

From the Brink of Death:

Judicial Legitimacy and the Supreme Court's Retreat
from Abolition of Capital Punishment in the 1970s

By Alex Wolinsky

Adviser: Professor Charles McClain

Abstract

In 1972, in *Furman v. Georgia*, the Supreme Court declared the death penalty unconstitutional across the United States, effecting what appeared to be an end to executions and sparing the lives of hundreds on death row. Four years later, a nearly identical high court restored capital punishment's constitutional legitimacy in *Gregg v. Georgia*. Scholarship offers numerous explanations for the court's sudden retreat from abolition of the death penalty, but conspicuously absent is an account whose primary focus is public perception of the Supreme Court and the fluctuations in judicial legitimacy surrounding *Furman* and *Gregg*. In this paper, I aim to provide such a narrative.

Through analysis of legal and other scholarship, legislative actions and contemporary newspaper content, I evaluate public reception of and response to the Supreme Court rulings of the *Furman* and *Gregg* era. In doing so, I recreate the sociolegal environment in which the rulings were issued, emphasizing the role of the court's public legitimacy in each decision. In particular, I track the value of the court's "legitimacy account" throughout the 1960s and 1970s, from its sharp decline in the Warren era through its gradual but incomplete replenishment during the Burger Court. Additionally, I discuss lawmakers' responses to *Furman* and how this influenced judicial legitimacy, as manifested in *Gregg*. Both approaches, and especially the second, help to resolve the tension inherent in the 1976 death penalty rulings, which sought to limit jury discretion while banning mandatory capital punishment statutes, which arguably eliminate discretion to the fullest extent possible.

Examining the death penalty cases of the 1970s through the lens of Supreme Court legitimacy provides an interesting explanation for the rapid resurrection of capital punishment, and it also offers insight regarding the behavior of the court in general.

I. Introduction

At the dawn of the Supreme Court's 1972 term, there was no indication that the death penalty's constitutional legitimacy was in any doubt. Indeed, only one year prior, the court had ruled unequivocally that capital punishment was legally permissible, with Justice John Harlan writing for the majority that "[the court finds] no constitutional infirmity in the conviction of either petitioner" (*McGautha v. California*, 1971). In hearing four additional capital cases, the court aimed only to, in the words of Justice Hugo Black, " 'once and for all make it clear to the nation that the death penalty and all its aspects pass constitutional muster' " (Mandery, 2013, p. 115).

On June 29, 1972, however, the high court struck down the death penalty in *Furman v. Georgia*, with each justice in the 5-4 majority providing a separate rationale for rejecting capital sentencing in its contemporary form. Foremost among these was the notion that death sentences were imposed arbitrarily, with those convicted of similar crimes receiving wildly disparate sentences (*Furman*, 1972). As a result, about 600 prisoners condemned to death were granted a reprieve, and much of the academic community proclaimed the ruling marked an end to state-sanctioned killings in the United States (Banner, 2002). Scholars were wrong: Four years later, the Supreme Court restored the death penalty's legitimacy in *Gregg v. Georgia*, with Justice Stewart writing in his controlling opinion that "[n]o longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines" (*Gregg*, 1976).

Why did the court so suddenly retreat from abolition of capital punishment? Academics have suggested a series of rationales. Some, such as Oshinsky (2010), accept the court's stated reasoning at face value, simply allowing that the *Gregg* majority believed the new death penalty

statutes of Georgia and thirty-five other jurisdictions had eliminated the caprice endemic in capital sentencing prior to *Furman*. Others, such as Banner (2002), argue that the court (as indicated in Justice Stewart's opinion in particular) realized that it misread standards of decency in deciding *Furman* and that capital punishment was in fact well within society's conception of acceptable punishment. Still others, namely Mandery (2013), suggest the court's retreat was a result of the coalescence of many forces, among them a shift in public opinion, more effective lawyering from death penalty proponents in *Gregg* and interpersonal dynamics among the justices.

While each of the aforementioned factors undoubtedly played some role in altering the court's stance on capital punishment, I find the existing narratives unsatisfactory in that none devotes sufficient space to discussing the court's motivation from the perspective of the institution's public legitimacy¹. Given the importance of such notions to the authority of the judiciary, I aim to construct a narrative of the court's retreat from *Furman* with an emphasis on court legitimacy at its center. In doing so, I hope not only to explore why the Supreme Court endorsed capital punishment in *Gregg* but also to understand how our nation's highest judicial body navigates controversial matters in general.

II. Methodology

In essence, the Supreme Court functions as does any arm of government, with its decisions inevitably following from politics and the public will. Although the court is insulated from popular opinion to some extent due to justices' lifetime appointments, it is difficult to argue that it acts without any regard for sentiment among the masses. Even the Warren Court, famous

¹ It is worth mentioning that, in passing, Mandery (2013) notes that the Supreme Court issued several unpopular rulings in the early 1970s that led to declining public confidence in the judiciary. Although I find these rulings significant and will elaborate on them below, I find Mandery's discussion of them excessively terse.

for expanding civil liberties for many of society's most vulnerable and unpopular groups (most notably criminal defendants and African Americans), was at some level subject to the attitudes of the public. This is perhaps best evidenced by the second iteration of *Brown v. Board of Education* (1955), more often called *Brown II*, in which the court's opinion called for districts to proceed with integration with "all deliberate speed"—quite an extension of the original *Brown v. Board of Education*'s (1954) "[w]e conclude that in the field of public education the doctrine of 'separate but equal' has no place," which, while powerful, lacks a clear statement of a remedy for the inequality. One might reasonably argue that the court acted as such due to support for integration among Northerners that vastly outweighed Southern hostility. Thus, I will view the Supreme Court as a body concerned about popular perception and responsive, on some level, to the public will.

I will draw primarily upon two models in evaluating the legitimacy of the court: Ingber's (1981, p. 339) notion of the "bank account of legitimacy" and Clark's (2009) ideas regarding congressional court-curbing. I will here discuss each in turn, providing elucidation via applications to *Brown*.

