.E.2d 969, 984 (N.Y. 2007).

³⁶ *Id.*

³⁷ *State and Federal Info: New York*, *supra* note 14.

³⁸ See Joyce Purnick, *Temperature Seems to Cool on Death Law*, N.Y. TIMES (Dec. 20, 2004), <https://www.nytimes.com/2004/12/20/nyregion/temperature-seems-to-cool-on-death-law.html> [<https://perma.cc/H6XN-FT6L>] (reporting views of Professor Robert Blecker).

³⁹ The states that have legislatively abolished the death penalty since 2004 are New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), Nebraska (2015), New Hampshire (2019), Colorado (2020), and Virginia (2021). See *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [<https://perma.cc/Q9UU-ABUV>] (last visited Oct. 27, 2022). Nebraska’s legislative abolition was

likely outcome and left death penalty opponents in precisely the same position that they would have been in had they achieved affirmative legislative repeal—with the onus on proponents to pass new legislation to revive the moribund death penalty.

B. Delaware

More than a decade after New York's *LaValle* decision, the Delaware Supreme Court struck down its state's death penalty statute as unconstitutional in *Rauf v. Delaware*.⁴⁰ Although the particulars of the Delaware story diverge in some interesting ways from the events in New York, the effect of judicial intervention was the same. Repeal of the death penalty was accelerated with reduced political cost to death penalty opponents, and death penalty supporters were left facing the same uphill battle for restoration of the punishment that they would have confronted had abolition been achieved legislatively.

One important difference between the constitutional interventions in New York and Delaware is that Delaware's ruling was based on the federal constitution in the wake of a constitutional ruling by the U.S. Supreme Court, whereas the New York case was based on the Due Process Clause of its state constitution, which the New York Court of Appeals interpreted "to provide greater protection than its federal counterpart as construed by the Supreme Court."⁴¹ The Delaware court did not face the same degree of political heat for its decision as the New York court did, nor did death penalty supporters seek a second bite at the apple as they had before the New York high court. Whereas state constitutions can and often do provide *more* protection to capital defendants than the federal constitution, state courts may not provide *less* protection and, thus, have no choice but to apply federal constitutional norms. So, when the conservative-leaning U.S. Supreme Court issued a defendant-protective constitutional ruling, the Delaware Supreme Court had political cover for applying it, even when the ruling had the effect of repealing the state's death penalty and ultimately removing all prisoners from death row.

reversed the following year when Nebraska voters approved a ballot question restoring capital punishment in the state. *State and Federal Info: Nebraska, DEATH PENALTY INFO. CTR.*, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nebraska> [<https://perma.cc/3533-HJXZ>] (last visited Oct. 27, 2022).

⁴⁰ 145 A.3d 430 (Del. 2016).

⁴¹ *People v. LaValle*, 817 N.E.2d 341, 364 (N.Y. 2004).

The federal constitutional ruling in question was *Hurst v. Florida*,⁴² which held that the Sixth Amendment right to trial by jury requires that juries, not judges, make all factual determinations that render a capital defendant eligible for the death penalty. Florida, Delaware, and Alabama all had statutes that allowed judges to override jury life verdicts to impose a death sentence instead. In *Hurst*, the U.S. Supreme Court found that Florida's statute unconstitutionally permitted judicial factual determinations of death eligibility. Two months later, the Florida legislature amended the state's capital statute to eliminate death sentences via judicial override.⁴³ Attention turned immediately to Delaware and Alabama, but it was not obvious that the result would be the same in those states, whose statutes were broadly similar but not identical to Florida's. Indeed, even some experts *opposed* to capital punishment did not predict a sweeping ruling in Delaware. As a local paper explained,

[J]udges in Delaware have not been using that power [of judicial override].

For that reason, the U.S. Supreme Court ruling is not expected to impact the 14 people currently on death row in Delaware, according to Robert Dunham, executive director of the nonprofit Death Penalty Information Center in Washington, D.C.⁴⁴

Predictions that the Supreme Court's ruling in Florida might not extend beyond that state's borders were vindicated in Alabama, when that state's supreme court ruled that its death penalty statute was sufficiently different from Florida's to remain constitutionally valid.⁴⁵

Nonetheless, the Delaware Supreme Court in *Rauf* choose to read *Hurst* broadly, going beyond the particulars of the U.S. Supreme Court's ruling to hold that a jury not only must

⁴² 577 U.S. 92 (2016).

⁴³ See *Florida Abolishes Death Sentences by Judicial Override*, EQUAL JUST. INITIATIVE (Mar. 9, 2016), <https://eji.org/news/florida-abolishes-judge-override/> [https://perma.cc/7J2D-CSDG].

⁴⁴ Jessica Masulli Reyes, *Will Death Penalty Ruling Affect Delaware?*, DEL. ONLINE (Jan. 14, 2016), <https://www.delawareonline.com/story/news/local/2016/01/14/supreme-court-ruling-floridas-death-penalty-affect-delaware/78745374/> [https://perma.cc/PNV5-WA8R].

⁴⁵ See *Alabama Supreme Court Rules that Death Penalty Statute is Still Valid*, EQUAL JUST. INITIATIVE (Sept. 30, 2016), <https://eji.org/news/alabama-supreme-court-rules-death-penalty-statute-still-valid/> [https://perma.cc/58PG-LKTL]. Eventually, it was the Alabama legislature, not its high court, that repealed judicial override. See *Alabama Abolishes Judge Override in Death Penalty Cases*, EQUAL JUST. INITIATIVE (Apr. 4, 2017), <https://eji.org/news/alabama-legislature-passes-law-abolishing-judicial-override/> [https://perma.cc/V2VR-TNMR].

determine the facts that make a defendant eligible for a death sentence, but also must find those facts unanimously and beyond a reasonable doubt, contrary to the requirements of the Delaware statute. The *Rauf* Court's decision was self-consciously portentous, weighing in at 148 pages that traced the history of capital punishment in the United States before reaching the rather technical issues that determined the outcome of the case. Later that same year, the Delaware Supreme Court held that *Rauf* applied retroactively, ultimately leading to the removal of everyone from the state's death row.⁴⁶

Another contrast between the Delaware and New York experiences is the differing political contexts in which the state high courts ruled. At the time of the Delaware ruling, Delaware was a much more active death penalty state than New York was at the time of its ruling. Although New York had been a very active death penalty state earlier in the 20th century, its last execution took place in 1963. Despite Governor Pataki's successful revival of the death penalty in the 1990s, his statute yielded very few death sentences and no executions before it was declared unconstitutional—a fact that helped defeat legislative reinstatement after the *LaValle* decision. Why pay the high financial costs of conducting capital trials and maintaining death row if there would be nothing to show for it? Delaware, however, had one of the highest per capita execution rates in the country at the time of the *Rauf* decision, and its last execution had taken place only four years earlier.⁴⁷ Despite its much smaller size, Delaware had twice as many people on death row when its statute was constitutionally invalidated than New York.

Paradoxically, despite its robust use of the death penalty, Delaware seemed to be much closer to legislative abolition at the time of the *Rauf* decision than New York had been at the time of *LaValle*. Three years before *Rauf*, the Delaware Senate passed, by a one-vote margin, a provision to abolish the death penalty. Two years later, the Senate again proposed an abolition measure that mirrored the earlier bill. In her press release for the latter bill, Senator Karen Peterson explained what motivated her and the numerous other sponsors of the

⁴⁶ See *Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (applying *Rauf* retroactively).

⁴⁷ See *State and Federal Info: Delaware*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/delaware> [<https://perma.cc/MDY9-P285>] (last visited Aug. 20, 2022).

legislation.⁴⁸ The release highlighted “documentation of inmates being executed for a crime, only to be exonerated posthumously by new evidence.”⁴⁹ The Senator also emphasized the lack of evidence of the death penalty’s deterrent effect and the adequacy of life without parole as a substitute. The release quoted Ti Hall, campaign manager for the Delaware Repeal Project, who appealed to closure and cost. “There are so many problems with the broken death penalty system,” he said, “but perhaps the worst is that it traps victims’ families in endless years of uncertainty and court hearings.”⁵⁰ By contrast, “A sentence of life without parole is swift and certain punishment.” And the money saved could go toward “actually help[ing] families by providing grief counseling, scholarships for children who have lost a parent, and other much-needed services.”⁵¹ The bill passed in the Senate 11–10.⁵²

As abolition was pending in the Delaware legislature, the state’s Democratic governor also had a change of heart. Having remained silent on the issue despite pressure from Senator Peterson and others, Governor Jack Markell finally announced his support of the repeal effort in 2015, invoking concerns about innocence.⁵³ He called the death penalty “an ‘instrument of imperfect justice’”⁵⁴ and cited recent exonerations and the introduction of flawed forensic testimony in cases around the country.⁵⁵

The Delaware House, however, proved to be a sticking point. After finally making it out of the House Judiciary Committee, where it had been stalled, the bill failed on the floor of the House, 23–16, “but one of the no votes was a strategic decision that would have made it possible for a supporter of the

⁴⁸ *Press Release: Bill to Repeal Delaware’s Death Penalty Introduced*, DEL. STATE SENATE DEMOCRATIC CAUCUS (Mar. 18, 2015), <https://www.desenatedems.com/march-18—press-release.html> [<https://perma.cc/JJ58-CUEG>].

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Jon Offredo, *Gov. Markell: I Will Sign Delaware Death Penalty Repeal*, DEL. ONLINE (May 7, 2015), <https://www.delawareonline.com/story/firststatepolitics/2015/05/07/markell-supports-death-penalty-repeal/70966740/> [<https://perma.cc/LK57-7GSX>].

⁵⁴ *Id.*

⁵⁵ See Randall Chase, *Delaware Governor Supports Repeal of Death Penalty*, HARTFORD COURANT (May 7, 2015), <https://www.courant.com/sdut-delaware-governor-supports-repeal-of-death-penalty-2015may07-story.html?outputType=amp> [<https://perma.cc/55EK-Z39T>].

bill to file a motion for reconsideration.”⁵⁶ When the time came for filing the motion for reconsideration, however, the Delaware Supreme Court was gearing up to weigh in on the validity of the prevailing statute. Accordingly, the House sponsors of the repeal bill decided to wait for the high court’s ruling. One sponsor of the bill said that the move to wait “only makes sense.”⁵⁷ Another agreed that it was “[t]he prudent course of action” to “wait and see what the court decides.”⁵⁸

As a consequence of all this political momentum, restoring capital punishment after the Delaware Supreme Court’s ruling in *Rauf* seemed unlikely to contemporary observers. “Supporters of capital punishment will now want the General Assembly to fix the statute’s language so the practice can continue[,]” wrote a local reporter after the state supreme court’s decision.⁵⁹ “That could be tough since a vocal opposition helped a bill to abolish the death penalty pass the state Senate in 2015, before it failed in a close vote in the House this year.”⁶⁰ The *New York Times* reported the same: “A new drive to revive the death penalty in Delaware, experts said, would clearly face an uphill battle.”⁶¹ The Governor said he hoped the Court’s ruling would be the final word on the punishment.⁶²

A legislative fix to the problem identified by the U.S. Supreme Court in *Hurst* and the Delaware Supreme Court in *Rauf* would have been very easy. Indeed, both the Florida and Alabama legislatures amended their capital statutes to eliminate death sentences by judicial override and, thus, preserve the death penalty against further constitutional challenges pursuant to *Hurst*. But despite vigorous efforts by proponents of reinstatement, no such fix has been forthcoming in Delaware since 2016.

⁵⁶ Jessica Masulli Reyes, *Death Penalty Repeal Bill Stalled for High Court Ruling*, DEL. ONLINE (Mar. 7, 2016), <https://www.delawareonline.com/story/news/politics/2016/03/07/delaware-death-penalty-repeal-bill-stalled/81454606/> [<https://perma.cc/M4BU-SSQW>].

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Jessica Masulli Reyes, *Top Court: Delaware’s Death Penalty Law Unconstitutional*, DEL. ONLINE (Aug. 2, 2016) <https://www.delawareonline.com/story/news/local/2016/08/02/court-delawares-death-penalty-law-unconstitutional/87963012/> [<https://perma.cc/2E6H-EF9Z>].

⁶⁰ *Id.*

⁶¹ Erik Eckholm, *Delaware Supreme Court Rules State’s Death Penalty Unconstitutional*, N.Y. TIMES (Aug. 2, 2016), <https://www.nytimes.com/2016/08/03/us/delaware-supreme-court-rules-states-death-penalty-unconstitutional.html> [<https://perma.cc/9PYP-X3LG>].

⁶² *Id.*

At first, the chances for reinstatement began to look more promising for supporters of the death penalty in the year following the *Rauf* decision. A brutal prison riot that resulted in the torturous death of a correctional officer and the murder of a Delaware state trooper killed in the line of duty produced sensational headlines that blew wind into the sails of the reinstatement effort.⁶³ Less than one year after *Rauf* was handed down, the Delaware House voted in 2017 to reinstate the death penalty, 24-16, with “overwhelming support” from law enforcement.⁶⁴ The Senate, which for four years had narrowly championed legislative repeal of the death penalty, appeared to present a less formidable obstacle in light of the retirement of Senator Peterson, who had led the repeal efforts, and her replacement’s apparent openness to considering arguments for reinstatement in light of the recent high-profile murders.⁶⁵

Nonetheless, the reinstatement bill never made it to the floor of the Senate, despite the confluence of horrible murder headlines and electoral changes. Since 2017, proponents have continued to introduce bills with some bipartisan support to restore the death penalty in Delaware, most recently in 2020, still citing “Correctional Officer Lt. Steven Floyd, who proponents of the bill argue was killed in a ‘horribly inhumane’ way during the 2017 riot at a correctional center near Smyrna.”⁶⁶ Democratic Governor John Carney, who took office in early 2017, has said that “he is opposed to reinstating Delaware’s death penalty, but that he would probably sign a bill allowing capital punishment if it were restricted to killers of

⁶³ See Juliet Linderman, *Prison Workers Sue Delaware Over Deadly Vaughn Correctional Facility Inmate Riot*, NBC PHILA. (Apr. 18, 2017), <https://www.nbcphiladelphia.com/news/local/vaughn-delaware-prison-standoff-deadly-lawsuit/13098/> [https://perma.cc/7767-5FAL]; *Mourners Say Final Goodbye to Slain Trooper*, NBC PHILA. (May 3, 2017), <https://www.nbcphiladelphia.com/news/local/delaware-state-police-stephen-ballard-funeral-roads/14878/> [https://perma.cc/M6RB-XDKT] (last updated May 5, 2017).

⁶⁴ Randall Chase, *Delaware House Votes to Reinstate Death Penalty*, NBC PHILA. (May 9, 2017), <https://www.nbcphiladelphia.com/news/local/delaware-death-penalty-house-vote-correctional-officer-state-trooper/15685/> [https://perma.cc/9JER-N8CB].

⁶⁵ James Dawson, *House Lawmakers Gives Green Light to Revive Death Penalty*, DEL. PUB. MEDIA (May 9, 2017), <https://www.delawarepublic.org/post/house-lawmakers-gives-green-light-revive-death-penalty> [https://perma.cc/5EZU-B8GW].

⁶⁶ Sophia Schmidt, *Positions Vary on Latest Proposal to Reinstate Death Penalty*, DEL. PUB. MEDIA (Feb. 6, 2020), <https://www.delawarepublic.org/post/positions-vary-latest-proposal-reinstate-death-penalty> [https://perma.cc/K54D-7LD3].

law enforcement officials.”⁶⁷ Delaware thus remains in a more precarious situation with regard to possible legislative reinstatement of the death penalty than New York, with a more recent constitutional invalidation, more enthusiasm for reinstatement in its House (despite Democratic control), and a more accommodating Democratic Governor. Even with these relative advantages, reinstatement seems unlikely, given its failure in 2017 when the fresh horror of the Smyrna prison riot was unable to revive the moribund death penalty.

The thus-far futile efforts to restore the death penalty in Delaware, even in the narrow circumstances that would avoid a gubernatorial veto, illustrate the formidable power of judicial constitutional intervention to “flip the script” and shift the burden of proof on the question of capital punishment. Even in the absence of the leftward lurch in the political landscape that made restoring the death penalty in New York untenable, and even in the presence of continuing zealous energy for reinstatement efforts in its House, Delaware has remained in the abolitionist column. The obstacles Delaware death penalty proponents have faced in their attempts to enact new legislation underscore the paradoxical fact that, as in New York, sometimes even an “easy fix” can nonetheless be too difficult to pull off.