In his famous 1981 article "The Interface of Myth and Practice in Law," Stanley Ingber argues that courts have the capacity to both lead and follow social change. He illustrates this through his legitimacy bank account metaphor². In essence, the idea is simple. Suppose the Supreme Court has a bank account that holds "legitimacy" instead of money. When the court issues a ruling aligned with popular principles—mandating that government officials cannot use public funds for personal gain, for example—it makes a deposit in the account, so its legitimacy store grows. Conversely, when the court makes a decision that is contrary to public sentiment, it

² One should note that Ingber applies his model to *Furman* and *Gregg* in a footnote. While his discussion certainly is valid, I find it lacking in completeness and will extend his model to further aspects of the era under consideration.

makes a withdrawal and thus depletes its legitimacy store. If withdrawals outpace deposits, the public will cease to recognize the court's authority. Ingber asserts that all rulings will create deposits and withdrawals among different communities. The purpose of amassing legitimacy, he argues, is that it allows an institution to issue unpopular decisions when it deems effecting social change necessary. The advantage of a court doing this, rather than a legislature, is that legislative repeal of a law suggests an activity is encouraged, whereas judicial invalidation merely indicates an activity is not legally forbidden.

The case of *Brown* easily illustrates the applicability of Ingber's (1981) legitimacy account. As Klarman (1994) notes, "*Brown* crystallized southern resistance to racial change"—clearly, the decision was immensely unpopular in the South (p. 82). Shortly after *Brown*, billboards reading "Impeach Earl Warren" lined southern highways in an unequivocal expression of southern resentment for the Supreme Court (Mandery, 2013). Furthermore, southerners fought implementation of the ruling throughout the process. National Guardsmen had to force Arkansas Governor Orval Faubus to allow integration to proceed at Little Rock High School in 1957, and Alabama Governor George Wallace famously blocked an auditorium door at the University of Alabama rather than permit black students to enroll. Evidently, the court's words held little sway in the South, in large part due to lost legitimacy in the region.

Simultaneously, however, the court's ruling augmented its legitimacy outside the South, as a majority of those in the North and the West favored an aggressive integration program. According to Erskine (1962), 64 percent of Americans living outside the South supported the Supreme Court's ruling in *Brown* in 1954, and, further, the same percentage in 1957 supported Eisenhower's decision to send the National Guard to Little Rock High School. From these statistics and an overall lack of resistance to *Brown* outside the South, it is reasonable to

conclude that the rest of the nation supported integration, likely to an extent sufficient to offset the loss of legitimacy in the South. Thus, the Supreme Court acted to effect a net legitimacy deposit in demanding that integration proceed “with all deliberate speed.”

Tom Clark, in his 2009 paper “The Separation of Powers, Court Curbing, and Judicial Legitimacy,” proposes that congressional and other legislative hostility toward the Supreme Court, as evinced by the passage of legislation contrary to judicial decree and speech expressing distaste for the judiciary, indicates “a lack of judicial legitimacy and public prestige” (p. 973). Furthermore, Clark posits, the justices change their votes to be better aligned with popular sentiment for the purpose of preserving the court’s legitimacy. Clark also notes that the public becomes more likely to support measures countering and restricting the court’s authority when the body’s popular legitimacy declines sufficiently. Significantly, Clark argues that anticipated loss of legitimacy is no less important than actual loss of legitimacy—justices are likely to vote in a manner consistent with public opinion if they perceive the court’s standing is suffering. In sum, “despite the Supreme Court’s nominal insulation from the American people, the justices have strong incentives to be concerned with their public standing” (p. 973).

Clark (2009) provides an application to *Brown* in his paper that aptly illustrates the relevance of his model. After the 1954 ruling, the Supreme Court declined to consider anti-miscegenation laws until 1967, likely due to southern hostility to interracial marriage, and also neglected to hear cases regarding the decidedly hot-button issue of prayer in public schools (Clark, 2009). This occurred primarily due to the justices anticipating democratic backlash, as government actors (such as the aforementioned Orval Faubus) were already taking non-legislative steps to resist the court’s rulings. The justices were reluctant to act further against the

public will, as they were “aware that the political situation [was] too perilous” (Clark, 2009, pp. 973-74).

In applying Ingber’s (1981) theory, I will identify events representing legitimacy account withdrawals and deposits from my period of consideration as well as a few years before and after. I add years to either end of my time frame because failing to do so would provide an incomplete picture: The Supreme Court’s ruling in *Furman* followed a series of other rulings that led to significant fluctuation in the institution’s legitimacy store, and the years after *Gregg* include decisions that evince larger judicial trends arising from legitimacy concerns. In applying Clark’s (2009) model, I will review the legislative response to *Furman*. I will evaluate opinion by considering polls and contemporary news articles, as I expect a combination of these to serve as an accurate barometer of public sentiment in the era under consideration.

III. Historical overview

The first serious challenge to the overall constitutional legitimacy of the death penalty (as opposed to the legitimacy of capital punishment for crimes such as rape or armed robbery) came from within the Supreme Court. In 1963, Justice Arthur Goldberg, disturbed after his first year on the bench by what he perceived as arbitrary and racially discriminatory application of the death penalty, asked law clerk Alan Dershowitz to compose a memorandum about the constitutionality of capital punishment (Banner, 2002). The resulting document was radical. Dershowitz suggested that capital punishment was in violation of the Eighth Amendment on the basis of the amendment’s new meaning, drawn from Chief Justice Earl Warren’s majority opinion in *Trop v. Dulles* (1958), in which the court ruled unconstitutional the revocation of a military deserter’s citizenship (Mandery, 2013). In particular, Warren wrote that “[t]he

Amendment must draw its meaning from the *evolving standards of decency that mark the progress of a maturing society*,” suggesting that what defines cruel and unusual punishment changes with popular attitudes (*Trop*, 1958, emphasis added). Goldberg proceeded to circulate the memo among his colleagues, simultaneously announcing his intention to publish it in a law review (Mandery, 2013). At Warren’s urging, Goldberg refrained from doing so and instead published a shortened version of Dershowitz’s findings in a dissent from a refusal to grant certiorari in *Rudolph v. Alabama* (1963) (Banner, 2002). Therein, Goldberg questioned the constitutional validity of capital punishment on the basis of the Eighth and Fourteenth Amendments, suggesting that he found the death penalty a disproportionately severe sanction.

Although Goldberg’s dissent possessed no legal force of its own, civil rights litigators across the nation took notice. Most important among these was the Legal Defense Fund (LDF), previously the NAACP’s litigation arm³ (Oshinsky, 2010). Initially led by Thurgood Marshall, whom President Lyndon Johnson appointed to the Supreme Court in 1967, the LDF was arguably the preeminent law firm of the Civil Rights Movement, most notably winning *Brown v. Board of Education* in 1954. The Fund’s interest in capital punishment abolition arose when three staffers discussed the possibility of mounting a constitutional challenge to the death penalty on the basis of racial discrimination a few months after Goldberg issued his dissent (Meltsner, 1973). Anthony Amsterdam, who proved to be the attorney most integral to the LDF’s litigation strategy, joined the Fund shortly thereafter.

The central tactic of the LDF’s campaign was the “moratorium strategy,” which Amsterdam set in motion in 1967. This entailed the LDF intervening in some capacity in every

³ Unfortunately, a history of the LDF (also sometimes called the “Inc. Fund”) is beyond the scope of this paper. Those interested in the Fund’s formative years will find no source better than Jack Greenberg’s *Crusaders in the Courts* (1994), which details the history of the Fund from its origins to its role in *Brown v. Board of Education*. Additionally, Michael Meltsner’s *Cruel and Unusual* (1973) provides a similarly definitive narrative of the LDF’s death penalty litigation before and up to *Furman*.

death penalty case in the United States, with the ultimate goal of forcing “the machinery of execution to a temporary halt” (Banner, 2002, p. 252). The LDF hoped to delay executions by continuing to litigate until every avenue of appeal was exhausted, thereby leading to unchecked growth in the national death row population. The LDF hoped that this, in turn, would render judges unwilling to authorize resumption of executions and thus a wave of death. As Meltsner (1973), who with Amsterdam led the LDF’s anti-capital-punishment efforts, notes, “[t]he undertaking was massive, and without precedent” (p. 109). The challenge was exacerbated by the fact that the LDF was woefully understaffed and underfunded (although this latter problem was solved by a 1967 Ford Foundation grant). Still, however, the moratorium was immensely successful. Four hundred and thirty-five prisoners waited on death row in 1967. By 1972, that number had climbed to 620 (Banner, 2002). Ultimately, and largely as a result of the moratorium strategy, the United States executed no prisoners between 1967 and 1977, and judges—including those of the Supreme Court—took notice (Mandery, 2013).

Meanwhile, public support for capital punishment continued the decline it had begun decades earlier. The Gallup poll reported that 68 percent of Americans supported the death penalty for murder in 1938. That figure dropped steadily, to a low of 42 percent in 1966 (Erskine, 1970). In 1972, on the eve of *Furman*, Gallup found that 50 percent of Americans favored executing murderers (Vidmar and Ellsworth, 1974). The Harris poll reported similar results (Vidmar and Ellsworth, 1974). Legislative attitudes were additionally favorable to abolition. Between 1957 and 1972, six states abolished the death penalty without Supreme Court action, and three others severely restricted the circumstances under which a capital sentence was permissible (Vann, 2011). Furthermore, the Justice Department publicly opposed the death penalty in 1965, and President Lyndon Johnson’s administration urged Congress to forbid capital

punishment for federal offenses in 1968 (Vann, 2011). By every indication, Dershowitz's suggestion that evolving standards of decency rendered capital punishment unconstitutional seemed to be gaining validity.

In the years after the launch of the moratorium strategy, abolitionist litigators enjoyed considerable success. In 1967, the LDF won a case striking down the capital punishment portion of the Federal Kidnapping Act on the basis that it allowed only juries—and not judges—to impose the death penalty in cases of kidnapping, giving defendants an incentive to choose a trial before a judge (Mandery, 2013). The following year, abolitionists won a critical victory in *Witherspoon v. Illinois*, in which the Supreme Court declared unconstitutional the practice of assembling a “death-qualified” jury, or a jury systematically excluding those who have doubts regarding capital punishment (Banner, 2002). In 1969, the LDF argued two death penalty cases before the Supreme Court, *Maxwell v. Bishop* and *Boykin v. Alabama*. In both cases, the crux of Amsterdam's argument was that capital punishment was inflicted discriminatorily—“ ‘on unhappy minorities, whose numbers are so few ... that society can readily bear to see them suffer torments which would not for a moment be acceptable as penalties of general application to the populace’ ”—and that “ ‘contemporary standards of decency would condemn the use of death as a penalty if such a penalty were uniformly, regularly and even-handedly applied’ ” (Mandery, 2013, pp. 68-69). Mandery (2013) describes the justices' conference, at which a majority supported reversing both petitioners' sentences, albeit on disparate grounds⁴. Due to delays induced by Justice William Douglas' unwillingness to compromise in writing for the majority, however, *Maxwell* was put over to the next term while *Boykin* was decided on the narrow grounds of an involuntary plea (Mandery, 2013).

⁴ These included standardless sentencing (which was later a critical aspect of the *Furman* ruling) and the need for bifurcated, or two-phase, trials. Some justices, most notably Potter Stewart, advocated deciding the cases on *Witherspoon* grounds, the narrowest option (Mandery, 2013).

Prior to *Maxwell's* reargument, the court underwent critical personnel changes brought on by Chief Justice Earl Warren's retirement. President Johnson initially nominated Justice Abe Fortas to replace him, but after corruption allegations marred Fortas' record, the confirmation process derailed, ultimately leading to Fortas' resignation⁵ (Mandery, 2013). As a result, the nomination of the next chief justice fell to President Richard Nixon, who chose Warren Burger. Burger, whom Nixon saw as a "voice ... of enlightened conservatism," was unsympathetic to criminals and had gained a reputation as a man of law and order (Woodward and Armstrong, 1979, p. 12). With Warren's departure, the court lost perhaps the driving force behind its expansion of civil liberties.