II

EXTENDING ABOLITION RETROACTIVELY

One of the most formidable challenges that abolitionists face in urging legislative repeal of the death penalty is that complete abolition looks not merely forward, but also backward. It is one thing to take the death penalty off the table for as-yet unnamed, faceless murderers of unknown, future victims. But it is another thing entirely to essentially grant a reprieve to those who have committed notorious crimes and been sent to death row by unanimous juries. One of the things that led California voters to amend their state constitution in response to full judicial abolition in 1972 was outrage at the fact that both Charles Manson and Sirhan Sirhan had been removed from death row by that decision. Consequently, legislative repeal is sometimes possible only when it is limited to prospective application.

⁶⁷ Randall Chase, *Delaware Lawmakers Face Competing Death Penalty Bills*, AP NEWS (Mar. 19, 2020), <https://apnews.com/article/3c937d6e75a8a1e1deb0b68b362205e1> [<https://perma.cc/Y5LX-QBYX>].

In some states, when the legislature enacted a prospective repeal of the state's capital statute, the state supreme court then "completed" the repeal by applying it retroactively as a matter of constitutional law. This two-pronged approach to full death penalty abolition allows the legislature to avoid responsibility for releasing heinous offenders from death row, while simultaneously permitting the supreme court to base its constitutional interpretation on the fact that the legislature no longer believed that the death penalty was an appropriate punishment going forward. Connecticut was the first state in which this particular dynamic occurred, propelled by an especially horrible crime that made retroactive repeal unthinkable in the legislature. Although the details of Connecticut's two-step dance to full abolition are unique to Connecticut, the possibility that specific state dynamics may serve as more generalizable archetypes has been realized in the way that other states have followed Connecticut's lead in the few short years since.

A. Connecticut

Connecticut legislatively abolished its death penalty in 2012, though the repeal by its terms applied only to crimes committed after the effective date of the law. This was the fourth time in less than a decade that a repeal bill came up for a vote in the state legislature. In 2005, a repeal bill failed in the House 89-60, though it was the closest that abolition had ever come.⁶⁸ In 2009, a repeal bill was passed by the legislature but vetoed by Republican Governor M. Jodi Rell.⁶⁹ In 2011, a Democratic governor was in office, but proponents of repeal failed to rally enough votes for a bill to pass in the legislature.⁷⁰ Finally, in 2012, repeal was passed by the legislature and signed into law by Governor Dannel Malloy.⁷¹ The timing of the abolition campaign, the twists and turns of the repeal story,

⁶⁸ See Mark Pazniokas, *Death Penalty Survives*, HARTFORD COURANT (Mar. 31, 2005), <https://www.courant.com/news/connecticut/hc-xpm-2005-03-31-0503310605-story.html> [<https://perma.cc/9DLU-M6AQ>].

⁶⁹ See Chris Keating, *Rell Vetoes Bill To Abolish Death Penalty*, HARTFORD COURANT (June 6, 2009), <https://www.courant.com/community/hc-rell-vetoes-bill-to-abolish-death-penalty-story.html> [<https://perma.cc/NDX4-P8VX>].

⁷⁰ See Khalilah Brown-Dean & Ben Jones, *Building Authentic Power: A Study of the Campaign to Repeal Connecticut's Death Penalty*, 5 POL., GRPS., & IDENTITIES 321, 325 (2017).

⁷¹ See David Ariosto, *Connecticut Becomes 17th State to Abolish Death Penalty*, CNN (Apr. 25, 2012), <https://www.cnn.com/2012/04/25/justice/connecticut-death-penalty-law-repealed/index.html> [<https://perma.cc/YH4M-MXAL>].

and the prospective nature of the repeal bill that ultimately succeeded all were influenced by high-profile cases that dominated the headlines.

The introduction of the failed 2005 repeal bill was prompted by the impending execution of Michael Ross, a serial killer who had confessed to strangling eight girls and young women and to raping most of them in the 1980s.⁷² His case jumped into the headlines in 2005 when he sought to forfeit his appeals and hasten his execution. After an extensive hearing, a judge found Ross mentally competent to waive his appeals, and an execution date was set.⁷³ With an actual execution looming in Connecticut for the first time in decades, opponents of the death penalty were galvanized to introduce legislation that would fully abolish the state's death penalty, sparing Ross and six others on death row.⁷⁴ During the legislative debate, supporters of the repeal bill argued that Connecticut was the only New England state with prisoners on death row and that Ross's execution would be the first in Connecticut and in all of New England since 1960.⁷⁵ Opponents of abolition declined to debate the death penalty in the abstract and instead "focused on Ross, his victims, and their families."⁷⁶ Public enthusiasm for Ross's execution ran high; indeed, a Quinnipiac University poll showed that seventy percent of those questioned supported executing Ross, while only fifty-nine percent supported the death penalty in general.⁷⁷ With Ross's case dominating the legislative debate, "[t]he outcome never was in doubt."⁷⁸ The repeal bill failed, and Michael Ross was executed on May 13, 2005.⁷⁹ His execution was the first in Connecticut

⁷² See William Yardley, *Connecticut Execution Is Unlikely to Hasten Others, Experts Say*, N.Y. TIMES (May 14, 2005), <https://www.nytimes.com/2005/05/14/nyregion/connecticut-execution-is-unlikely-to-hasten-others-experts-say.html> [<https://perma.cc/ZD44-JMT9>].

⁷³ See William Yardley, *At Competency Hearing, Two Profiles of Serial Killer*, N.Y. TIMES (Apr. 15, 2005), <https://www.nytimes.com/2005/04/15/nyregion/at-competency-hearing-two-profiles-of-serial-killer.html> [<https://perma.cc/F9VK-XEV3>].

⁷⁴ See Pazniokas, *supra* note 68.

⁷⁵ See *id.*

⁷⁶ *Id.*

⁷⁷ See Gregory B. Hladky, *Poll: State Voters OK with Death Penalty, Especially for Ross*, NEW HAVEN REG. (Jan. 13, 2005), <https://www.nhregister.com/news/article/Poll-State-voters-OK-with-death-penalty-11650172.php> [<https://perma.cc/5BUY-9XFQ>]. When presented with the option of a sentence of life without parole, support for the death penalty dropped to forty-nine percent. *Id.*

⁷⁸ Pazniokas, *supra* note 68.

⁷⁹ See *Connecticut Serial Killer Put to Death*, CNN (May 13, 2005), <https://edition.cnn.com/2005/LAW/05/13/ross.execution/> [<https://perma.cc/JY5D-CPW6>].

in forty-five years—and likely the last the one ever, in light of subsequent legislative and judicial action, as detailed below.

Although the death penalty had been “a peripheral issue in Connecticut politics” prior to 2005, the execution of Michael Ross “energized Connecticut’s repeal movement by forcing it to mobilize.”⁸⁰ And once Ross no longer dominated the headlines, abolitionists hoped for a “fresh debate” about the death penalty in which the horrors of Ross’s crimes were no longer the focus.⁸¹ Two years after Ross’s execution, however, one of the most infamous crimes in the history of the state exploded in Connecticut headlines and beyond. Two men, Stephen Hayes and Joshua Komisarjevsky, broke into the Cheshire home of Dr. William A. Petit Jr., his wife Jennifer Hawke-Petit, and their two daughters Hayley, 17, and Michaela, 11. The intruders beat Dr. Petit with a baseball bat and tied up and killed his wife and daughters, after raping Mrs. Hawke-Petit and the younger daughter and setting the house on fire while the two daughters were still alive and tied to their beds.⁸² Dr. Petit managed to escape and became a passionate advocate for death sentences for the murderers of his family and for the retention of the death penalty in Connecticut.⁸³

It is impossible to overstate the media attention the Cheshire murders received for years to come and the extent to which the case saturated the ongoing debate about Connecticut’s death penalty. In the short term, there was an “extraordinary outpouring of grief and shock that followed the horrific break-in,” and the crime was repeatedly analogized to Capote’s *In Cold Blood*.⁸⁴ In the longer term, the case continued to reverberate, in part because the separate capital trials of the two murderers did not conclude until more than four years after the crime, and in part because abolitionist lawmakers continued to push the case for death penalty repeal in the state legislature. As Colin McEnroe, one of the state’s best-known columnists, wrote upon the conviction and death sentence of the second defendant in 2011, “It is not possible to have lived in this state since 2007 and not know the Petit

⁸⁰ Brown-Dean & Jones, *supra* note 70, at 328.

⁸¹ Yardley, *supra* note 72.

⁸² See William Glaberson, *Death Penalty for a Killer of 3 in Connecticut*, N.Y. TIMES (Nov. 8, 2010), <https://www.nytimes.com/2010/11/09/nyregion/09cheshire.html> [<https://perma.cc/8THN-42Q3>].

⁸³ *Id.*

⁸⁴ Peter Applebome, *‘In Cold Blood,’ Re-enacted in Our Time*, N.Y. TIMES (Aug. 2, 2007), <https://www.nytimes.com/2007/08/02/nyregion/02towns.html?searchResultPosition=15> [<https://perma.cc/43KW-FB4K>].

case[.] . . . It enters our night dreams and day musings. There is no vaccine against it.”⁸⁵ And as *The New York Times* explained upon the conviction and death sentence of the first defendant the previous year, “Partisans on both sides of the capital punishment debate came to see the case as a test of the issue in Connecticut.”⁸⁶

One might have expected that proponents of abolition would be dissuaded from pressing the cause after the Cheshire murders. But the 2008 elections “tilted the [Connecticut] House of Representatives away from the death penalty,”⁸⁷ and in 2009, the newly-strong Democratic majority in the legislature passed a repeal bill,⁸⁸ even though Dr. Petit testified against the repeal at a public legislative hearing, telling lawmakers that anything less than capital punishment “would demean the victims of capital crimes, including his wife and children.”⁸⁹ Proponents of repeal clearly had learned their lesson from the Michael Ross case: the repeal bill they passed would apply only to future crimes and, thus, would not take death off the table for the Cheshire murderers who were awaiting their capital trials.⁹⁰ This did not stop Republican Governor Rell, in vetoing the repeal bill as anticipated, from invoking both the Cheshire murders and Dr. Petit’s passionate advocacy for retaining capital punishment:

Dr. William Petit recently quoted Lord Justice Denning, Master of the Rolls of the Court of Appeals in the United Kingdom, who said: “. . . The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.”⁹¹

⁸⁵ William Glaberson, *Death Penalty for 2nd Man in Connecticut Triple-Murder Case*, N.Y. TIMES (Dec. 9, 2011), <https://www.nytimes.com/2011/12/10/nyregion/joshua-komisarjevsky-gets-death-for-cheshire-killings.html> [https://perma.cc/M5CP-2BRP] (quoting McEnroe).

⁸⁶ Glaberson, *supra* note 82.

⁸⁷ See Mark Pazniokas, *Petit Case Shadows Death Penalty Debate*, N.Y. TIMES (May 15, 2009), <https://www.nytimes.com/2009/05/17/nyregion/connecticut/17polct.html?searchResultPosition=1> [https://perma.cc/545F-9AVM].

⁸⁸ See *Connecticut Legislature Votes to Abolish the Death Penalty*, DEATH PENALTY INFO. CTR. (May 22, 2009), <https://deathpenaltyinfo.org/news/connecticut-legislature-votes-to-abolish-the-death-penalty> [https://perma.cc/LGT5-KQP2].

⁸⁹ Pazniokas, *supra* note 87.

⁹⁰ See *Rell Vows to Veto Ban on Death Penalty in Connecticut*, N.Y. TIMES (May 22, 2009), <https://www.nytimes.com/2009/05/23/nyregion/connecticut/23death.html> [https://perma.cc/C2LA-QJZ3].

⁹¹ Press Release, M. Jodi Rell, *Veto Message* (June 5, 2009), <https://www.ct.gov/Governorrell/cwp/view.asp?A=1716&Q=441210> [https://perma.cc/M7C6-D3ZL].

In 2010, the continuing leftward shift in state politics brought a Democrat, Dannel Malloy, into the governor's office. During the televised debates, Malloy responded to his opponent's invocation of the Cheshire murders as a reason for retaining the death penalty, with clear insistence—"I want to be very, very, very clear"—that any repeal bill that he signed would apply only prospectively and that he would allow a death sentence to be carried out on the Cheshire murderers if imposed under the prevailing law.⁹² Despite Governor Malloy's willingness to sign a prospective bill, abolitionist legislators were unable to muster the necessary votes to repeal the death penalty.⁹³ The vote occurred in the wake of the first Cheshire defendant's trial and death sentencing and shortly before the commencement of the second defendant's capital trial.⁹⁴ Repeal looked imminent until Dr. Petit paid a visit to two state senators who had voted for repeal in 2009 but were persuaded by his personal appeal to change their votes this time around.⁹⁵ Although the repeal bill would not apply to either of the Cheshire defendants because their crime had been committed before the effective date of the proposed law, Petit argued to the lawmakers that a legislative repeal might influence the jury's sentencing decision in the pending case, making it "more difficult for his family's murderers to get the justice he thought they deserved."⁹⁶ One of the senators who changed their votes from supporting to opposing repeal, Edith Prague, was clearly moved by the concern that repeal might make a death sentence less likely in the second trial, commenting after the Petit visit, "They should bypass the trial and take that second animal and hang him by his penis from a tree out in the middle of Main Street."⁹⁷

⁹² Christopher Keating, *Tom Foley, Daniel Malloy, Clash on Death Penalty, Jobs, Records in Gubernatorial Debate*, HARTFORD COURANT (Oct. 6, 2010), <https://www.courant.com/news/connecticut/hc-xpm-2010-10-06-hc-gubernatorial-debate-1006-20101005-story,amp.html> [<https://perma.cc/H47Y-TUH5>].

⁹³ See Brown-Dean & Jones, *supra* note 70, at 329–30.

⁹⁴ *Id.* at 329.

⁹⁵ See Mark Pazniokas, *At Petit's Request, Two Senators Stop Repeal of Death Penalty*, CT MIRROR (May 11, 2011), <https://ctmirror.org/2011/05/11/petits-request-two-senators-stop-repeal-death-penalty/> [<https://perma.cc/9DLU-M6AQ>].

⁹⁶ Neena Satija, *A Senator Struggles for an Answer on Capital Punishment*, CT MIRROR (Mar. 14, 2012), <https://ctmirror.org/2012/03/14/senator-struggles-answer-capital-punishment/> [<https://perma.cc/9TRA-8KZG>].

⁹⁷ Bob Connors, *Prague: 'Hang the Animal by His . . .'*, NBC CONN., <https://www.nbcconnecticut.com/news/local/prague-hang-the-animal-by-his/1884149/#:~:text=22They%20should%20bypass%20the%20trial%20and%20take%20that,morning%2C%20Prague%20said%20she%20stood%20by>

After the second Cheshire defendant was sentenced to death, the concern about a repeal bill influencing the sentencing jury evaporated, but the Cheshire case continued to haunt the death penalty debate. When Democrats reintroduced a repeal bill shortly after the second verdict, opponents charged them with hypocrisy, arguing that a prospective repeal made no moral sense, but reflected only political expediency: “You guys that support [repealing] the death penalty prospectively only, because the votes aren’t there to do it across the board, please don’t act holier than thou on that.”⁹⁸ Opponents also raised the concern that the repeal bill would not turn out to be prospective in actuality, because the Connecticut Supreme Court would use the bill as grounds to set aside the death sentences of the Cheshire defendants and the nine other people on Connecticut’s death row: “should that bill go forward, the appeal for those 11 men on death row will be successful and [] those sentences will be commuted.”⁹⁹

In response to this concern, proponents of repeal tried to make it unmistakably clear in the legislative record that the bill was intended to be prospective only. One senator announced, “I want to make the declaration that this bill is intended to be prospective and to have no retroactive application at all.”¹⁰⁰ He expressed his belief that the state supreme court would respect that intent, noting two prior instances in Connecticut history in which the high court deferred to legislative intent on the prospective nature of death penalty reform legislation.¹⁰¹ He concluded from this history that “the intent of this Legislature would be an extremely big factor in our Supreme Court or our Appellate Court determining whether or not in this instance any change in our death penalty statute would have retroactive effect.”¹⁰² Other lawmakers, however, questioned this reassurance and expressed skepticism that their intent could bind the judiciary:

Yes, courts interpret our statutes and hopefully they understand that we mean what [we] say.

⁹⁸ Connecticut General Assembly, Senate Transcript (Apr. 4, 2012) (unpaginated transcript), <https://www.cga.ct.gov/2012/trn/S/2012STR00404-R00-TRN.htm> [<https://perma.cc/B438-6DCJ>] (statement of Senator John Kissel).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (statement of Senator Eric Coleman).