Ultimately, *Maxwell* was decided in favor of the petitioner on *Witherspoon* grounds, implying no loss for the abolition movement but no appreciable gain (Mandery, 2013). In the 1971 term, however, the LDF and its cohorts suffered a crushing setback. In *McGautha v. California* (1971), the court ruled that neither bifurcated trials nor standards for sentencing were mandated by the Constitution. Indeed, Harlan questioned in his opinion for the majority whether the definition of standards for capital sentencing was even possible, given the discretionary nature of the jury system. The ruling was an indication that the court found no constitutional shortcomings related to capital sentencing, and abolitionists feared the moratorium was reaching its end. At the urging of Black, the court accepted four capital appeals—the murder cases *Furman v. Georgia* and *Aikens v. California*⁶ and the rape cases *Branch v. Texas* and *Jackson v. Georgia*—in the next term only to indicate unequivocally that the death penalty was constitutional (Mandery, 2013). Abolitionists' prospects were not helped by additional turnover

⁵ Fortas was eventually replaced in 1970 by Justice Harry Blackmun, who in his first years on the court was a reliable judicial conservative.

⁶ The Supreme Court issued no ruling in *Aikens* because the California Supreme Court declared the death penalty unconstitutional in *People v. Anderson* a few months before the U.S. Supreme Court ruled in *Furman* (Mandery, 2013). This victory, albeit short-lived, likely aided the LDF in the *Furman* cases.

on the court, with Nixon appointees Lewis Powell and William Rehnquist, both reliably conservative, replacing Justices Black and Harlan, respectively.

With little left to lose, Amsterdam framed his briefs in the *Furman* cases around the notion that the death penalty was unconstitutional on the basis of the Eighth and Fourteenth Amendments. Amsterdam characterized the death penalty as “atavistic barbarism ... an extreme and mindless act of savagery, practiced upon an outcast few” (Brief for Petitioner, *Aikens*, 1972). Additionally, Amsterdam introduced a novel distinction between the Eighth and Fourteenth Amendments in his briefs: The Eighth, he argued, is concerned with equitable outcomes, whereas the Fourteenth (which contains the Due Process Clause) guarantees an equitable process. Given the disproportionate rate at which capital punishment was applied to racial minorities and the socioeconomically disadvantaged, it was clear that the Eighth Amendment was being violated, the LDF asserted. Furthermore, Amsterdam wrote, the rampant discretion afforded to the judge and the jury created arbitrariness in sentencing, in violation of the Fourteenth Amendment’s safeguards. Also important in Amsterdam’s argument was *Trop*’s idea of evolving standards of decency giving definition to the Eighth Amendment, rather than rooting the amendment’s meaning in the 200-year-old intentions of the Founding Fathers.

The resulting decision was among the most fragmented in the history of the Supreme Court. Every justice wrote his own opinion, and among the five in the majority, none joined any other’s ruling. Ultimately, the court issued a *per curiam*⁷ opinion declaring that “the imposition and carrying out of the death penalty *in these cases* constitute cruel and unusual punishment,” leaving open the possibility of a constitutional capital punishment statute (*Furman*, 1972, emphasis added). Still, however, one can sort those voting in favor of the petitioner into two distinct camps. Justices William Brennan and Thurgood Marshall deemed capital punishment

⁷ Literally, “for the court.”

unconstitutional in all cases on the basis of evolving standards of decency. Marshall's opinion is notable in that he defined standards as arising from enlightened public opinion, rather than the simple whims of the majority⁸. Furthermore, Marshall questioned the legitimacy of retribution as a goal of punishment and argued that the death penalty served no alternative deterrent purpose. The other three justices in the majority, Potter Stewart, Byron White and William Douglas, found the death penalty unconstitutional in its existing form but not necessarily in all cases. Douglas' opinion focused on the racial and social prejudice endemic in capital sentencing: "[T]he discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised ... and saving those who by social position may be in a more protected position" (*Furman*, 1972). Most vividly, Douglas compared existing death penalty statutes to a hypothetical law mandating that only those "who never went beyond the fifth grade in school, those who made less than \$3,000 a year, or those who were unpopular or unstable should be the only people executed" (*Furman*, 1972). In Douglas' view, capital punishment might be constitutionally permissible if legislatures could resolve the prejudicial sentencing problem. The opinions of Stewart and White, which ultimately became the most significant ones, expressed concern about the unpredictability of capital sentencing and its declining relevance as an effective criminal sanction. Stewart captured the haphazardness of the death penalty best in the most famous sentence of the decision:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

⁸ This idea became known as the "Marshall hypothesis" and was considered at length by Vidmar and Sarat (1976) prior to the court's ruling in *Gregg*.

For White, the unpredictability issue was less significant than the death penalty's efficacy as a deterrent. From his perspective, capital punishment was not applied with sufficient frequency to dissuade would-be murderers and rapists from committing crimes and thus served no worthwhile social purpose: "A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment" (*Furman*, 1972).

Each of the Nixon appointees issued a separate dissent, with each joining every other justice's opinion except for that of Blackmun, which expressed serious moral and political reservations about capital punishment while upholding its constitutional legitimacy. Most significant among the dissents was Burger's, whose fifth section, in a manner wholly atypical of dissenting opinions, offered a sort of remedy for states seeking to reinstate the death penalty according to the concerns outlined in Stewart's and White's opinions. Specifically, Burger noted that "legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed" (*Furman*, 1972). In essence, Burger here suggested that states could implement procedures to guide, and thus limit, the jury's discretion. Many states—most notably Georgia, Florida and Texas—took this suggestion to heart. Burger also described a second solution, albeit with some distaste⁹: "Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge" (*Furman*, 1972). Under this prescription, juries would lack sentencing discretion entirely for some crimes, with first-degree murder, for example, entailing an automatic trip to the execution chamber. Some

⁹ The reason for Burger's distaste is not entirely clear. As Mandery (2013) notes, Burger expressed abhorrence for the death penalty in conference. Alternatively, Burger's revulsion to this solution may stem from his concern about jury nullification, which he mentions in the subsequent sentence. The chief justice's true views on the death penalty remain uncertain, as he swore his clerks to a vow of silence and ordered his papers sealed until 2026.

states—most significantly North Carolina and Louisiana—adopted the mandatory death penalty solution in the wake of *Furman*.