¹⁰¹ *Id.*

¹⁰² *Id.*

But whether our intent is to make it prospective or really prospective or sure prospective or make it crystal clear that it's prospective, if it's unconstitutional, it's unconstitutional, and no matter what we say about the intent doesn't matter.¹⁰³

In the end, the skeptics turned out to be right. The prospective repeal bill passed and was signed into law by Governor Malloy in 2012.¹⁰⁴ But before any of the eleven people whose death sentences were left standing by the repeal could be executed, the Connecticut Supreme Court declared the death penalty unconstitutional under the state constitution and applied that ruling retroactively to clear out death row.¹⁰⁵ In a lengthy, wide-ranging opinion, the Court surveyed all of the reasons that the Connecticut death penalty no longer comported with the “evolving standards of decency that mark the progress of a maturing society” by which its constitutionality was to be measured under the Connecticut constitution.¹⁰⁶ As the skeptics predicted, the Court placed significant weight on the passage of the death penalty repeal bill, noting that “both this court and the United States Supreme Court have stated that ‘the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’”¹⁰⁷ As the Court observed: “For the first time in our state’s history, the governor and a majority of both legislative chambers have now rejected state sanctioned killing and agreed that life imprisonment without the possibility of release is a just and adequate punishment for even the most horrific crimes.”¹⁰⁸ The Court recognized that the legislature’s intent was to limit the bill to prospective application, but rejected that intent as binding on its constitutional analysis:

Although the prospective nature of [the repeal] reflects the intent of the legislature that capital punishment shall die with a whimper, not with a bang, its death knell has been rung nonetheless. Our elected representatives have

¹⁰³ *Id.* (statement of Senator John McKinney).

¹⁰⁴ *See* Ariosto, *supra* note 71.

¹⁰⁵ *See* Benjamin Mueller & James C. McKinley Jr., *Connecticut Death Penalty Law Is Unconstitutional, Court Rules*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/14/nyregion/connecticut-death-penalty-law-is-unconstitutional-court-rules.html> [<https://perma.cc/H27X-8MUN>]; *State v. Santiago*, 122 A.3d 1 (Conn. 2015).

¹⁰⁶ *Santiago*, 122 A.3d at 32 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

¹⁰⁷ *Id.* at 39 (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)).

¹⁰⁸ *Id.* at 39–40.

determined that the machinery of death is irreparable or, at the least, unbecoming to a civilized modern state.¹⁰⁹

And in what must have been the most galling passage to the legislative skeptics, the Court quoted Senator John Kissel, the very legislator who had assured his brethren that the Court would respect the legislature's prospective intent: "As a ranking member of the Judiciary Committee recognized in 2012, '[T]his law is the best and most recent indication of evolving standards in our society of human decency.'"¹¹⁰

After a careful combing of the legislative history, the Court concluded that the prospective-only limit on the repeal was a strategic political compromise that allowed the legislature not to up-end the expectations of family members of victims whose murderers were sentenced to death before the effective date of the law and to "accommodate the public demand that certain notorious inmates remain on death row[.]"¹¹¹ The Court frankly recognized that this compromise reflected the fact that "there were not enough votes to pass a full repeal."¹¹² But it looked past the absence of political will for retroactive application to the underlying intent of the law: "The only plausible reading of the legislative history, then, is that the legislature made a principled determination that capital punishment should no longer be the policy of Connecticut."¹¹³

The Court acknowledged the influence of the Cheshire murders on the thinking of many legislators, mentioning the case and the victims by name numerous times throughout the opinion. But ultimately, the Court rejected the desire to preserve the death sentences of the Cheshire murderers as an illegitimate desire for vengeance, which the Court characterized as "the Hyde to retribution's Jekyll."¹¹⁴ The Court observed, "There is every indication . . . that [the repeal] was crafted primarily to maintain the possibility of executing two particular offenders—the much reviled perpetrators of the widely publicized 2007 home invasion and murder of three members of Cheshire's Petit family."¹¹⁵ But the Court concluded that "vengeance traditionally has not been

¹⁰⁹ *Id.* at 40 (footnote call number omitted).

¹¹⁰ *Id.* at 40 (quoting Senator John A. Kissel).

¹¹¹ *Id.* at 45.

¹¹² *Id.* at 44.

¹¹³ *Id.* at 47.

¹¹⁴ *Id.* at 71.

¹¹⁵ *Id.* at 72.

considered a constitutionally permissible justification for criminal sanctions.”¹¹⁶

The Court’s vote was a close one, 4-3, with vigorous dissents. After one of the members of the slim majority left the Court, prosecutors immediately asked the Court to overturn the decision. But the new justice appointed by Democratic Governor Malloy voted to uphold the retroactive constitutional invalidation of the death penalty. In addition, Chief Justice Chase T. Rogers, who had dissented from the original decision, voted to join the majority in upholding it. “I feel bound by the doctrine of stare decisis in this case for one simple reason[,]” Chief Justice Rogers explained,

my respect for the rule of law. To reverse an important constitutional issue within a period of less than one year solely because of a change injustices [sic] on the panel that is charged with deciding the issue, in my opinion, would raise legitimate concerns by the people we serve about the court’s integrity and the rule of law in the state of Connecticut.¹¹⁷

The constitutional rulings by the Connecticut Supreme Court “completed” the abolition that the legislature was able to pass only prospectively. Some abolitionist legislators might have been grateful to the Court for sparing them the ire of those who were outraged by the Cheshire murderers evading the death penalty. But others no doubt felt betrayed by the way that the Court used their partial repeal to bootstrap full abolition of the death penalty. As the Senate Minority Leader charged, “Connecticut’s Supreme Court stepped way out of line and wrongfully took on the role of policymakers. Their ruling deliberately circumvented the will of the people and the legislators who represent each and every Connecticut resident.”¹¹⁸ Regardless of how the Court’s rulings were received by the lawmakers, the two-step dance between the legislature and the judiciary led to a full, retroactive abolition that precluded the carrying out of any extant death sentences as well as any possibility of a legislative reauthorization of capital punishment in the state.

¹¹⁶ *Id.* at 71.

¹¹⁷ *State v. Peeler*, 140 A.3d 811, 811–12 (Conn, 2016) (Rogers, C.J., concurring).

¹¹⁸ Press Release, Len Fasano, *Dr. William Petit, Sen. Fasano Release Statements on Supreme Court Death Penalty Ruling* (Aug. 14, 2015), <https://ctsenaterepublicans.com/2015/08/dr-william-petit-sen-fasano-release-statements-on-supreme-court-death-penalty-ruling-fox-ct/> [https://perma.cc/Y48N-J9SX].

B. Beyond Connecticut

The particularities of the achievement of full abolition of the death penalty in Connecticut are unique to that state. But the two-step dynamic between the legislature and the judiciary has extended beyond Connecticut's borders. In a short timespan, two other states have followed suit, passing prospective-only repeals of some or all of their capital statutes that were then made retroactive by their supreme courts, which relied on the prospective legislative repeals to construe their state constitutions to require retroactive application. The repetition of this progression from prospective/legislative to retroactive/judicial repeal demonstrates the way in which the dynamics that we observe in specific state contexts can serve as archetypes that may well spread or be deployed strategically beyond state borders.

During the Connecticut legislative debates on the prospective repeal bill, lawmakers looked to other jurisdictions to try to predict how the judiciary might treat their explicit intent to prevent retroactive application of the repeal. In particular, they looked to New Mexico, which had passed a prospective-only repeal three years earlier in 2009. The Connecticut lawmakers argued at length about the meaning of a footnote in a 2011 Connecticut Supreme Court opinion, which described the New Mexico repeal as follows: "Notably, the New Mexico ban is prospective only and no clemency has been granted to convicted capital offenders, leaving that state's existing death row intact. Given that circumstance, it is unlikely that the New Mexico legislature was convinced that the death penalty is intolerable under any and all circumstances."¹¹⁹ Some legislators interpreted this footnote to indicate that the New Mexico Supreme Court had chosen to respect the prospective nature of the repeal, setting a sister-state precedent that the Connecticut Supreme Court seemed to be citing approvingly.¹²⁰ But Senator McKinney did more homework, going so far as to speak with a New Mexico official from the Chief State's Attorney's office, who informed him that the New Mexico Supreme Court had not in fact considered or decided the constitutional retroactivity issue. More broadly, McKinney stated emphatically that the issue "has not been

¹¹⁹ State v. Rizzo, 31 A.3d 1094, 1167 n.88 (Conn. 2011).

¹²⁰ See Connecticut General Assembly transcript, *supra* note 98 (statement of Senator Eric Coleman).

addressed in any of the 50 states. It has not been addressed.”¹²¹

In an ironic twist of fate, after the Connecticut Supreme Court became the first court to decide the issue in 2015, the New Mexico Supreme Court cited the Connecticut precedent to extend its own state’s prospective repeal to the two men who remained on death row.¹²² Unlike the Connecticut court, the New Mexico court relied on its statutory duty to conduct comparative proportionality review of all death sentences rather than on a constitutional prohibition of excessive and disproportionate punishment. But in revisiting and rejecting its prior determinations of proportionality, the New Mexico court recapitulated the logic of the Connecticut court that the legislative repeal represented a key changed circumstance. The New Mexico Supreme Court wrote: “The repeal represents a profound change in the legislative attitude toward the death penalty and a shift in the standards of decency.”¹²³ This statement was followed by an almost identical quote from (and cite to) the Connecticut precedent: “The prospective abolition of the death penalty . . . provides strong support for the conclusion that capital punishment no longer comports with contemporary standards of decency.”¹²⁴ To make a comparative proportionality determination within the universe of New Mexico capital cases, the New Mexico court looked to Connecticut’s determination of constitutional proportionality under the Connecticut constitution.

In 2019, the same year as the New Mexico Supreme Court decision, the Oregon legislature passed a partial repeal of its state’s capital statute, to be applied prospectively only. The Oregon repeal reclassified the criminal conduct that had previously constituted aggravated murder, which is subject to the death penalty, as murder in the first degree, which cannot be punished by death. The law maintained the death penalty as a permissible punishment going forward, but it reduced the categories of aggravated murder to four narrow circumstances, none of which were identical to the broader, now-repealed definitions of capital murder. As Governor Kate Brown explained as she signed the partial repeal into law, “Oregon’s legislature made the wise decision to ‘close the front door’—

¹²¹ *Id.* (statement of Senator John McKinney).

¹²² *See Fry v. Lopez*, 447 P.3d 1086, 1105 (N.M. 2019).

¹²³ *Id.* at 1097 (citing *State v. Santiago*, 122 A.3d 1, 62 (Conn. 2015)).

¹²⁴ *Id.* (quoting *State v. Santiago*, 318 Conn. 1, 122 A.3d 1, 62 (Conn. 2015)).

most of the way, at least—to death row, reserving death sentences for only the rarest and most heinous murders.”¹²⁵

Despite the fact that the Oregon legislature did not make the repeal retroactive to sentences imposed before its effective date, the Oregon Supreme Court in 2021 reversed David Ray Bartol’s death sentence, which had been imposed under the old law, as a “disproportionate punishment[.]” under the Oregon Constitution.¹²⁶ As both the Connecticut and New Mexico courts had done before it, the Oregon court relied heavily on the concept of “evolving standards of decency,” which was first articulated by the U.S. Supreme Court as the principle undergirding the federal constitution’s prohibition of “cruel and unusual punishments” in the Eighth Amendment. “Like the Eighth Amendment’s proportionality requirement, Article I, section 16’s proportionality requirement [in the Oregon constitution] must be interpreted based on current societal standards[,]” the Oregon Supreme Court wrote. “It is not static; it evolves as societal standards change.”¹²⁷ The Court elaborated:

Legislative enactments are strong indicators of those standards, and the enactment of [the partial repeal] shows that the legislature has determined that, regardless of when it was committed, conduct that was previously classified as “aggravated murder” but is now classified as “murder in the first degree” does not fall within the narrow category of crimes for which the death penalty can be imposed. Importantly, that moral judgment stands apart from the question of retroactivity.¹²⁸

Although it did not mention Connecticut or New Mexico by name, the Oregon Supreme Court noted that its

conclusion is consistent with how others have responded to similar changes in the law. As the historical information submitted . . . shows, whenever a state’s laws have changed so that persons with existing death sentences would not be eligible for the death penalty if they were sentenced under the new law, those persons have not been executed.¹²⁹

¹²⁵ *Oregon Governor Signs Bill Narrowing Use of the Death Penalty*, DEATH PENALTY INFO. CTR. (Aug. 2, 2019), <https://deathpenaltyinfo.org/news/oregon-governor-signs-bill-narrowing-use-of-the-death-penalty> [<https://perma.cc/K585-5AEZ>].

¹²⁶ See *State v. Bartol*, 496 P.3d 1013, 1015 (Or. 2021).

¹²⁷ *Id.* at 1026.

¹²⁸ *Id.* at 1028.

¹²⁹ *Id.* at 1029 n.9.

Although the decision in *Bartol* reversed only a single death sentence, the logic of the Court's decision would seem to apply to all extant death sentences in Oregon. "My expectation is that every death sentence that is currently in place will be overturned as a result of this [decision]," predicted Jeffrey Ellis, co-director of the Oregon Capital Resource Center.¹³⁰

A recent comprehensive study of cases both within the United States and abroad confirms the Oregon court's impression that retroactive application of death penalty abolition is the historical norm.¹³¹ The study examined all jurisdictions within the United States that either legislatively repealed or judicially invalidated their capital statutes, temporarily or permanently, at any point in American history. It also considered the experiences of Canada and the United Kingdom and attempted to compile as much information as possible about the post-abolition practices of other countries in Europe and beyond, though it acknowledged that the worldwide data "are more difficult to confirm[.]"¹³² And finally, the study considered the status of juvenile offenders who were sentenced to death in states that later raised the minimum age of death-eligibility to 18. These various investigations "uncovered *no* cases in which executions have gone forward under those circumstances."¹³³ Although Connecticut, New Mexico, and Oregon are the first states in which courts have explicitly repudiated prospective-only repeals on the grounds that carrying out previously imposed death sentences would constitute "disproportionate" punishment, the avoidance of such executions has long been established historical practice.

Within the United States, only a single person is currently on death row in a jurisdiction that has abolished the death penalty: Michael Addison is under sentence of death for killing a police officer in New Hampshire, which passed a prospective repeal of its death penalty in 2019.¹³⁴ Opponents of the

¹³⁰ *Oregon Supreme Court Overturns Death Sentence in Decision That Could Clear the State's Entire Death Row* (Oct. 8, 2021), DEATH PENALTY INFO. CTR. <https://deathpenaltyinfo.org/news/oregon-supreme-court-overturns-death-sentence-in-decision-that-could-clear-the-states-entire-death-row> [<https://perma.cc/MC5K-P7KK>].

¹³¹ See James R. Acker & Brian W. Stull, *Life After Sentence of Death: What Becomes of Individuals Under Sentence of Death After Capital Punishment Legislation is Repealed or Invalidated*, 54 AKRON L. REV. 267 (2020).

¹³² *Id.* at 322.

¹³³ *Id.* at 276 (emphasis added).

¹³⁴ *New Hampshire Repeals Its Death Penalty*, PBS NEWS HOUR (May 30, 2019), <https://www.pbs.org/newshour/nation/new-hampshire-repeals-its-death-penalty> [<https://perma.cc/QG8J-F88Z>].

legislative repeal have predicted, however, that he will not ultimately be executed. "If you think you're passing this today and Mr. Addison is still going to remain on death row, you are confused," said Republican state Senator Sharon Carson during the debates around repeal.¹³⁵ "Mr. Addison's sentence will be converted to life in prison."¹³⁶ If the experiences of Connecticut, New Mexico, and Oregon are any indication, Senator Carson's prediction may well be vindicated through judicial action.

III

PRESERVING LEGISLATIVE REFORM: NORTH CAROLINA

The North Carolina story is almost an inverse of the Connecticut one. While the Connecticut Supreme Court constitutionally extended the legislature's repeal of the death penalty to give it retroactive effect, the North Carolina Supreme Court constitutionally prevented the legislature from giving retroactive effect to its repeal of the North Carolina Racial Justice Act (RJA), which had brought the death penalty to a screeching halt across the state. State courts can amplify legislative restrictions on the death penalty *both* by extending them retroactively (as Connecticut, New Mexico, and Oregon all did in various ways) *and* by blocking a politically transformed legislature from retroactively repealing previously enacted restrictions, as North Carolina did. Legislatures may control the substantive content of the law, but courts play a powerful role in determining the temporal scope of legislation.

The story of the North Carolina RJA begins with the Supreme Court's 1987 decision in *McCleskey v. Kemp*,¹³⁷ which rejected a federal constitutional challenge based on racial disparities in the application of the death penalty in Georgia. A sophisticated empirical study by Professor David Baldus and associates formed the basis of McCleskey's challenge; the study demonstrated the powerful influence of race—especially the (white) race of the victim—on death sentences in Georgia.¹³⁸ Although the state challenged the study's validity, the Supreme Court assumed it to be valid for the purposes of deciding McCleskey's claims under the Eighth and Fourteenth Amendments. The Court held that statistical proof of racial disparities in capital sentencing across a range

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 481 U.S. 279, 319 (1987).

¹³⁸ *Id.* at 286.

of cases was insufficient to make out a violation of either the Equal Protection clause of the Fourteenth Amendment or the Cruel and Unusual Punishments clause of the Eighth Amendment, essentially rendering such statistical evidence constitutionally irrelevant—not just for *McCleskey* himself, but for all future capital defendants. As Justice Lewis Powell wrote for the Court, summarizing *McCleskey*'s holding, “The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.”¹³⁹

However, the pronouncement that the federal courts were not empowered to issue a constitutional remedy was not the end of the story. Justice Powell explicitly invited legislative action on the issue of racial disparities in the application of capital punishment:

[These] arguments are best presented to the legislative bodies It is the legislatures, the elected representatives of the people, that are “constituted to respond to the will and consequently the moral values of the people.” . . . Legislatures are also better qualified to weigh and “evaluate the results of statistical studies in terms of their local conditions and with a flexibility of approach that is not available to the court.”¹⁴⁰

Justice Powell's invitation did not go unanswered. One day before the first anniversary of the decision in *McCleskey*, Representative John Conyers of Michigan introduced the federal Racial Justice Act of 1988, which would have prohibited “impos[ing] or carry[ing] out the penalty of death in criminal cases in a racially disproportionate pattern” and provided that “ordinary methods of statistical proof [shall] suffice” to establish a racially disproportionate pattern.¹⁴¹ Although the House would eventually pass such a bill, it ultimately failed in the Senate in 1994, and the battle to legislatively overrule *McCleskey* moved to the state legislative arena.¹⁴²

The first state Racial Justice Act was passed in Kentucky in 1998.¹⁴³ The impetus for the Kentucky RJA was a study

¹³⁹ *Id.* at 319.

¹⁴⁰ *Id.* (citation omitted).

¹⁴¹ See Racial Justice Act of 1988, H.R. 4442, 100th Cong. (2d Sess. 1988).

¹⁴² See Katharine Q. Seelye, *Senate, in 58-41 Vote, Bars Race-Based Death Row Pleas*, N.Y. TIMES (May 12, 1994), <https://www.nytimes.com/1994/05/12/us/senate-in-58-41-vote-bars-race-based-death-row-pleas.html> [<https://perma.cc/VM3A-6WDE>].

¹⁴³ See 1998 KY. REV. STAT. ANN. § 532.300-309 (West).

commissioned by the Kentucky General Assembly on the impact of race on capital sentencing in the state over a fifteen-year period immediately following Kentucky's reinstatement of the death penalty in 1976.¹⁴⁴ At the time of the study, "100% of the 33 inmates on Kentucky's death row were there for murdering a white victim. None were there for the murder of a Black victim, despite the fact that there had been over 1,000 African-Americans murdered in Kentucky since the death penalty was reinstated."¹⁴⁵ The Kentucky RJA permitted capital defendants to raise a pretrial claim that "race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought."¹⁴⁶ Although the statute explicitly permitted the defendant to introduce statistical evidence about patterns of disparities based on the race of either defendants or victims, it also required that the defendant "state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence *in his or her case*."¹⁴⁷ This limitation was one of several features of the Kentucky RJA that rendered it essentially toothless. The legislation also did not apply retroactively to any inmates on death row at the time of its adoption in 1998; did not permit capital defendants to raise claims of racial discrimination in sentencing (as opposed to charging) decisions; required capital defendants to raise their claims pretrial rather than on appeal or in post-conviction proceeding; and imposed a burden of proof of clear and convincing evidence (rather than a preponderance of the evidence).¹⁴⁸ As a consequence, no capital defendant has prevailed on a claim under the statute in the nearly 25 years since the Kentucky RJA was enacted.

North Carolina was the second state to pass a Racial Justice Act, more than a decade after Kentucky.¹⁴⁹ The 2009

¹⁴⁴ See Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials, 1976-1991: A Study of Racial Bias as a Factor in Capital Sentencing*, 20 AM. J. CRIM. JUST. 17 (1995).

¹⁴⁵ Justin R. Arnold, *Race and the Death Penalty After McCleskey: A Case Study of Kentucky's Racial Justice Act*, 12 WASH. & LEE J. C.R. & SOC. JUST. 93, 99 (2005) (footnote call number omitted).

¹⁴⁶ See 1998 KY. REV. STAT. ANN. § 532.300(2) (West).

¹⁴⁷ *Id.* at § 532.300(4) (emphasis added).

¹⁴⁸ See KY. BAR ASS'N, TEN YEARS AFTER: WHAT IS THE STATUS OF THE RECOMMENDATIONS CONTAINED IN THE ABA'S *Kentucky Assessment Report on the Death Penalty?* 7 (2021), <https://cdn.ymaws.com/www.kybar.org/resource/resmgr/convention/2021/materials/TenYearsAfter-WhatistheStatu.pdf> [https://perma.cc/CCT5-VHFA].

¹⁴⁹ See N.C. GEN. STAT. §§ 15A-2010 to 2012 (2009).

law was propelled by concern about six high-profile exonerations in the state in the decade preceding the passage of the RJA—including those of five death row inmates.¹⁵⁰ In particular, “the case of Darryl Hunt, a black man from Winston-Salem wrongfully convicted of killing a white woman, helped spark the effort to get the Racial Justice Act into law.”¹⁵¹ Darryl Hunt’s saga brought attention to a larger body of evidence about the role of race in the imposition of the death penalty in North Carolina. As was the case in Georgia and Kentucky, the death penalty was far more likely to be imposed in cases involving white victims. The year the RJA was passed, a newspaper published statistics indicating that, of the executions carried out in the state since 1984, “80 percent were against people convicted of murdering white victims[.]” while only “18 percent were against people convicted of murdering black victims.”¹⁵² Black defendants also made up the lion’s share of those sentenced to death in the state. According to the Department of Justice, of the 161 people on North Carolina’s death row in 2008, eighty-six were Black.¹⁵³ Black people represented 21.6 percent of the total population.¹⁵⁴

The content of North Carolina’s RJA reflected an effort to avoid the inefficacy of the Kentucky statute. The North Carolina law permitted challenges to racial discrimination in capital cases with regard not only to charging decisions, but also to sentencing decisions and to the exercise of peremptory challenges to strike prospective jurors. It allowed patterns of charging, sentencing, or peremptory strike decisions to establish proof of racial discrimination, with no requirement that there be proof specific to a defendant’s individual case. Moreover, such patterns could be established within the

¹⁵⁰ See Barbara O’Brien & Catherine M. Grosso, *Confronting Race: How a Confluence of Social Movements Convinced North Carolina to Go Where the McCleskey Court Wouldn’t*, 2011 MICH. ST. L. REV. 463, 490 (2011).

¹⁵¹ Michael Hewlett, *N.C., Ky. Diverge on Racial Justice*, WINSTON-SALEM J. (Dec. 25, 2011), https://journalnow.com/news/local/n-c-ky-diverge-on-racial-justice/article_5f179bf0-ab2e-5c45-a89b-339c7e2dbbf6.html [https://perma.cc/7D5W-XEYE].

¹⁵² *Death-Penalty Bias*, WINSTON-SALEM J. (July 26, 2009), https://journalnow.com/opinion/editorials/death-penalty-bias/article_da2d6e9e-e9e5-5414-8ac0-d8a59b99ee37.html [https://perma.cc/ZPE5-RD5A].

¹⁵³ See U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., CAPITAL PUNISHMENT, 2009—STATISTICAL TABLES 8 (2010), <https://bjs.ojp.gov/content/pub/pdf/cp09st.pdf> [https://perma.cc/2XA8-V694].

¹⁵⁴ See STATE CTR. FOR HEALTH STAT. & OFF. OF MINORITY HEALTH & HEALTH DISPARITIES, NORTH CAROLINA MINORITY HEALTH FACTS: AFRICAN AMERICANS 1 (2010), https://schs.dph.ncdhs.gov/schs/pdf/AfricanAmer_FS_WEB_080210.pdf [https://perma.cc/Y7A6-DZ6U].

county, the prosecutorial district, the judicial division, or the state. The statute applied retroactively, permitting any capital defendant or inmate on death row to mount such a challenge up to the time of execution. The capital defendant's burden of proving racial discrimination was by a preponderance of the evidence (not clear and convincing evidence).

As prosecutors and pro-death penalty legislators had feared and predicted during the debates over the passage of the RJA, virtually all of the 158 inmates on North Carolina's death row quickly invoked the muscular new law to challenge their death sentences.¹⁵⁵ The wheels of repeal began turning almost immediately. But "[d]istrict attorneys intensified their campaign against it after the first appeal was scheduled for January. They tried to have the African-American judge overseeing the case removed. That failed, so they approached lawmakers, including Republican Senator Thom Goolsby."¹⁵⁶ After the 2010 elections, Republicans held veto-proof majorities in the Senate,¹⁵⁷ although they still required some Democratic votes in the House.¹⁵⁸ Their lobbying campaign against the RJA soon materialized and produced Senate Bill 9—"a measure essentially repealing the 2009 Racial Justice Act."¹⁵⁹

Democratic Governor Bev Purdue vetoed it. Arguing that the RJA sought to fine tune rather than destroy the machinery of death, Purdue emphasized that

I am—and always will be—a strong supporter of the death penalty. I firmly believe that some crimes are so heinous that no other punishment is adequate. As long as I am Governor, I am committed to ensuring that the death penalty remains a viable punishment option in North Carolina in appropriate cases. However, because the death penalty is the ultimate punishment, it is essential that it be carried out fairly and

¹⁵⁵ See Jessica Jones, *Controversy Surrounds N.C. 'Racial Justice Act,'* NPR (Dec. 1, 2011), <https://www.npr.org/2011/12/01/143017942/controversy-surrounds-n-c-racial-justice-act> [<https://perma.cc/SKG7-P38R>] ("All but five of North Carolina's 158 death row inmates, both black and white, have sought hearings under the law.")

¹⁵⁶ *Id.*

¹⁵⁷ Wade Rawlins, *North Carolina Governor Vetoes Death Row Bias Rollback,* REUTERS (June 28, 2012), <https://www.reuters.com/article/us-usa-northcarolina-deathrow/north-carolina-governor-vetoes-death-row-bias-rollback-idUSBRE85S02K20120629> [<https://perma.cc/93CD-Q7LK>].

¹⁵⁸ *Id.*

¹⁵⁹ Laura Leslie, *Reactions to Veto of Racial Justice Act Repeal,* WRAL (Dec. 14, 2011), <https://www.wral.com/news/state/nccapitol/blogpost/10500572/> [<https://perma.cc/6YC4-RJE7>].

that the process not be infected with prejudice based on race.¹⁶⁰

She also emphasized that the provision did not enable anyone to walk out of prison but rather released successful claimants from death row to a lifetime of imprisonment. In response, the Senate President Pro Tempore, Phil Berger, reiterated previous retorts: “As much as Gov. Perdue claims to support the death penalty, she knows the Racial Justice Act and her veto are back-door bans on capital punishment.”¹⁶¹ The Senate overrode the veto,¹⁶² but the House failed to do so,¹⁶³ and the first repeal effort died.

Before the 2012 election, a North Carolina court freed the first person from death row under the RJA. Although it was far from the end of his saga, Marcus Robinson left death row in April of 2012. The court’s “careful, 167-page opinion” noted that “‘race was a significant factor in decisions to exercise peremptory challenges’ Almost 40 percent of county residents were black, yet the jury was made up of nine whites, two blacks and one American Indian.”¹⁶⁴ The court relied on a study conducted at the Michigan State University College of Law

that showed racial bias in removing blacks from juries in death penalty cases in all but 4 of the state’s 100 counties and that prosecutors were more than twice as likely to strike qualified blacks from a jury as members of other races in the 20-year period from 1990 to 2010.¹⁶⁵

Soon after Robinson’s victory, the legislature again sought to roll back the RJA. Indeed, “[t]he House Republicans were so eager to turn back the racial justice law that they maneuvered around legislative rules to turn a 2011 bill about rereading

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See Wade Rawlins, *N. Carolina Senate Votes to Override Veto of Gutted Death Row Law*, REUTERS (Jan. 4, 2012), <https://www.reuters.com/article/us-northcarolina-death-veto/n-carolina-senate-votes-to-override-veto-of-gutted-death-row-law-idUSTRE8032BE20120104> [<https://perma.cc/SB2U-8DUD>].

¹⁶³ See Wade Rawlins, *North Carolina Lawmakers Override Race-Bias Death-Row Veto*, REUTERS (July 2, 2012), <https://www.reuters.com/article/us-usa-northcarolina-race/north-carolina-lawmakers-override-race-bias-death-row-veto-idUSBRE86201920120703> [<https://perma.cc/PU8H-NQV6>].

¹⁶⁴ *Justice Under North Carolina’s Racial Bias Law*, N.Y. TIMES (Apr. 20, 2012), <https://www.nytimes.com/2012/04/21/opinion/justice-under-north-carolinas-racial-bias-law.html> [<https://perma.cc/6WWMJ-Z9E9>].

¹⁶⁵ *Racial Injustice in North Carolina*, N.Y. TIMES (June 7, 2013), <https://www.nytimes.com/2013/06/08/opinion/racial-injustice-in-north-carolina.html?action=click&module=relatedLinks&pgtype=article> [<https://perma.cc/KW95-HRUG>].

tires on school buses into this bill.”¹⁶⁶ Once more, the measure they passed “so severely limit[ed] the proof an inmate could use to show race bias,” explained the Editorial Board of *The New York Times*, “as to render the law ineffective.”¹⁶⁷ Or, as Governor Purdue put it, the bill “gutted the law and rendered it meaningless.”¹⁶⁸ Under the revised bill, “statistical evidence alone was insufficient to prove racial discrimination in jury selection, or to overturn a death sentence.”¹⁶⁹ Purdue again vetoed the legislation,¹⁷⁰ but this time to no avail.¹⁷¹ The Senate overrode the veto 31–11; the House was “able to attract a handful of Democratic legislators and overrode her veto.”¹⁷² In fact, it mustered “exactly the number of approval votes needed for a three-fifths majority of members present.”¹⁷³

Nevertheless, the same judge voided three more death sentences—even under the new, highly restrictive version of the RJA.¹⁷⁴ The judge credited evidence that

words and deeds of the prosecutors showed racial bias in jury selection. Prosecutors in at least one case used a cheat sheet with pretexts for striking black jurors without mentioning race. A prospective black juror with no criminal record was struck because she was said to live in a “bad area,” whereas a white juror who had been a marijuana dealer was picked in part because he was a “fine guy.”¹⁷⁵

These additional grants of relief provided fuel to the fire of opposition to the RJA, and in June of 2013, the legislature

¹⁶⁶ *A Test of Racial Justice*, N.Y. TIMES (June 17, 2012), <https://www.nytimes.com/2012/06/18/opinion/a-test-of-racial-justice.html> [<https://perma.cc/FGM6-F8CB>].

¹⁶⁷ *Id.* (“It would disallow proof of discrimination based on the race of the victim, which is a major basis for finding racial bias in capital punishment in North Carolina and elsewhere. And an inmate would have to show race discrimination in the county or district where he was convicted, not in the entire state. The bill, which amends the death penalty process, would also give prosecutors more flexibility in seeking death, and would limit the governor’s authority to oversee executions.”).

¹⁶⁸ Rawlins, *supra* note 157.

¹⁶⁹ Rawlins, *supra* note 163.

¹⁷⁰ *See id.*

¹⁷¹ *See id.*

¹⁷² Campbell Robertson, *Judge in North Carolina Voids 3 Death Sentences*, N.Y. TIMES (Dec. 13, 2012), <https://www.nytimes.com/2012/12/14/us/citing-race-north-carolina-judge-voids-death-sentences.html> [<https://perma.cc/8EL3-F86R>].

¹⁷³ Rawlins, *supra* note 163.