After the Supreme Court’s ruling in *Furman*, death penalty statutes nationwide were nullified, and the more than 600 people awaiting execution rejoiced. The celebrations, however, proved premature: Mere months after *Furman*, states began enacting revised death penalty statutes according to the two models outlined by Burger. Attorneys general from states across the nation met at a conference to formulate capital punishment statutes with standards, which were in part drawn from the Model Penal Code¹⁰ (Mandery, 2013). The conference ended with state attorneys general voting 32-to-1 to urge Congress and states to reenact death penalty codes (Meltsner, 1973). Florida became the first state to enact a new statute, with its governor signing a new capital punishment law only six months after the court issued its ruling (Ehrhardt and Levinson, 1973). Ohio followed one month later (Meltsner, 2013). By 1976, shortly before the Supreme Court heard *Gregg v. Georgia*, thirty-five states and the federal government had approved new capital punishment statutes (*Gregg*, 1976).

National polling indicated similarly rising support for capital punishment among the public. In 1972, just after the court ruled in *Furman*, the Gallup poll reported that 57 percent of Americans favored the death penalty for murder—up from 50 percent only months earlier (Oshinsky, 2010). A 1974 poll placed support at 63 percent, and it continued to rise in subsequent years (Mandery, 2013). Politicians capitalized on this, with even Governor Nelson Rockefeller¹¹ of New York announcing, to immense applause, that his state would act to restore

¹⁰ Released in 1962 by the American Law Institute, the Model Penal Code offered a simple and standardized set of sentencing procedures for various crimes. The death penalty section, which the American Law Institute denoted as optional, urged juries to consider aggravating and mitigating factors in weighing whether to condemn an offender to death (“Criminal Law Web”).

¹¹ As Meltsner (1973) notes, Rockefeller had signed legislation restricting the death penalty to a few serious crimes in 1965.

the death penalty (Meltsner, 1973). Contrary to Amsterdam's contention in *Furman* that the public had repudiated capital punishment as a criminal sanction, Americans now endorsed the death penalty overwhelmingly.

In 1976, the Supreme Court agreed to hear five more death penalty cases¹² to assess the validity of the new statutes. Two of these cases—*Woodson v. North Carolina* and *Roberts v. Louisiana*—concerned mandatory-sentencing regimes, under which a death sentence was required for defendants convicted of various crimes, and the other three—*Jurek v. Texas*¹³, *Proffitt v. Florida* and *Gregg v. Georgia*—involved guided-discretion statutes, which authorized (and sometimes required) a jury to impose a death sentence if a series of conditions were met. The LDF's argument in the *Gregg* cases was similar to that in *Furman*: Amsterdam contended that the death penalty was unconstitutional due to the arbitrariness of its application, which persisted because the wide discretion previously vested in judges and juries simply had been moved to other steps of the process, and, still, because evolving standards of decency rendered capital punishment impermissible. Amsterdam compared capital sentencing to an “insensate lottery,” in which nothing serves “to justify the killing of any particular human being while his undistinguishable counterparts are spared in numbers that attest to our collective abhorrence of what we are doing to an outcast few” (“Brief for Petitioner,” *Jurek*, 1976). In the *Gregg* cases, however, the LDF faced a particularly competent adversary in Solicitor General Robert Bork. In an *amicus curiae* brief, Bork argued that the court could not declare the death penalty unconstitutional without encroaching on the power of the legislature, and, more significantly, he

¹² The Supreme Court also heard *Fowler v. North Carolina* in 1974, but given that the justices declined to issue a ruling and in fact considered almost precisely the same issues in *Woodson v. North Carolina* in 1976, I will omit *Fowler* from this summary for the sake of brevity.

¹³ The extent to which the Texas statute presented guided discretion (as opposed to mandatory sentencing) is dubious. As Mandery (2013) notes, both lawyers from the LDF and several justices felt the questions included in the statute were purely symbolic, with their answers prescribed merely by the fact that the defendant had committed murder. In fact, Justice John Paul Stevens (who in 1976 replaced Justice Douglas) in 2010 told Sandra Day O'Connor that he felt his vote for the state in *Jurek* was his only regret in his decades on the bench (Mandery, 2013).

took the LDF's argument to its logical conclusion: "To the extent [the LDF's argument] is a challenge against discretion in the criminal justice system, the argument assails that discretion as applied to all crimes, whether or not a death penalty results" ("Brief for the United States as Amicus Curiae," *Gregg*, 1976). If the court endorsed the LDF's argument, it would call into question the entirety of the criminal justice system. Amsterdam attempted to counter this during oral argument by asserting that the death penalty differed from other sanctions in both its history and its irreversibility, but few justices were convinced by his reasoning (Mandery, 2013).

The court's rulings in the *Gregg* cases were defined by politics as much as jurisprudence. According to Woodward and Armstrong (1979), Justices Powell, Stewart and the recently appointed John Paul Stevens met to discuss the cases shortly after the court's initial conference. All three justices were uncomfortable with the mandatory sentences imposed under North Carolina's death penalty statute, which the court had tentatively voted to uphold in early talks. Additionally, Powell disliked the Louisiana statute (which Stewart and Stevens supported upholding), and Stewart and Stevens had doubts about Texas' capital punishment law (which Powell felt was constitutional) (Mandery, 2013). Ultimately, the three justices, eventually known as the "troika," agreed to join in invalidating the Louisiana and North Carolina laws while allowing Texas' to stand. The controlling¹⁴ opinions in *Gregg* and *Woodson*, written by Stewart and joined by Powell and Stevens, held that capital sentencing required standards—"the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance"—and that mandatory sentencing was in violation of the Constitution—" [t]he North Carolina statute impermissibly treats all persons

¹⁴ Although an equal number of justices joined White's opinions in each case, scholars generally accept Stewart's as the controlling opinions.

convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty” (*Gregg*, 1976), (*Woodson*, 1976). In the judgment of the court, states whose statutes set forth standards had eliminated the arbitrariness that had plagued capital sentencing only four years previously. The machinery of death was set to resume operation.

In January 1977, Gary Gilmore became the first person executed in the United States in nearly a decade (Mandery, 2013). More than 1,000 others have faced the death penalty since then, and the constitutional legitimacy of the death penalty as a whole has not faced a serious challenge since *Gregg*.

IV. The persistence of arbitrariness in capital sentencing

After *Furman*, capital sentencing underwent few real changes. Indeed, according to Zimring (2005), “[b]ecause the Supreme Court required little more than the formality of written standards, there was soon little substantive difference between the disapproved system in *Furman* and the minimum permissible death penalty allowed under *Gregg* and its progeny” (p. 1409). Accordingly, I find that the supposed safeguards provided for by *Furman* were inadequate in curbing arbitrariness¹⁵ and, further, that the justices upheld capital punishment in *Gregg* due to concerns about court legitimacy rather than satisfaction that the new statutes had resolved the issue of caprice.

In the pre-*Furman* era, capital sentencing was marked by racial prejudice, especially in the South. According to Bowers and Pierce (1980), numerous studies conducted both decades and mere years before *Furman* found widely disparate death-sentencing rates for rape depending

¹⁵ In this paper, “arbitrary sentencing” refers to sentencing that takes into account factors other than those relevant to the legal matter at hand. If black defendants are systematically given harsher sentences than white defendants for the same offense, then that sentencing regime would be considered arbitrary.

on the race of the victim and the offender, with black men who raped white women being condemned to die at a rate far higher than that of white rapists or black rapists with black victims. Specifically, in the period 1945-1965, 39 percent of black-on-white rapes in the South resulted in a death sentence, compared with less than 5 percent of rapes in other racial categories. Bowers and Pierce (1980) found similar results for murder sentencing, with one study showing that 72 percent of blacks who killed whites were sentenced to death while only 31.6 percent of white-on-white murders ended in a capital sentence. In an earlier study reporting similar results, Wolfgang and Riedel (1973) summarize it best: “[B]lacks are disproportionately sentenced to death” (p. 124). Bowers and Pierce (1980) note that class appeared to have a causal effect on death sentencing as well: A 1969 study of prisoners sentenced to death in California found that those on death row overwhelmingly worked in blue-collar professions, and a second study of another jurisdiction found that murders across class lines were more likely to result in a death sentence for less affluent offenders. All of this suggests judges and juries considered factors beyond the facts of a given case in assigning a sentence in the pre-*Furman* era.

In the years between *Furman* and *Gregg*, sentencing remained capricious and discriminatory under both mandatory-sentencing and guided-discretion regimes enacted to satisfy *Furman*'s requirements. According to Riedel (1975), mandatory-sentencing schemes simply result in a larger number of commutations, and these commutations are overwhelmingly granted to whites—in other words, commutations were granted in an apparently arbitrary fashion. This certainly was the case in North Carolina, and the court was aware of it. During oral argument in the 1974 case *Fowler v. North Carolina*, Amsterdam presented statistics indicating that two-thirds of those sentenced to death in North Carolina had their sentences commuted (Mandery, 2013). Furthermore, in the same case, Marshall questioned North Carolina's deputy

attorney general about whether an executive had ever granted clemency to a black man condemned to die. The deputy attorney general responded that that had never happened (Mandery, 2013). Additionally, Riedel (1975) also argues that post-*Furman* guided-discretion statutes “were enacted ... with little concern for their effectiveness or consequences” (p. 269). Perhaps as a result, racial disparities in sentencing did not decline but expanded under post-*Furman* statutes, with 62 percent of those executed being of color, as compared with 53 percent prior to the imposition of the new laws (Riedel, 1975). Evidently—and according to information available to the justices when *Gregg* was decided—neither of the revised death penalty sentencing schemes succeeding in curbing arbitrariness.

Finally, reading of each affirming opinion¹⁶ in *Gregg* indicates that the court had motivations in mind other than whether discretion had been adequately controlled in determining the death penalty’s constitutionality. Indeed, Stewart’s first argument in his controlling opinion concerned not whether Georgia and the other states with guided-discretion statutes had sufficiently curbed arbitrariness but rather whether the court was performing actions outside its prescribed duty: “[W]hile we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators” (*Gregg*, 1976). Stewart went on to advocate restrictions on courts’ judgment, writing that “[c]ourts are not representative bodies” and that “they are not designed to be a good reflex of a democratic society” (*Gregg*, 1976). Rather, this purpose is left to the legislatures, which by nature are majoritarian and capture the popular will better than any unelected body. By prohibiting infliction of the death penalty in *Furman*, the Supreme Court overstepped its role, according to Stewart, and, implicitly,

¹⁶ I omit a discussion of Justice Blackmun’s brief concurrence because it simply refers readers to his dissent in *Furman*, which, while concerned with the court’s proper role, says little that is not covered in Stewart’s and White’s more robust concurrences and devotes much of its space to expressing Blackmun’s acute personal distaste for capital punishment.

its legitimacy suffered as a result. One might perceive Stewart's decidedly deprecatory remarks as a retreat from the court attempting to effect an unpopular social change in favor of deference to popularly elected institutions. Bork devoted much of his argument to describing limits on the court's functioning, and this line of reasoning apparently resonated with Stewart and the remainder of the troika ("Brief for the United States as Amicus Curiae," *Gregg*, 1976). Stewart also cited the passage of various death penalty statutes and juries' willingness to continue to impose the death penalty as an indication that the court misread public sentiment in *Furman* and thus should not attempt to act as a popular body (*Gregg*, 1976). Significantly, whether the court had overstepped by performing the role of the legislature was not one of the questions under consideration in any of the cases. By contrast, Stewart devoted only one section of his opinion to whether the guided-discretion statutes passed constitutional muster. In the first, he argued for the necessity of standards, and in the second, he tersely countered each of Amsterdam's arguments (*Gregg*, 1976). Absent was the grandiose language of the first few sections, in which Stewart outlined the proper role of the court. One might even conclude that the main point of Stewart's opinion was that the court should not improperly act as the legislature, not that guided-discretion death penalty statutes are constitutionally permissible.