¹⁷⁴ *State v. Robinson*, 846 S.E.2d 711, 714 (N.C. 2020) (“[T]he trial court held that the next three claimants met the higher standard and demonstrated that racial bias had infected their capital proceedings as well.”).

¹⁷⁵ *Racial Injustice in North Carolina*, *supra* note 165.

wiped the act from its statute books. The legislature was no doubt emboldened by the election of Republican Governor Pat McCrory, who deemed the act “a judicial loophole to avoid the death penalty and not a path to justice.”¹⁷⁶ In signing the repeal of the RJA into law, McCrory promised that there would be no more “procedural roadblocks” to resuming executions for the first time since 2006.¹⁷⁷ Attention immediately turned to the question of whether or not the law could retroactively apply to those already freed from death row and to the many others whose appeals for relief were still pending. The state appealed the re-sentencings granted in the four cases that had been decided under the RJA and in 2015 won a (temporary) victory in the supreme court. The Court vacated the trial court’s grants of relief because the trial court had failed to give the prosecution adequate time to respond to the Michigan State study on racial disparities. State officials immediately returned the four plaintiffs to death row.¹⁷⁸

Finally, in 2020, the North Carolina Supreme Court directly addressed the issue of whether the legislature could wipe out all pending claims for relief under the repealed act. Despite the legislature’s clear and explicit intent to do exactly that, the supreme court held that the state constitution’s protections against ex post facto laws and double jeopardy precluded a retroactive repeal of the RJA. With regard to the many (well over 100) claims still pending under the repealed law, the Court held in *State v. Ramsey*¹⁷⁹ that the RJA itself could apply retroactively because it had ameliorated previous conditions of sentences. But once invoked, the RJA’s protections could not be retroactively withdrawn without violating the protection against ex post facto legislation. The Court held that “a defendant need not carry the burden of showing that he would have been sentenced to a lesser term under the measure” but need only “establish that the measure of punishment itself has changed[]” to invoke the protection of

¹⁷⁶ Treye Green, *Racial Justice Act Repealed by North Carolina Lawmakers, Gov. Pat McCrory Signs Law*, INT’L BUS. TIMES (June 19, 2013), <https://www.ibtimes.com/racial-justice-act-repealed-north-carolina-lawmakers-gov-pat-mccrory-signs-law-1315199> [<https://perma.cc/7PJW-JYSQ>].

¹⁷⁷ Colleen Jenkins, *North Carolina Governor Signs Law Aimed at Restarting Executions*, REUTERS (June 19, 2013), <https://www.reuters.com/article/us-usa-northcarolina-race/north-carolina-governor-signs-law-aimed-at-restarting-executions-idUSBRE95J02620130620> [<https://perma.cc/KT76-2M84>].

¹⁷⁸ *They Were Freed from Death Row. Republicans Put Them Back.*, N.Y. TIMES (Aug. 23, 2019), <https://www.nytimes.com/2019/08/23/opinion/death-penalty-north-carolina.html> [<https://perma.cc/U8S3-Y93K>].

¹⁷⁹ 843 S.E.2d 106, 111 (N.C. 2020).

the ex post facto clause.¹⁸⁰ All previously filed applications could proceed.

In addressing the situation of Marcus Robinson and the other three claimants who had already *won* in the trial court under the RJA, the Court ruled that the trial court's initial grants of relief must stand, notwithstanding the Court's earlier reversal of those victories on the ground that the state had not been given enough time to rebut the racial disparity study. In *State v. Robinson*,¹⁸¹ the Court held that when the trial court granted relief, it essentially *acquitted* Robinson of his death sentence. Whether or not that acquittal was procedurally sound was constitutionally irrelevant. If the state were to try him again, it would subject him to a second jeopardy. The Court likened the RJA to an affirmative defense of insanity. "Though the State carried its burden at trial by proving the existence of at least one aggravating circumstance, the Act allowed Robinson to be acquitted of the death penalty by presenting evidence that racial discrimination infected his trial and capital sentencing proceedings[.]" explained the Court,

The Act provided the State an opportunity to present rebuttal evidence, but the trial court found the State's rebuttal evidence to be insufficient. . . . [T]he fact that this "acquittal" was made by a reviewing court after the original trial in Robinson's case does not negate or limit his double jeopardy protections.¹⁸²

North Carolina differs from most of the other states whose courts have handed down "little *Furman*" decisions that have restricted or repealed the death penalty. North Carolina is a Southern, red state in which a liberal supreme court squared off against a Republican legislature and governor intent on undoing a previous liberal legislative victory. This was decidedly *not* a case in which a liberal state supreme court offered political cover to a liberal or at least ambivalent legislature. Rather, North Carolina's electoral politics had flipped between the passage of the RJA and its repeal, and the political battles fought during that flip were fueled by racial resentment, for which the RJA served as a magnet and rallying cry. The Act was passed in 2009. In 2008, Barack Obama won

180 *Id.* at 112–13 (internal quotation marks omitted).

181 846 S.E.2d 711 (N.C. 2020).

182 *Id.* at 722.

North Carolina by .4%,¹⁸³ or just a little more than “fourteen thousand votes.”¹⁸⁴ In 2012, he lost by 2.2%. “President Obama’s share of the white vote declined from forty-three percent in 2008 to thirty-nine percent in 2012. Among white voters, Romney won by twenty percentage points, marking an unprecedented rejection among white voters of a successful Democratic presidential candidate.”¹⁸⁵ Much of this rejection had to do with the politics of racial resentment.¹⁸⁶

After the Supreme Court’s decision in *Citizens United v. FEC*¹⁸⁷ early in 2010, millions of dollars in political financing poured into North Carolina, mostly into Republican state legislative campaigns. Multi-millionaire and former state representative James Arthur Pope provided almost all the independent money to Republicans, and his investment paid off tremendously in the 2010 elections. Of the twenty-two races targeted, Republicans won eighteen. The state legislature flipped, leaving Republicans in control of both houses of the North Carolina General Assembly for the first time in more than a century.¹⁸⁸ The RJA figured prominently in Republican legislative campaigns as well as the gubernatorial contest between the Democratic incumbent Purdue and the Republican McCrory. In the second gubernatorial debate, the eventually successful McCrory described the RJA as “one of the worst pieces of legislation we’ve ever see in the criminal justice system in North Carolina.”¹⁸⁹ The elected state supreme court also paid a political price for blocking the legislature’s attempted retroactive repeal of the RJA. The Chief Justice and two other Democrats running for seats on the Court lost in the elections

¹⁸³ *Election Results 2008*, N.Y. TIMES (Dec. 9, 2008). <https://www.nytimes.com/elections/2008/results/states/north-carolina.html> [https://perma.cc/PA53-YEUX].

¹⁸⁴ Jane Mayer, *State for Sale: A Conservative Multimillionaire Has Taken Control in North Carolina, One of 2012’s Top Battlegrounds*, NEW YORKER (Oct. 3, 2011), <https://www.newyorker.com/magazine/2011/10/10/state-for-sale> [https://perma.cc/BU3P-KZ3E].

¹⁸⁵ Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 120 (2020) (footnotes omitted).

¹⁸⁶ See *id.* at 118; see also Vann R. Newkirk II, *The Battle for North Carolina*, ATLANTIC (Oct. 27, 2016), <https://www.theatlantic.com/politics/archive/2016/10/the-battle-for-north-carolina/501257/> [https://perma.cc/3Y3J-TQCG].

¹⁸⁷ 558 U.S. 310 (2010).

¹⁸⁸ Mayer, *supra* note 184.

¹⁸⁹ Video of North Carolina Gubernatorial Debate, C-SPAN (Oct. 16, 2012) (starting at 5:45), <https://www.c-span.org/video/?308825-1/north-carolina-gubernatorial-debate> [https://perma.cc/VX8U-C4QM].

that immediately followed those decisions. The Court went from a 6-1 Democratic majority to a slim 4-3 majority.¹⁹⁰

The North Carolina story both exemplifies and undermines the story of the unique role that state supreme courts can play in their interaction with the political branches over the political hot potato that is the death penalty. On the one hand, the North Carolina Supreme Court sounded a familiar theme in avowing its distinctive judicial role in enforcing the supremacy of constitutional restrictions to check the legislature's assertion of power to retroactively erase the protections of the RJA. On the other hand, an elected court does not and cannot stand apart from politics; it is viewed through a political lens by voters, and it will pay a political price for its decisions. There is no clear and sharp divide between the politics navigated by members of the "political" branches of government and those navigated by an elected judiciary.

IV

REGULATING THE DEATH PENALTY TO DEATH: NEW JERSEY

We have written elsewhere about the ways in which federal constitutional regulation of capital punishment has significantly reduced the footprint of the American death penalty (in terms of death sentences, executions, and retention) despite its relatively minimal substantive demands.¹⁹¹ The dynamic has played out in numerous, complicated ways. In the first two decades or so after *Furman*, a large share of death sentences were reversed because states had responded slowly or inadequately to Supreme Court decisions,¹⁹² most notably those mandating some measure of guidance in aggravating factors¹⁹³ and significant discretion in sentencer consideration of mitigating evidence.¹⁹⁴ The extraordinary reversal rates were not caused by difficult or insurmountable federal constitutional standards, but instead by states' delayed abandonment of impermissibly vague

¹⁹⁰ See Danielle Battaglia & Charlie Innis, *Paul Newby Wins NC Chief Justice Race as Incumbent Cheri Beasley Concedes*, NEWS & OBSERVER, <https://www.newsobserver.com/news/politics-government/election/article247781960.html> [<https://perma.cc/6S7E-Z3XR>] (last updated Dec. 13, 2020).

¹⁹¹ STEIKER & STEIKER, *supra* note 7, at 195–216.

¹⁹² *Id.* at 156–67; James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, at 62 (Columbia L. Sch. Pub. L. Working Paper No. 15, 2000).

¹⁹³ *Godfrey v. Georgia*, 446 U.S. 420, 422–23 (1980).

¹⁹⁴ *Lockett v. Ohio*, 438 U.S. 586, 606 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982); *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

aggravating factors and quasi-mandatory capital sentencing schemes.¹⁹⁵ In addition, the mere fact of newly-minted, top-down, federal constitutional regulation contributed to the development of more sophisticated capital defense advocates at all stages of capital proceedings, including trial, direct appeal, state postconviction review, and federal habeas review.¹⁹⁶ If the U.S. Supreme Court was going to regulate the death penalty rather than abolish it, it became clear that there needed to be more robust provision for capital defense to replace the slipshod, ad hoc mechanisms (primarily court-appointed lawyers with minimal training or expertise) prevailing at the time of *Furman*.

Changes in capital representation took time, but they ultimately resulted in a transformation of the capital defense bar. States devoted more resources to capital representation, the federal government funded representation of state inmates in federal proceedings, and non-profits that focused on capital defense emerged to help fill the void where state and federal funding was inadequate.¹⁹⁷ The rejection of mandatory death sentencing, in particular, changed the focus of capital trials to the punishment phase, with special attention to the investigation and presentation of mitigating evidence. Over time, advocacy in capital trials improved and became dramatically more costly, diminishing both the appetite for and the ultimate success of capital prosecutions.

In short, extensive and complex federal constitutional regulation, though it did not actually require much of states, generated institutional mechanisms that increased the cost of the death penalty, which in turn led to fewer death sentences. The American death penalty in recent years has been caught in this death spiral, as the radical decline in death sentences draws attention to the minimal returns achieved despite substantially higher expenditures, which in turn inspires even fewer capital prosecutions, and in some states the wholesale repeal of capital statutes. We have described this overall dynamic as “regulat[ing] the death penalty to death,” with the caveat that regulation need not be overly demanding to nevertheless make the underlying regulated practice untenable.¹⁹⁸

195 STEIKER & STEIKER, *supra* note 7, at 156–67.

196 *Id.* at 195–207.

197 *Id.*

198 *Id.* at 4.

New Jersey experienced a faster and slightly different version of “regulating the death penalty to death.” The New Jersey Supreme Court reversed virtually every death sentence it reviewed in the decade following reinstatement, relying primarily on its interpretation of the state’s death penalty statute, but also invoking the state constitution. As it became apparent that few death sentences would clear the New Jersey Supreme Court’s bar, prosecutors sharply cut back their efforts to seek death sentences, well before the remarkable national declines in death sentencing that began at the turn of the millennium. In addition to its role in reviewing capital convictions and sentences, the New Jersey Supreme Court took a leading role in requiring robust proportionality review, appointing special masters to assess potential arbitrariness and discrimination in New Jersey’s administration of the death penalty. Overall, whereas federal regulation of the death penalty had little bite, the New Jersey Supreme Court’s regulation imposed demanding standards, facilitating abolition in several ways: by demoralizing prosecutors seeking death sentences; by preventing executions (de facto moratoria have always been a strong predictor of abolition); by significantly increasing the cost of capital punishment; by sustaining a focus on the flaws and arbitrariness of the New Jersey death penalty; and overall by making the choice of retention unattractive and untenable. In short, whereas federal regulation undermined the death penalty indirectly over time by altering institutional structures and creating solvable (but often unsolved) problems, the New Jersey Supreme Court’s regulation posed an insurmountable and existential threat to retention by defeating any effort to move toward executions.

New Jersey’s reinstatement of the death penalty after *Furman* proceeded more slowly than in most other death penalty states. Thirty-five states had enacted new capital statutes in response to *Furman* by the time the Court revisited the death penalty in 1976, including New Jersey’s mid-Atlantic neighbors – Delaware, Pennsylvania, and New York, all of whom had crafted new statutes by 1974.¹⁹⁹ In fact, portending things to come, New Jersey did not technically reinstate in response to *Furman*: the New Jersey Supreme Court had invalidated the New Jersey capital statute (and cleared its death row) five months before *Furman* because that statute had made the death penalty available only to those who contested

¹⁹⁹ *State by State*, *supra* note 39.

guilt.²⁰⁰ In doing so, the New Jersey Supreme Court was responding to a different U.S. Supreme Court decision, which addressed a federal statute that exempted from the death penalty those defendants who waived their right to a jury trial.²⁰¹ The New Jersey Supreme Court could easily have saved the New Jersey statute by eliminating the preferred treatment for those who did not contest guilt, just as the U.S. Supreme Court saved the federal death penalty statute by regarding the jury provision as severable.²⁰² But the New Jersey Supreme Court took the more dramatic step of complete invalidation, over a vehement dissent by Justice Francis, who unsuccessfully urged the Court “refrain from interfering in important policy matters, such as continued existence of the death penalty.”²⁰³

Perhaps New Jersey is a state that would not have reinstated at all absent the Supreme Court’s interventions in *Furman* and *Gregg*, which together made the death penalty a more salient issue and confirmed the (federal) constitutionality of the punishment. New Jersey’s first efforts to reinstate the death penalty in 1978 failed when the legislation was vetoed by Governor Byrne.²⁰⁴ It took another four years to reestablish the death penalty, when, in 1982, Republican Governor Kean signed the measure into law.²⁰⁵ Prosecutors enthusiastically embraced the opportunity to secure death sentences under the new statute. In the five years following the passage of the statute (1983-87), New Jersey produced thirty-two death sentences,²⁰⁶ making New Jersey a moderately active death penalty state, comparable in raw numbers to Virginia and Arkansas during that period.²⁰⁷ Perhaps even more telling, during the early years under the new statute, New Jersey prosecutors sought death in more than 50% of death-eligible cases.²⁰⁸ The passage of the new death penalty law appeared

²⁰⁰ *State v. Funicello*, 286 A.2d 55 (N.J. 1972).

²⁰¹ *United States v. Jackson*, 390 U.S. 570, 571 (1968).

²⁰² *Id.* at 586.

²⁰³ *Funicello*, 286 A.2d at 77 (Francis, J., dissenting).

²⁰⁴ Aaron Scherzer, *The Abolition of the Death Penalty in New Jersey and Its Impact on Our Nation’s “Evolving Standards of Decency,”* 15 MICH. J. RACE & L. 223, 230 (2009).

²⁰⁵ *Id.*

²⁰⁶ Jessica S. Henry, *New Jersey’s Road to Abolition*, 29 JUST. SYS. J. 408, 411 tbl.1 (2008).

²⁰⁷ See *Death Sentencing Graphs by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/state-death-sentences-by-year> [<https://perma.cc/SU9G-V9YH>] (last visited Aug 21, 2022).

²⁰⁸ Scherzer, *supra* note 204, at 243.

to place New Jersey on the path to robust use of the death penalty.