Justice White's concurrence, joined by Burger and Rehnquist, placed greater emphasis on the constitutionality of the statutes under consideration, but it also devoted space to the paradigm of the Supreme Court's proper role¹⁷. White's primary argument in this regard was that the death penalty had been a legitimate part of American criminal justice since the nation's birth and that it was not the place of the court but of the legislature to determine whether it was obsolete (*Roberts*, 1976). Like Stewart, White also cited the zeal with which states and the federal

¹⁷ In his *Gregg* concurrence, White directs readers to his dissent in *Roberts v. Louisiana*. Thus, I cite *Roberts* here rather than *Gregg*.

government implemented new capital punishment statutes: “I cannot say that capital punishment has been rejected by or is offensive to the prevailing attitudes and moral presuppositions in the United States” (*Roberts*, 1976). White went further, interpreting the legislatures’ actions as an assertion that life imprisonment is an inadequate punishment in the eyes of the people, and he questioned whether it was the court’s role to determine the acceptability of this stance. Finally, he subtly alluded to what one might interpret as concerns about the court’s legitimacy, arguing that “it would be neither a proper or *wise* exercise of the power of judicial review to refuse to accept the reasonable conclusions of Congress and thirty-five state legislatures” (*Roberts*, 1976, emphasis added). “Proper” captures White’s conception of the court’s role, but the justice offered no specific explanation for the inclusion of the word “wise” in this excerpt. As a frequent dissenter in the Warren Court’s far-reaching expansions of civil liberties, White certainly was concerned about the legitimacy of the Supreme Court in the eyes of the public (Stith-Cabranes, 2003). Thus, in questioning the wisdom of the court doubting the validity of legislatures’ actions, White may have been emphasizing the importance of judicial deference as a contributor to legitimacy.

V. Analyzing *Gregg* according to the legitimacy account model

Unfortunately, a complete dataset measuring public confidence in the court is unavailable for the entirety of the pre-*Furman* era, as the Harris poll began asking relevant questions in 1966 and neglected to do so between 1969 and 1971 (Caldeira, 1986). Caldeira (1986), however, provides a graph tracking changes from 1966 to 1968 and 1971 to 1986¹⁸. Specifically, Caldeira (1986) reports the percentage of Americans expressing “great confidence” in the Supreme Court,

¹⁸ Caldeira (1986) also offers a structural explanation for what affects public confidence in the court. While his findings inform my own, I opt to take an approach more concerned with specific cases than general trends.

excluding from his graph the percentage of those expressing only “some support.” I attempt to offer a causal analysis to complement his data. For years before 1966¹⁹, I simply aim to identify deposits and withdrawals from the legitimacy account without considering overall levels of public sentiment regarding the court’s authority. I begin this section with an analysis of the Warren Court’s rulings of the 1960s, and I proceed to consider cases in a chronological fashion up to 1978’s *Regents of the University of California v. Bakke*²⁰. I make an exception to this chronological narrative to discuss the Warren Court’s rulings relating to criminal justice for the sake of cohesion, as public opinion regarding the judiciary’s handling of criminals changed relatively little throughout the period under consideration (Erskine, 1974).

As Caldeira (1986) indicates, the Warren Court of 1966 enjoyed public confidence of about 50 percent, a rate unmatched throughout the era Caldeira’s paper covers. In light of the decidedly activist nature of the Warren Court, this might be surprising. One would expect far lower confidence, given the Warren majority’s tendency toward legitimacy withdrawals. I posit, however, that the Warren Court simply depleted the vast legitimacy stores amassed during the seven-year Vinson Court. Indeed, under Chief Justice Fred Vinson, the Supreme Court issued few rulings contrary to public values, with perhaps the notable exception of a few decisions regarding racial segregation that served as precursors to the more sweeping antidiscrimination rulings delivered by the Warren Court (Frank, 1954). More significant, I argue, is the precipitous

¹⁹ I try to limit my analysis of this span for the sake of precision, but given the Warren Court’s tendency toward great legitimacy withdrawals, omitting years before 1966 from my analysis would provide an incomplete picture of the pre-*Furman* era.

²⁰ Given the profusion of cases that appear before the Supreme Court in any given term (and, as Mandery (2013) notes, during the Warren Court in particular), I will limit my analysis to landmark rulings, which I will choose on the basis of the reaction elicited among the public or strong public sentiment regarding the issue at hand. I omit *Brown*, which undeniably proved divisive among the public, in part due to the discussion in my methodology section and in part because, for the purpose of brevity, I confine my analysis’s earliest point to the 1960s. I end with *Bakke* because of the severe economic instability that began in 1979 (for a more thorough discussion of this, see footnote 33).

decline that Caldeira (1986) finds between 1966 and 1967, which appears to have continued until 1971, the third year of the Burger Court.

I begin my analysis with 1962's *Engel v. Vitale*, in which the court ruled prayer in public school unconstitutional. In a strongly worded opinion, Justice Black condemned codification of religion, comparing New York's encouraging schoolchildren to recite a prayer each day to the archaic British law that "caused many of our early colonists to leave England and seek religious freedom in America" (*Engel*, 1962). Intense public condemnation immediately followed. In the days after the ruling, newspapers nationwide denounced the organized-prayer ban in editorials²¹. The Wall Street Journal argued in an editorial that the decision was a slippery slope that would lead to a complete divorce of God and the public sphere, resulting in a loss of American culture, and the Los Angeles Times' editorial board vividly described the ruling as "mak[ing] a burlesque of the world's first complete declaration of religious toleration" ("In the Name of Freedom," 1962), ("A Very Upsetting Little Prayer," 1962). Members of the public dissented overwhelmingly as well, sending letters to the Supreme Court condemning the decision ("Mail Pours Into Court On Its Prayer Decision," 1962). Some school district superintendents announced their intention to ignore the ruling altogether (Lewis, 1962). Adams (1975) notes that about three-fourths of Americans favored prayer in public schools in 1964, and there is no reason to believe support was lower when *Engel* was issued. Clearly, the ruling was entirely contrary to public sentiment and should be characterized as a significant withdrawal from the court's legitimacy account.