Then death penalty appeals started to reach the New Jersey Supreme Court. The first two cases were argued to the court in 1985,²⁰⁹ and it took over two years to decide them. The opinions in the cases together occupied almost 500 pages in the New Jersey Reports. Some thought the court might invalidate the scheme altogether,²¹⁰ a distinct possibility given the court's longstanding view that the New Jersey Constitution affords greater protections than the federal constitution (and that the court was thus not bound by decisions of the U.S. Supreme Court upholding capital punishment in general and Georgia's similar capital statute in particular).²¹¹ But the New Jersey Supreme Court was reluctant to reject the death penalty *per se*, finding that it was not inconsistent with community standards, disproportionate as a punishment, or inevitably discriminatory.²¹² Nor was the New Jersey Supreme Court willing to find the particulars of the new statute wanting; the relative lateness of New Jersey's revival of capital punishment gave the legislature the benefit of the U.S. Supreme Court's guidance regarding the necessary components of a valid post-*Furman* statute, and the legislature chose to adopt Georgia's approach because it had survived Court review.

Nonetheless, the New Jersey Supreme Court reversed both sentences. It rejected one sentence because the trial judge improperly coerced the deadlocked jury to reach unanimity without informing the jury that it could return a non-unanimous verdict for life;²¹³ it rejected the other sentence because the verdict form, following the language of the statute, did not clearly require the jury to find beyond a reasonable doubt that aggravating circumstances outweighed mitigating circumstances, instead allowing a death sentence where mitigation did not outweigh aggravation.²¹⁴

The Court went on to overturn thirty-one of the thirty-two remaining death sentences that it reviewed in the five years

²⁰⁹ *State v. Ramseur*, 524 A.2d 188 (N.J. 1987); *State v. Biegenwald*, 524 A.2d 130 (N.J. 1987).

²¹⁰ Scherzer, *supra* note 204, at 231.

²¹¹ *See, e.g., State v. Hunt*, 450 A.2d 952, 959 (Pashman, J., concurring) (stating that "the United States Constitution as construed by the United States Supreme Court establishes the minimum degree of protection a state must give to constitutional rights" and that "state constitutions may provide further protection for individual liberties").

²¹² *Ramseur*, 524 A.2d at 210-16.

²¹³ *Id.* at 280.

²¹⁴ *Biegenwald*, 524 A.2d at 152-58.

after it upheld the statute, about a 97% reversal rate.²¹⁵ Many of the reversals were rooted in similar sorts of technical errors in jury instructions regarding burdens of proof and the consideration of mitigating evidence.²¹⁶ One significant line of cases focused on whether the mens rea of intent to cause serious bodily injury was sufficient to support a death sentence, with the New Jersey Supreme Court insisting, as a matter of state constitutional law, that juries specifically find purpose or knowledge respecting *death*.²¹⁷ The court's decisions generated a backlash, particularly after the court reversed a conviction and death sentence in a highly aggravated case where the jury had not been asked to make a specific finding regarding the defendant's intent to kill.²¹⁸ In response to the ruling, the legislature proposed and voters ratified a constitutional amendment rejecting that line of cases, authorizing the death penalty as a matter of state constitutional law so long as a defendant purposely or knowingly causes serious bodily injury resulting in death.²¹⁹

The New Jersey Supreme Court's highly visible reversals of death sentences (as well as underlying convictions in some cases) generated the perception that the court simply would not allow the New Jersey death penalty to move forward, despite its initial decisions upholding the death penalty in the abstract. In 1990, after the court's tally of consecutive reversals had reached twenty-five, *The New York Times* metro section featured an article entitled "Is Court Killing Death Penalty In New Jersey?"²²⁰ The New Jersey Attorney General was quoted in the story lamenting the extraordinary string of reversals, suggesting that "[i]f the court's underlying message is that it philosophically objects to the death penalty, then it is time to eliminate the charade and to reassess directly and expressly the continued death penalty in the state."²²¹

Apart from its decisions reversing death sentences, the New Jersey Supreme Court engaged the death penalty in other ways that made it more difficult to impose. For those (relatively

²¹⁵ Henry, *supra* note 206, at 411 tbl.1.

²¹⁶ Scherzer, *supra* note 204, at 232-33.

²¹⁷ *Id.* at 233-37 (discussing *State v. Gerald*, 549 A.2d 792 (N.J. 1988) and its progeny).

²¹⁸ *Id.* at 235-36 (discussing *State v. Harvey*, 581 A.2d 483 (N.J. 1990)).

²¹⁹ *Id.* at 237.

²²⁰ Joseph F. Sullivan, *Is Court Killing Death Penalty in New Jersey?*, N.Y. TIMES (Dec. 1, 1990) <https://www.nytimes.com/1990/12/01/nyregion/is-court-killing-death-penalty-in-new-jersey.html> [<https://perma.cc/HR49-48ZJ>].

²²¹ *Id.*

few) death sentences that survived appeal, it conducted extensive comparative proportionality review to ensure that death sentences were not excessive in relation to other cases, including those in which death had not been imposed. Even though such review rarely led to a finding of excessiveness, the process was time-consuming and resource-consuming, which prompted a successful legislative effort to restrict comparative proportionality review to a smaller universe of cases—those in which death *had* been imposed.²²² The court did not accept this legislative limitation, maintaining that its constitutional authority over appeals in capital cases required “meaningful” appellate review²²³ and that further study was necessary to determine whether the new legislative restriction would impair such review.²²⁴

Perhaps more importantly, during most of the life of the modern New Jersey death penalty, the New Jersey Supreme Court enlisted outside experts to help structure its approach to proportionality review, primarily to ensure that impermissible considerations of race did not infect its capital system. The court first appointed Professor David Baldus as a “Special Master” in 1988 to assist the court in developing a statistically sophisticated approach to proportionality review, including a working database of cases.²²⁵ Baldus had previously served as the primary researcher in the famous study of Georgia’s death penalty practices that the United States Supreme Court reviewed in its landmark 1987 decision *McCleskey v. Kemp*.²²⁶ The New Jersey Supreme Court later enlisted David Baime, a former Superior Court judge, to help hone its approach to proportionality review.²²⁷ Baldus and Baime brought gravitas to the proportionality enterprise, and the New Jersey Supreme Court’s opinions both crafting and applying its proportionality approach reflect an unusual level of sophistication, complexity, and detail. In the first case applying its proportionality approach in the early 1990s, the court’s proportionality analysis occupies more than 100 pages, followed by an additional sixty or so pages from a dissenting judge who would

²²² Scherzer, *supra* note 204, at 238.

²²³ *State v. Loftin*, 724 A.2d 129, 146 (N.J. 1999).

²²⁴ *Id.*

²²⁵ *State v. Marshall*, 613 A.2d 1059, 1063 (N.J. 1992) (discussing appointment of Baldus).

²²⁶ 481 U.S. 279 (1987), *reh’g denied*, 482 U.S. 920 (1987).

²²⁷ *In re Proportionality Review Project (II)*, 757 A.2d 168, 172–78 (N.J. 2000) (discussing Baime’s reports to the court and their role in crafting the court’s proportionality review).

have found the inmate's sentence disproportionate.²²⁸ Even as it denied relief, the New Jersey Supreme Court communicated its view that fairness across cases was essential to the proper functioning of the New Jersey death penalty as a matter of both statutory and constitutional law. The court's lengthy, statistically-based approach to assessing proportionality undermined the death penalty in several ways: by increasing the time and resources spent on capital cases; by discouraging prosecutors from seeking death unless they could point to other cases with similar facts that had yielded death sentences (a chicken and egg problem); by signaling the long gauntlet of review that awaited any New Jersey death verdict; and by shining a light on the intractable difficulties of operating a fair and consistent capital regime, which would later become central to the abolition effort in the public sphere.

The New Jersey courts also prevented executions from moving forward by striking down the prevailing lethal injection protocol in 2004. An intermediate appellate court was troubled by the failure of the prison to have emergency life-saving equipment available in the event lethal drugs had been administered and a court subsequently announced a stay; the court also was concerned about limits on media access to inmates prior to execution and the prohibition against filming executions.²²⁹ The New Jersey Supreme Court declined to stay the ruling, leaving the state without an operative protocol.²³⁰ In a telling passage of the intermediate court's opinion, the court declined to reach questions implicating retention of the death penalty, stating that it was not at liberty to "revisit that legislative decision in view of the [New Jersey] Supreme Court's repeated reaffirmation that, conceptually at least, capital punishment, if attended by mandated and appropriate adjudicative safeguards, does not violate the constitutional proscription."²³¹ The intermediate court's language ("conceptually at least") aptly captured the New Jersey Supreme Court's ambivalent and contingent embrace of the death penalty as it reviewed cases in the two decades following reinstatement.

The New Jersey Supreme Court's engagement with the death penalty likely facilitated abolition by keeping death row

²²⁸ *Marshall*, 613 A.2d.

²²⁹ *In re Readoption with Amendments of Death Penalty Regulations of N.J.A.C. 10A:23*, 842 A.2d 207, 214 (N.J. Super. Ct. App. Div. 2004).

²³⁰ Henry, *supra* note 206, at 410-11.

²³¹ *In re Readoption with Amendments of Death Penalty Regulations of N.J.A.C. 10A:23*, 842 A.2d at 210.

small, preventing executions, and generally lowering expectations (of prosecutors, legislators, executive officials, and the general public) about the feasibility of the death penalty “working” in New Jersey. With this foundation, several political developments contributed to the ultimately successful legislative effort to abolish. A grass-roots organization, New Jerseyans for a Death Penalty Moratorium (“NJDPM”) was formed in 1999 to advocate for a moratorium on executions, with its limited ambition a reflection of the challenging political environment it encountered.²³² NJDPM emphasized in its advocacy New Jersey’s increasingly low death sentencing rate, its high reversal rate, and the lack of executions in the modern era.²³³ After several years of tenaciously pursuing legislation to study the death penalty and impose a moratorium on executions, NJDPM finally secured such legislation in early 2006, in part because of the Democratic party’s control of both the legislature and governorship. The legislation established a new death penalty study commission charged with examining all aspects of the death penalty, including whether the death penalty serves any penological interests, is excessively costly or arbitrary, and is consistent with evolving standards of decency.²³⁴ That study, produced in January 2007, found “no compelling evidence that the New Jersey death penalty rationally served a legitimate penological interest,” noting, among other things, the increased cost of the death penalty compared to life in prison without parole, the inefficacy of executing small numbers of offenders, and the ability of maximum-security facilities to ensure public safety.²³⁵ The commission recommended abolishing the death penalty in New Jersey. The legislature moved quickly to act on the recommendation, though final deliberation on the proposed abolition was delayed until December. One of the central arguments for abolition came from the principal sponsor in the senate, Raymond Lesniak, who had voted to reinstate the death penalty in 1982: “[W]e shouldn’t have the death penalty unless

²³² See Robert J. Martin, *Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute*, 41 U. TOL. L. REV. 485, 501 (2010).

²³³ *Id.* at 502.

²³⁴ *Id.* at 520.

²³⁵ NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 1 (2007), https://files.deathpenaltyinfo.org/legacy/files/pdf/NJDPSC_REPORT.pdf [<https://perma.cc/P7DU-3CEP>].

we're going to use it."²³⁶ The measure narrowly prevailed and Governor Jon Corzine signed it into law on December 17, 2007.

V

COUP DE GRACE BY JUDICIAL ABOLITION: WASHINGTON
STATE

It seems likely that death penalty abolition will be achieved in the United States, if at all, through a federal constitutional decision finding the punishment incompatible with the Eighth Amendment. Although numerous states have repealed their capital statutes in recent years, it is hard to imagine all of the remaining retentionist jurisdictions (twenty-seven states and the federal government) moving in the same direction, especially in the deep South. Moreover, federal legislation barring the death penalty in the states is both politically unlikely and possibly beyond congressional power.²³⁷ Accordingly, the most plausible scenario for nationwide abolition is the continued withering of the death penalty, followed by a U.S. Supreme Court decision declaring that the death penalty no longer meaningfully serves any penological purposes, violates prevailing standards of decency, unacceptably risks wrongful executions, or is excessively arbitrary or discriminatory (or some combination of these and other considerations). This scenario seemed not only plausible but likely as we approached the 2016 presidential election: had Hillary Clinton prevailed in that election and chosen replacements for Justices Scalia, Kennedy, and Ginsburg, the American death penalty might already have been discarded. Had abolition been secured in this way, the U.S. Supreme Court would have played more of a supporting than central role, because the most important work would have happened on the ground: the spectacular quarter-century decline in death sentencing, the slowing of executions, the marked weakening in popular support for the punishment, and the corresponding deterioration of support among political actors (including prosecutors, legislators, and executive officials).

The end of Washington State's death penalty was achieved in this manner. Washington's death penalty was in steep decline. Death sentencing was never strong in Washington's post-*Furman* era, but it went from modest to almost non-existent, with fewer than five new sentences from 2003 to

²³⁶ Martin, *supra* note 232, at 535.

²³⁷ See STEIKER & STEIKER, *supra* note 7, at 256–57.

judicial abolition in 2018.²³⁸ The state had carried out only one execution after 2001.²³⁹ Many of the important political actors in Washington expressed opposition to or serious concerns about the death penalty. In 2013, former governor Dan Evans, described as “the state’s most esteemed living Republican,”²⁴⁰ argued in favor of repeal, urging the legislature to “place us with those civilized nations and states who have chosen reason over the satisfaction of revenge.”²⁴¹ Governor Jay Inslee, originally a supporter of the death penalty, declared a moratorium on executions in 2014, citing concerns about its unequal application throughout the state.²⁴² A year later, the Washington Association of Prosecuting Attorneys “surprised everyone”²⁴³ by calling for reconsideration of the death penalty through a public vote.²⁴⁴ The call was apparently motivated by the refusal of juries to return death sentences in two highly aggravated capital cases, one involving the killing of six family members and the other involving the murder of a police officer.²⁴⁵ The head prosecuting attorney for King County, the largest county in the state, subsequently penned an op-ed supporting abolition (“We Don’t Need the Death Penalty”), insisting that the state’s “four-decade-long failed experiment” with the death penalty was a failure.²⁴⁶ In 2017, the state’s attorney general, Bob Ferguson, joined by prior attorney general Rob McKenna, called for legislative abolition of the

²³⁸ *State and Federal Info: Washington Death Sentences*, DEATH PENALTY INFO, CTR. <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/washington> [<https://perma.cc/9DQT-WUH8>].

²³⁹ *Id.* (showing Washington execution totals since 1976).

²⁴⁰ Jonathan Martin, *The Votes Are There: Legislature Can End the Death Penalty*, SEATTLE TIMES, <https://www.seattletimes.com/opinion/the-votes-are-there-legislature-can-end-the-death-penalty> [<https://perma.cc/3NLR-MVUA>] (last updated Feb. 17, 2016).

²⁴¹ Sharon Coleman, *Choosing Reason Over Revenge: Former Governor Dan Evans Speaks Out on the Death Penalty*, ACLU WASH. (Apr. 26, 2013), <https://www.aclu-wa.org/blog/choosing-reason-over-revenge-former-governor-dan-evans-speaks-out-death-penalty> [<https://perma.cc/9QPG-MF8C>].

²⁴² Jerry Cornfield, *Governor Inslee Will Not Impose Death Penalty*, MERCER ISLAND REP. (Feb. 12, 2014), <https://www.mi-reporter.com/news/governor-inslee-will-not-impose-death-penalty> [<https://perma.cc/UN8G-8KN4>].

²⁴³ Martin, *supra* note 240.

²⁴⁴ *Washington Prosecutors Want Public Vote on Death Penalty*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/law-justice/washington-prosecutors-want-death-penalty-referendum> [<https://perma.cc/6VRA-3T22>] (last updated Nov 13, 2015).

²⁴⁵ *Id.*

²⁴⁶ Dan Satterberg, *King County’s Prosecuting Attorney: ‘We Don’t Need the Death Penalty,’* SEATTLE TIMES, <https://www.seattletimes.com/opinion/king-countys-prosecuting-attorney-we-dont-need-the-death-penalty> [<https://perma.cc/7XRR-Z3CQ>] (last updated Jan. 20, 2018).

death penalty on a variety of moral and pragmatic grounds.²⁴⁷ Former state judges, including a former justice whose vote had been critical to sustaining the death penalty in a prior case, likewise voiced opposition to the death penalty, joining an amicus brief in 2016 asking the Washington Supreme Court to invalidate the punishment.²⁴⁸ Public opposition to the death penalty, measured by opinion polls, reached extraordinary highs just before the state supreme court's intervention, with 69% preferring persons convicted of murder receive sentences of life imprisonment over the death penalty.²⁴⁹

Given these extraordinary indicators of declining support (especially among officials charged with seeking and enforcing capital verdicts), it is less hard to explain the invalidation of the death penalty by the Washington Supreme Court than it is to understand why it was necessary in the first place. Apparently, "the votes [were] there" for legislative abolition in 2016,²⁵⁰ but the vagaries of the political process frustrated repeal efforts. Despite the prosecutors' public call for a referendum, none was actually filed. There appeared to be enough votes in both houses of the legislature to pass repeal legislation, but a staunch conservative heading the Senate Law and Justice Committee refused to give any repeal legislation a hearing, even bills urged by prosecutors.²⁵¹ And on the House side, Democratic leaders did not want to go first approving repeal legislation if there was no hope on the Senate side, fearing their efforts would be fruitless and a potential liability in some districts.²⁵² The shortness of the legislative session (sixty days) further complicated efforts to get death penalty repeal on the agenda, especially as Republicans were increasingly interested

²⁴⁷ Press Release, Washington State Office of the Attorney General, *AG Ferguson Proposes Bipartisan Bill to End Washington's Death Penalty* (Jan. 16, 2017), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-proposes-bipartisan-bill-end-washington-s-death-penalty> [<https://perma.cc/AS2N-3735>].

²⁴⁸ Gene Johnson, *Dozens of Former Judges Ask Washington High Court to Ban Execution*, SEATTLE TIMES (Feb. 24, 2016), <https://www.seattletimes.com/seattle-news/law-justice/dozens-of-judges-ask-washington-high-court-to-ban-execution> [<https://perma.cc/6GYU-QXS2>].

²⁴⁹ Christine Clarridge & Lewis Kamb, *Death Penalty Struck Down by Washington Supreme Court, Taking 8 Men off Death Row*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/death-penalty-opponents-cheer-washington-supreme-court-ruling-that-struck-punishment-down> [<https://perma.cc/8KTA-VANB>] (last updated Oct. 12, 2018).

²⁵⁰ Martin, *supra* note 240.

²⁵¹ *Id.*

²⁵² *Id.*

in prioritizing other social issues, such as “transgender bathroom” use.²⁵³

In some respects, the lack of urgency surrounding legislative repeal was another sign of the death penalty’s weakness in Washington. With fewer than ten inmates on death row, almost no new death sentences, and a moratorium in place, everyone seemed to assume that the death penalty in Washington was on its way out. A leading columnist for the *Seattle Times* who closely followed the politics surrounding the state’s death penalty captured this sentiment in the first line of an op-ed: “Repeal of the death penalty in Washington [] is a matter of when, not if.”²⁵⁴ Another reason for lack of urgency was the pendency of the case that would end the Washington death penalty, which is best understood through a brief account of capital punishment in the state.

The history of the death penalty in Washington reflects modest use and ambivalence. As a territory, Washington enacted its first capital statute in 1854.²⁵⁵ About thirty executions were carried out by hanging in local counties until the state legislature moved hangings to the state penitentiary in 1901.²⁵⁶ After women were granted the franchise under the state constitution in 1910, the death penalty was abolished in 1913 as part of a new wave of reform,²⁵⁷ making Washington the first western state to abolish. Six years later, the death penalty was reinstated in response to “a rise in murders[,]”²⁵⁸ but Washington’s pace of executions remained relatively low, reaching an annual high of five only once, in 1939 (and carrying out only five executions total in the four decades spanning 1954-1993).²⁵⁹ In response to *Furman*, Washington voters passed a mandatory death penalty via initiative in 1975,²⁶⁰ which was invalidated in response to *Woodson*.²⁶¹ After the legislature modified the statute to allow consideration

253 *Id.*

254 *Id.*

255 John White, *Death Penalty Longtime Washington Law*, KITSAP SUN (Dec. 6, 1992), https://products.kitsapsun.com/archive/1992/12-06/242353_death_penalty_longtime_washingt.html [<https://perma.cc/X3KS-E3FE>].

256 *Id.*

257 David Wilma, *Washington Abolishes the Death Penalty on March 22, 1913*, HISTORYLINK.ORG (June 13, 2003), <https://www.historylink.org/File/5471> [<https://perma.cc/7FBK-UFYN>].

258 White, *supra* note 255.

259 WASH. STATE DEP’T OF CORR., PERSONS EXECUTED SINCE 1904 IN WASHINGTON STATE (2016), <https://doc.wa.gov/docs/publications/reports/100-SR002.pdf> [<https://perma.cc/Q7XL-CURQ>].

260 White, *supra* note 255.

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

of mitigating evidence, the Washington Supreme Court struck down the revised statute because it punished defendants who went to trial by removing death eligibility for those who pled guilty.²⁶² Washington's modern-era statute was then adopted in 1981.

Washington produced relatively few death sentences and executions in the years following reinstatement, and many of the new sentences were overturned in state or federal court.²⁶³ Of the five persons executed in the modern era in Washington, three had abandoned their appeals.²⁶⁴ The rarity of death sentences and executions drew concerns about the evenhanded application of Washington's death penalty. Like New Jersey, Washington's new statute included a statutory requirement of proportionality review, and the Washington Supreme Court likewise struggled with the appropriate universe of cases to employ in its comparative analysis.²⁶⁵ One of the greatest challenges to the mandated proportionality inquiry involved Gary Ridgway, the "Green River Killer" who pled guilty in 2003 to forty-eight murders in the Seattle/Tacoma area, most occurring between 1982-84. In addition to killing his victims, Ridgway had also returned to the burial sites to commit sex acts on many of their bodies. To secure Ridgway's cooperation in identifying other victims and locating remains, prosecutors took the death penalty off the table, and Ridgway received sentences of life without possibility of parole.²⁶⁶ Based on interrogations, it appears Ridgway was responsible for around seventy murders, and the number of "confirmed" murders made Ridgway the second most prolific serial killer in American history.²⁶⁷

After his plea in 2003, Washington death-sentenced inmates argued that their sentences were disproportionate given the disposition of Ridgway's cases. In an important 2006

²⁶² State v. Frampton, 627 P.2d 922, 936 (Wash. 1981).

²⁶³ State v. Cross, 132 P.3d 80, 113 (Wash. 2006) (Johnson, J., dissenting) (reporting that nineteen of the first thirty-one defendants sentenced to death had either their convictions or sentences reversed).

²⁶⁴ Execution Database, DEATH PENALTY INFO. CTR. <https://deathpenaltyinfo.org/executions/execution-database> [<https://perma.cc/Y5QA-WBXF>] (filter by state for "Washington").

²⁶⁵ See Cross, 132 P.3d at 106-07 (Wash. 2006).

²⁶⁶ *Id.* at 100.

²⁶⁷ Brian Alexander, *Public's Assistance Sought in Green River ID*, SEATTLE TIMES (Aug. 9, 2005), <https://www.seattletimes.com/seattle-news/publics-assistance-sought-in-green-river-id> [<https://perma.cc/B36B-PUT9>]; see also Elisha Fieldstadt, *America's Deadliest Serial Killers*, CBS NEWS <https://www.cbsnews.com/pictures/americas-deadliest-serial-killers/> [<https://perma.cc/FH87-QWMJ>] (last updated Feb. 23, 2022).

decision, *State v. Cross*, the Washington Supreme Court narrowly rejected the claim that the administration of its death penalty was impermissibly arbitrary.²⁶⁸ Cross argued that Ridgway's plea illustrated the "freakish and wanton" administration of the state's death penalty.²⁶⁹ He also invoked *Bush v. Gore*²⁷⁰ for the proposition that different counties within a state should not be permitted to apply significantly different standards on matters of fundamental importance, such as whether to subject a defendant to the death penalty.²⁷¹ Five justices rejected the claims, stating that "Ridgway was spared because a highly respected, honorable, and thoughtful prosecutor made the decision to stay the hand of the executioner in return for [valuable] information."²⁷² Four justices in dissent argued that Ridgway was one of several "mass murderers" in Washington to avoid the death penalty, and that those "cases exemplify the arbitrariness with which the penalty of death is exacted."²⁷³ The dissent discussed the cases of two defendants who had been convicted of killing thirteen persons in a Seattle restaurant as well as the case of another serial offender who had killed thirteen victims.²⁷⁴ According to the dissenters, the failure to secure death in such highly aggravated cases "leads to the conclusion that the sentence of death in this case, and generally, is disproportionate."²⁷⁵

The experience with Ridgway (and the three other offenders who had more than ten victims) likely diminished prosecutors' appetite to seek death sentences and contributed to the steep decline in death sentencing in the mid-2000s. It also laid the groundwork for further judicial consideration of the systemic fairness of the Washington death penalty. Six years after *Cross*, the Washington Supreme Court was again confronted with disproportionality, this time by an inmate whose crime, unlike *Cross's*, included only one victim.²⁷⁶ The court in *State*

²⁶⁸ *Cross*, 132 P.3d 80.

²⁶⁹ *Id.* at 99–100.

²⁷⁰ 531 U.S. 98, 107 (2000).

²⁷¹ *Cross*, 132 P.3d at 101.

²⁷² *Id.* at 100.

²⁷³ *Id.* at 115 (Johnson, J., dissenting).

²⁷⁴ *Id.* at 113–14. The dissent criticized the differing treatment one of those defendants received in different counties: Richard Yates was able to plead to thirteen counts of murder to avoid the death penalty in Spokane County but was convicted and sentenced to death for two murders he committed in Pierce County. *Id.*

²⁷⁵ *Id.* at 109 (Johnson, J., dissenting) (emphasis added).

²⁷⁶ *State v. Davis*, 290 P.3d 43 (Wash. 2012) (en banc).

v. Davis rejected the proportionality challenge, indicating that it had already addressed in *Cross* concerns about Ridgway's non-death sentence and observing that "Ridgway's sentence remains an isolated incident that does not bear on whether imposition of a sentence of death in Davis's case is excessive or disproportionate."²⁷⁷ But three dissenting justices in two separate opinions continued to express concerns about the evenhandedness of Washington's death penalty. The first dissent, penned by Justice Fairhurst, focused on the relative rarity of death sentences in Washington, and the "dozens of life sentences imposed for aggravated murders similarly brutal to the one" under review.²⁷⁸ Justice Fairhurst concluded with the observation that "[o]ne could better predict whether the death penalty will be imposed upon Washington's most brutal murderers by flipping a coin than by evaluating the crime and the defendant."²⁷⁹ In her view, Washington's "system of imposing the death penalty defies rationality, and our proportionality review has become an 'empty ritual.'"²⁸⁰ The second dissent focused more pointedly on the role of race in allocating death sentences. It offered some raw data points indicating that Black defendants "were much more likely than Caucasians to be sentenced to death,"²⁸¹ and suggested that a quick review of aggravating factors in the cases did not support the differential results.²⁸² But the dissent recognized that it could not produce a sophisticated statistical analysis of the role of race in Washington capital cases and called for further factual development, arguing that such analysis was a critical part of its comparative proportionality review.²⁸³

The two *Davis* dissents, particularly the latter one calling for further study of the role of race, set in motion the ultimate judicial invalidation of the Washington death penalty. As a result of the dissents, attorneys for Allan Gregory, an inmate on Washington's death row, enlisted Katherine Beckett, a sociologist at University of Washington, to study the role of race in capital sentencing.²⁸⁴ The Beckett Report analyzed 297

²⁷⁷ *Id.* at 72.

²⁷⁸ *Id.* at 84 (Fairhurst, J., dissenting).

²⁷⁹ *Id.* at 92.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 93 (Wiggins, J., dissenting).

²⁸² *Id.*

²⁸³ *Id.* at 98.

²⁸⁴ See *STUDIES: Jurors in Washington State More Likely to Impose Death on Black Defendants*, DEATH PENALTY INFO. CTR. (Feb. 25, 2014), <https://deathpenaltyinfo.org/news/studies-jurors-in-washington-state-more-likely-to-impose-death-on-black-defendants> [<https://perma.cc/9GZT-XZXX>].

aggravated first-degree murder cases involving death-eligible defendants.²⁸⁵ The study was greatly facilitated by provisions in the Washington capital statute mandating trial courts to submit forms to the Washington Supreme Court detailing case characteristics and outcomes in first-degree aggravated murder cases, as a means of facilitating the court's comparative proportionality review. The most important finding of the study was that Washington juries were significantly more likely to sentence Black defendants to death, controlling for crime and defendant variables: "the regression results indicate that *juries were four and one half times more likely to impose a sentence of death when the defendant was black than [] they were in cases involving similarly situated white defendants.*"²⁸⁶ The Beckett study maintained that the findings were not surprising given available evidence about implicit racial bias and scholarly literature suggesting that such bias is most likely to operate at the sentencing stage of capital litigation.²⁸⁷

Gregory sought relief from his death sentence based on the Beckett Report's conclusions, arguing that the role of race documented in the report rendered the Washington death penalty unconstitutional under both the federal and state constitutions. As discussed above, by the time the Washington Supreme Court was set to rule on Gregory's claims, the political climate surrounding the Washington death penalty was favorable for abolition. Governor Inslee had already established a moratorium on executions. Many prosecutors had registered their opposition to the death penalty, and the state's attorney general had called for abolition. Only eight people occupied Washington's death row, and public polling showed astonishingly low support for the death penalty.

The Washington Supreme Court unanimously held that the prevailing administration of the death penalty violated the state constitution, with Justice Fairhurst writing the central opinion.²⁸⁸ Relying primarily on the Beckett Report, the court held that the arbitrary and discriminatory administration of

²⁸⁵ KATHERINE BECKETT & HEATHER EVANS, THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2014, at 5, <https://files.deathpenaltyinfo.org/legacy/documents/WashRaceUPDATE.pdf> [<https://perma.cc/855H-EULS>] [hereinafter "Beckett Study"]. The initial version of the study analyzed slightly fewer (285) cases. See *STUDIES: Jurors in Washington State More Likely to Impose Death on Black Defendants*, *supra* note 284.

²⁸⁶ Beckett Study, *supra* note 285, at 33.

²⁸⁷ *Id.*

²⁸⁸ *State v. Gregory*, 427 P.3d 621, 626–27 (Wash. 2018).

the death penalty violates Washington's constitutional prohibition against "cruel punishment."²⁸⁹ The Beckett Report's statistical findings regarding the role of race were supported, in the court's view, by additional evidence of "implicit and overt racial bias against black defendants in this state," of which the court took "judicial notice."²⁹⁰ The arbitrary and discriminatory administration of the death penalty undermined its ability to serve any "legitimate penological goals," rendering the punishment impermissibly cruel.²⁹¹

Gregory is notable in several respects. The court could have decided the case on statutory grounds, holding that Gregory's individual sentence was disproportionate, and doing so would have comported with the avoidance canon; but the court chose to reach the constitutional issue because proportionality review "is not a substitute for the protections afforded to all persons under our constitution."²⁹² The court also took great lengths to insulate its opinion from federal review by stating explicitly that it did not reach the federal constitutional issue and that its resolution amounted to an "adequate and independent state" basis for decision unreviewable by the U.S. Supreme Court.²⁹³ The court extolled the role of state judiciaries in finding greater protection for individual rights under their constitutions than those afforded by the federal constitution, lest they deprive their people of this "double security."²⁹⁴

Perhaps most importantly for present purposes, the Washington Supreme Court made clear that it was not invalidating the death penalty per se, finding only that its prevailing administration was unconstitutional and leaving open the possibility that the legislature could draft a new statute presumably designed to reduce discrimination.²⁹⁵ But even as the court disclaimed the power "to substitute [its] moral judgment for that of the people,"²⁹⁶ it remained hard to imagine how any new statute would erase the discrimination

²⁸⁹ *Id.* at 631.

²⁹⁰ *Id.* at 635.

²⁹¹ *Id.* at 636.

²⁹² *Id.* at 631.

²⁹³ *Id.* at 632 ("Let there be no doubt—we adhere to our duty to resolve constitutional questions under our own constitution, and accordingly, we resolve this case on adequate and independent state constitutional principles.").

²⁹⁴ *Id.* at 631 (citation omitted).

²⁹⁵ *Id.* at 636.

²⁹⁶ *Id.* at 637.

fatal to the operation of the current statute, just as the post-*Furman* legislature had failed in its attempt “to avoid such deficiencies.”²⁹⁷ The court also explicitly converted all existing death sentences to life imprisonment.²⁹⁸

Gregory illustrates the complicated interplay between the state judiciary, the other branches of state government, and the U.S. Supreme Court. The Washington legislature’s decision to mandate proportionality review and to require documentation regarding the disposition of aggravated first-degree murder cases created the record necessary for the Washington Supreme Court’s ultimate decision. The decisions of various state executive actors to curtail use of the death penalty (e.g., imposing moratorium, rarely seeking death) and to advocate for its repeal likely emboldened the court to issue a broad ruling striking down the prevailing capital statute rather than a narrower decision regarding *Gregory*’s sentence. The Washington Supreme Court could in some sense be viewed as acting on behalf of those executive actors, who were unable to overcome the quirky political obstacles to legislative repeal (e.g., the shortness of the legislative session, the committed opposition of a single key player in the state senate when the votes “were there”). At the same time, by avoiding a decision on the status of the death penalty per se, the court could insist that it was not usurping legislative authority, although its decision amounts to an enormous obstacle to reinstatement: there is simply no reason to believe that a newly crafted statute would be able to satisfy *Gregory*’s insistence on non-arbitrariness as a basic command of the state constitution.

Gregory also stands as an implicit rebuke of the U.S. Supreme Court’s own rejection of a race discrimination claim in *McCleskey v. Kemp*.²⁹⁹ In some respects, *Gregory*’s claim was stronger than *McCleskey*’s because the Beckett Report showed strong race-of-the-defendant effects, which heightened concerns than *Gregory* himself suffered unfair treatment on the basis of his race. *Gregory*’s claim was further strengthened by the court’s own findings regarding race discrimination against Black defendants within the Washington criminal justice system. Nonetheless, had the Washington Supreme Court ruled on federal constitutional grounds, it is virtually certain that the U.S. Supreme Court would have reversed. *McCleskey* rejected the proposition that evidence of systemic

297 *Id.* at 636.

298 *Id.* at 642.

299 481 U.S. 279 (1987).

discrimination requires either global or individual relief, requiring instead that a defendant offer proof of discrimination in his own case.³⁰⁰ *Gregory's* insistence that system-wide discriminatory administration of the death penalty undermines its ability to serve legitimate penological purposes models an alternative approach to the Eighth Amendment than the path chosen by *McCleskey*. It creates a powerful argument for abolition in other state courts who read their constitutions more broadly than the federal constitution, provides a compelling policy argument for legislative repeal, and offers a critical appraisal of federal constitutional doctrine while avoiding the disciplining effect of Supreme Court review.

Over three years after *Gregory*, the death penalty remains an issue in Washington politics. Tellingly, legislative efforts are focused primarily on completing the work of the Washington Supreme Court rather than reversing it. Attorney General Bob Ferguson has continued to advocate for legislative repeal, arguing that such legislation is necessary because the Washington Supreme Court had not declared the death penalty unconstitutional *per se*.³⁰¹ But the same obstacles to repeal before *Gregory* appear to have prevented repeal post-*Gregory*.³⁰² And more limited efforts to restore the death penalty via a narrower statute, such as making the death penalty available only in cases involving killings by prisoners, have little political support.³⁰³ As in many of the other states discussed above, the Washington Supreme Court's decision invalidating the prevailing statute operates in a context in which political decision-making seems paralyzed. *Gregory* not only shifted the burden to those who would restore the death penalty but did so in a context where the larger political will is decisively on the abolitionist side. Hence, *Gregory* represents the ability of a state court to end the death penalty where the death penalty is essentially dead both practically and politically, but the formal power to kill it remains elusive.

³⁰⁰ *Id.* at 292.

³⁰¹ Lilly Fowler, *WA's Death Penalty May be Unconstitutional, But It's Not Dead—Yet*, CROSSCUT (Feb. 15, 2019), <https://crosscut.com/2019/02/was-death-penalty-may-be-unconstitutional-its-not-dead-yet> [<https://perma.cc/3W2U-8WDL>].

³⁰² See *Legislative Roundup—Recent Legislative Activity as of March 7*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/legislative-roundup-recent-legislative-activity-as-of-march-7> [<https://perma.cc/PGL3-7UZZ>].

³⁰³ See Fowler, *supra* note 301.

CONCLUSION: STATE COURT INTERVENTION AS ENGINE OF DECLINE
(OR STABILIZATION?)

The foregoing narratives present a broad but not comprehensive catalog of the ways in which state supreme courts have facilitated the massive decline in the practice of capital punishment in the United States over the past two decades. These accounts reveal some of the myriad “superpowers” that courts often enjoy, to varying degrees, in comparison to the political branches of government. State supreme courts usually have the final word on the death penalty’s constitutionality and the meaning of the state’s capital statute. If a state supreme court decision is based on the state constitution, the only way to supersede the court’s ruling is to amend the constitution.³⁰⁴ If a state supreme court decision relies on the federal constitution, as the Delaware court did in striking down Delaware’s death penalty,³⁰⁵ however, that leaves the decision vulnerable to review by the U.S. Supreme Court. Delaware’s ruling was left standing, but other state court death penalty rulings based on the federal constitution have not survived U.S. Supreme Court review.³⁰⁶ If a state supreme court interprets the state’s capital statute, the legislature of course remains free to change the statutory scheme—but the above accounts reveal how difficult even relatively simple legislative fixes can be to enact.³⁰⁷ State supreme courts are also somewhat more insulated from

³⁰⁴ State constitutional amendment to reinstate that death penalty is rare, but not vanishingly so. We noted the constitutional amendment following the California *Anderson* decision abolishing the state death penalty in the first paragraph of this article. Oregon experienced a similar constitutional amendment by ballot initiative in 1984 following a decision by the Oregon Supreme Court striking down the death penalty in 1981. See OREGON DEATH PENALTY, OR. DEPT OF CORR. <https://www.oregon.gov/doc/about/Pages/oregon-death-penalty.aspx> [<https://perma.cc/3X9X-QDQS>]. More recently, voters in Oklahoma preemptively amended the state constitution in 2016 to ensure that the death penalty could not be deemed by the state courts to constitute cruel and unusual punishment under the state’s constitution. See Austin Sarat, *Asking Voters Is Not the Way to End the Death Penalty*, THE HILL (Jan. 24, 2022), <https://thehill.com/opinion/criminal-justice/591053-asking-voters-is-not-the-way-to-end-the-death-penalty/> [<https://perma.cc/SFT2-SLJX>]. There is also the possibility that constitutional rulings can be addressed by legislative fixes, as we discussed in the context of New York and Delaware. See *supra* Part I.

³⁰⁵ See *supra* Part I.

³⁰⁶ See, e.g., *Kansas v. Marsh*, 548 U.S. 163 (2005) (reversing decision by the Kansas Supreme Court that held the Kansas death penalty unconstitutional under the federal Eighth Amendment); *Kansas v. Carr*, 577 U.S. 108 (2016) (reversing decision by the Kansas Supreme Court that held that the sentencing instructions given by the trial court violated the federal Eighth Amendment).

³⁰⁷ See *supra* Part I.

political winds than the political branches of government. Their degree of insulation depends on whether the justices stand for election, in what kind of electoral process, and how often. Compare, for example, the supreme court justices of New Jersey, who are selected by gubernatorial appointment, to those of North Carolina, who stand for partisan election.³⁰⁸ State supreme courts also derive some insulation from political pressures from the fact that their decisions are often framed in coolly technical as opposed to overtly political terms. In addition, the conception of the courts as standing above or apart from politics, judicial elections notwithstanding, gives state supreme court decisions some claim to legitimacy even with those who may disagree on the merits. Consequently, even judges who disagree with an outcome may be unwilling to overturn recent precedent in order to maintain the legitimacy of the judiciary, as we saw in the flipped vote of the Chief Justice of the Connecticut Supreme Court, who joined the majority in upholding its recent decision abolishing the state's death penalty and applying that ruling retroactively, even though she had dissented in the original case.³⁰⁹

These institutional advantages have allowed state supreme courts to play a unique and powerful role in the decline of the death penalty—but not an isolated one. Rather, the courts have interacted with the political branches in complex ways, in what sometimes looks like an intricate dance. Courts have flipped the power of legislative inertia, asserted control over the temporal scope of legislative action, rendered legislative authorization of capital punishment difficult or impossible to implement, and rendered the final coup de grace when the death penalty is essentially defunct, but the legislature is not (yet) ready to enact repeal. The examples we catalog serve as a corrective to twin misperceptions about the role of state supreme courts in the recent history of capital punishment: they reject the view of judicial intervention as its own sequestered silo, and they expand the scope of a narrative that has tended to foreground other actors (prosecutors, juries, legislatures, and governors) as the primary drivers of the unprecedented death penalty decline of the past two decades.

However, it is important to note that judicial intervention is not a one-way ratchet. Sometimes judicial reform or restriction of capital punishment short of wholesale abolition can have the

³⁰⁸ See *State Supreme Courts*, BALLOTEDIA, https://ballotpedia.org/State_supreme_courts [<https://perma.cc/UBA8-XXL4>].

³⁰⁹ See *supra* subpart II.A.

effect—and may well be intended to have the effect—of stabilizing the practice against disrepute or legal challenge. A good example of such potentially stabilizing interventions are the decisions of the Georgia and Nebraska Supreme Courts to declare the electric chair unconstitutional as a means of execution—decisions that sanitized the execution process by eliminating a gruesome and increasingly marginalized execution method. At the time of the Georgia Supreme Court's 2001 decision in *Dawson v. State*,³¹⁰ only three states (Alabama, Georgia, and Nebraska) designated electrocution as their exclusive method of execution. In the modern, post-1976 era of capital punishment, the electric chair had increasingly been replaced by lethal injection, and around the turn of the millennium, a spate of “grisly cases, including one in Florida in which a plume of fire erupted from the condemned man's head, escalated the fight to eliminate the chair.”³¹¹ After the Supreme Court agreed to hear a case from Florida on whether the state's electric chair constituted cruel and unusual punishment under the Eighth Amendment, the Florida legislature voted almost unanimously in 2000 to replace the electric chair with lethal injection.³¹² That same year, the Georgia legislature followed suit—but applied the ban on electrocution only to those sentenced to death after May 1, 2000.³¹³ The Georgia Supreme Court acted quickly to address the question of the constitutionality of electrocution for the more than 100 inmates on death row who were still eligible to be executed in the chair. In *Dawson*, the court proclaimed, “[W]e hold that death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition against cruel and

³¹⁰ 554 S.E.2d 137, 144 (Ga. 2001).

³¹¹ Sue Anne Pressley, *Georgia Supreme Court Outlaws Electric Chair*, WASH. POST (Oct. 6, 2001), <https://www.washingtonpost.com/archive/politics/2001/10/06/georgia-supreme-court-outlaws-electric-chair/f5f29a32-4290-493e-9a3a-e1d08e907e0a/> [<https://perma.cc/595V-G9D8>].

³¹² Sara Rimer, *Florida Lawmakers Reject Electric Chair*, N.Y. TIMES (Jan. 7, 2000), <https://www.nytimes.com/2000/01/07/us/florida-lawmakers-reject-electric-chair.html> [<https://perma.cc/42PY-E6WL>]. Although the Supreme Court later declined to hear an analogous Alabama appeal, the Alabama legislature also voted to replace its electric chair with lethal injection in 2002. See *Bill to Switch to Lethal Injection for Executions OKd in Alabama*, L.A. TIMES (Apr. 12, 2002), <https://www.latimes.com/archives/la-xpm-2002-apr-12-mn-37423-story.html> [<https://perma.cc/P5AF-BTQ5>].

³¹³ See *Not So Shocking: The Death of the Electric Chair in Georgia at the Hands of the Georgia Supreme Court in Dawson v. State*, 53 MERCER L. REV. 1695, 1696 (2002).

unusual punishment” under the state constitution.³¹⁴ Passionate commitment to humane punishment, or canny curtailment to protect the death penalty from unwanted scrutiny? Unknowable intent aside, there is no question that the Georgia Court’s intervention had the effect of precluding U.S. Supreme Court review of the constitutionality of the state’s electric chair, and it quite likely deflected public scrutiny and assuaged public discomfort with the gory mechanics of state killing.

The Nebraska Court’s 2008 decision in *State v. Mata*³¹⁵ echoed the Georgia Court’s emphasis on the possibility of extreme pain in the electrocution process: “[T]here is abundant evidence that prisoners sometimes will retain enough brain functioning to consciously suffer the torture high voltage electric current inflicts on a human body.”³¹⁶ The Nebraska Court dramatically concluded that the electric chair “has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber of state prisons.”³¹⁷ The Nebraska Court’s rejection of the electric chair occurred in a political context in which the state’s commitment to retaining the death penalty was much weaker than it had been in Florida, Georgia, or Alabama. Indeed, the year before the *Mata* decision, Nebraska’s legislature came within one vote of abolishing capital punishment outright.³¹⁸ Nonetheless, the case for a stabilizing effect from the high court’s ruling draws some support from the fact that the legislature passed a bill reinstating the death penalty the year following the ruling by a wide margin.³¹⁹ It may also be the case that the Nebraska Court sought simply to avoid the state’s unenviable position of being the only jurisdiction left that relied entirely on the electric chair for carrying out its death penalty, as the Court explicitly noted: “Faced with changing societal values, we cannot ignore Nebraska’s status as the last state to retain electrocution as its sole method of execution.”³²⁰

³¹⁴ *Dawson*, 554 S.E. 2d at 144.

³¹⁵ 745 N.W.2d 229 (Neb. 2008).

³¹⁶ *Id.* at 277.

³¹⁷ *Id.* at 278 (internal quotation marks omitted).

³¹⁸ See JoAnne Young, *Ruling Puts Senators into a Quandary*, LINCOLN JOURNAL-STAR (Feb. 9, 2008) at A1, A2; Shari Silberstein, *How Nebraska Repealed the Death Penalty*, THE MARSHALL PROJECT (May 28, 2015), <https://www.themarshallproject.org/2015/05/28/how-nebraska-repealed-the-death-penalty> [<https://perma.cc/P2D6-XP96>].

³¹⁹ See Young, *supra* note 318.

³²⁰ *Mata*, 745 N.W.2d at 264.

The irony, of course, is that whatever stabilizing effect the rejection of the electric chair produced was short-lived. In the past decade, problems associated with the seemingly more humane method of execution by lethal injection have taken center stage.³²¹ As a result, lethal injection drugs have become scarce and extremely expensive leading some states to reauthorize the electric chair, among other alternative modes of execution. Some death row inmates have even elected to be executed by electric chair over lethal injection when given the choice by state law.³²² Although stabilization may not endure, if indeed it occurs at all, the fact remains that reform and restriction of the death penalty always carries the possibility that they will render the practice less objectionable or more seemingly legitimate. As we have explained at greater length elsewhere, this possibility is as true for legislative reform as it is for constitutional regulation of the death penalty.³²³ Concern about ameliorating and thereby entrenching the practice of capital punishment shadows any kind of death penalty regulation short of full-blown abolition.

Nonetheless, the overwhelming weight of state judicial intervention over the past two decades has served to diminish the practice of capital punishment in the United States rather than to reinforce it. Moreover, the stories that we sketch above are not merely idiosyncratic examples confined to the specific contexts in which they occurred. Rather, they can usefully be viewed as archetypes or templates for other states. Some have already played this role, as we saw in the way that New Mexico and Oregon followed closely the model that Connecticut set in extending prospective abolition (or in Oregon's case, reform) retrospectively by relying on the legislature's action as evidence of evolving standards of decency.³²⁴ It is unclear how much

³²¹ See, e.g., Austin Sarat, *Oklahoma Botched Yet Another Execution*, SLATE (Nov. 1, 2021), <https://slate.com/news-and-politics/2021/11/oklahoma-botches-another-execution-using-lethal-injection-drugs.html> [<https://perma.cc/5P58-TXH6>] (noting that the prisoner convulsed and vomited during his execution).

³²² See Rick Rojas, *Why This Inmate Chose the Electric Chair Over Lethal Injection*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/us/electric-chair-tennessee.html> [<https://perma.cc/H5UP-2VAX>].

³²³ See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995) (describing legitimating effect of the Supreme Court's constitutional regulation of capital punishment); Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417 (2002) (arguing that abolitionists should consider the possible legitimating effect of legislative reform).

³²⁴ See *supra* subpart II.B.

more state judicial intervention to limit or abolish the death penalty we can expect to see going forward, given that most of the states that still retain the death penalty interpret their state constitutions in tandem with the U.S. Supreme interpretations of analogous federal provisions.³²⁵ However much further the striking phenomenon of state court intervention regarding capital punishment may ultimately go, which is a story yet to be written, the narrative up to this point shows beyond doubt that “little *Furmans*”—like “little fires”—have the potential to promote major conflagrations.³²⁶

³²⁵ See William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1213–14 (2020) (cataloguing state interpretations of their Eighth Amendment analogues).

³²⁶ With thanks for the inspiration from Celeste Ng’s 2017 novel, *Little Fires Everywhere*.