The following year, the Warren Court depleted its legitimacy store further in *Abington School District v. Schempp*, which held that school-sanctioned Bible-reading was

²¹ Among national newspapers, a notable exception to the general pattern of disapproval is the New York Times, which in an editorial applauded the court's ruling ("Prayer Is Personal," 1962). This is unsurprising, however: According to Puglisi (2011), the newspaper has long had a leftward bent.

unconstitutional. Notably, however, the public's reaction was tempered relative to that to the *Engel* ruling. Again, most newspaper editorial boards stated disagreement with the decision, but they did so in less violent language than in the previous year. The Chicago Tribune's editorial board expressed greater concern with the majority's opinion's language comparing Bible-reading to "a raging tyrant" than with the thrust of the opinion itself ("School Prayer Is Out," 1963). Surprisingly, most religious leaders supported the decision on the basis that it encouraged parents to take responsibility for their children's religious education (Stern, 1963). Nevertheless, strong negative reaction occurred, with some schools defying the ban and one official calling the ruling "another step toward the elimination of God from all public American life" ("Schools Defy Court Ban on Bible Reading," 1963), (Hechinger, 1963). Given that opposition outweighed support for the *Abington* decision, it is fair to characterize the ruling as a moderate withdrawal from the legitimacy account.

Although the Warren Court primarily did away with the legitimacy apparently amassed during Vinson's term as chief justice, some of its expansions of civil liberties found widespread endorsement among the public and thus augmented the "value" in the legitimacy account. The 1965 ruling *Griswold v. Connecticut*, which invalidated any statute barring the use of contraception, is one such example²². Part of this may be due to Justice Douglas' framing of the issue in his opinion for the majority: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship" (*Griswold*, 1965). As Ingber (1981) notes, conjuring the image of law enforcement stampeding into the bedroom of a married couple overwhelmed the impulse to oppose any action by the Supreme Court to interfere with

²² The existence of such aberrations from the Warren Court's typically countermajoritarian rulings might explain both the high level of public regard in 1966 (at a peak of 50 percent confidence) and the declining rate at which confidence declined after 1967.

activity typically reserved for the legislature, and available barometers of public opinion reflect this. In an editorial titled “Marital Privacy” (1965), the editorial board of the Washington Post lauded the court’s decision, calling the Connecticut statute “an intrusion of official authority into the most private aspect of the marital relationship.” Significantly, the editorial also acknowledges that the court acted as the legislature should have in this situation, but the editors find such overstepping of authority inoffensive in this case—when the court acts in accordance with public values, citizens care little about whether it does the work rightfully the responsibility of elected representatives. A collection of editorial excerpts in the New York Times further attests to widespread support for *Griswold*; only a Catholic newspaper voiced opposition to the ruling on the basis of its content²³ (“Opinion: at Home and Abroad,” 1965). Even non-Catholic Christian groups were in favor of constitutionally protecting the use of birth control, although in some cases disagreeing with the court’s precise reasoning (“Court Criticized on Birth Control,” 1965). Given the evident level of public support (and the accompanying lack of resistance) for *Griswold*, one could characterize it as a boon to the Supreme Court’s legitimacy endowment, in part offsetting the withdrawals of *Engel* and *Abington*.

Whatever legitimacy the Warren Court gained in *Griswold* took a blow after the court struck down anti-miscegenation laws in *Loving v. Virginia* in 1967—at least in the South. According to Erskine (1973)²⁴, white nationwide were overwhelmingly uncomfortable with interracial marriage in the 1960s and 1970s, with 90 percent of respondents to the 1967 Harris poll answering that they would be concerned in the event that one of their children dated a black

²³ An excerpt from the Boston Herald questions the majority opinion’s jurisprudence (namely, questioning the existence of a constitutionally guaranteed “right to privacy,” but from the single sentence presented in the Times, one cannot conclude that the newspaper abhors the decision on substantive grounds.

²⁴ One might wonder why I primarily use statistical data to describe sentiment regarding *Loving* rather than newspaper content, as I do for the previously covered cases. This is so because I find only available news content—favorably bent articles and supportive editorials—unrepresentative of public opinion, given the strongly negative attitude toward interracial marriage evinced by contemporary polls. Furthermore, unlike in the *Furman* aftermath, no dramatic shift in sentiment occurred (Erskine, 1974).

youth. While strong in the North, distaste for biracial relations was even more pronounced in the South, where 79 percent of those surveyed in 1964 expressed support for anti-miscegenation laws²⁵ (Erskine, 1973). Legislative activity attests to this support: On the eve of the *Loving* decision, 16 states had anti-miscegenation statutes in effect, and many remained on the books (although unenforced) for decades after the ruling (Pratt, 1997). Surprisingly, however, little visible resistance to the *Loving* ruling occurred. Editorials in the *New York Times*, the *Chicago Daily Defender*²⁶ and other national newspapers hailed the decision as a victory for the “right to marry,” and no significant legislative effort to reinstate laws barring biracial marriage was mounted (“The Right to Marry,” 1967), (“Mixed Marriage,” 1967). Despite the lack of an explosive public reaction to the court’s decision, however, it is reasonable to categorize it as a legitimacy withdrawal due to the marked opposition to mixed-race unions among whites nationwide.

Also significant during the Warren years was the court’s expansion of the rights of those accused of crimes. Although the Warren Court considered an array of criminal cases, I limit my analysis to *Miranda v. Arizona* and *Terry v. Ohio* for the sake of brevity. During the 1960s, the crime rate skyrocketed. In 1965, 48 percent of Americans attributed some of the rise to the leniency of the courts in criminal matters, and by the 1970s, this figure had climbed to about 75 percent (Erskine, 1974). Social leaders, including then-American Bar Association President Lewis Powell, called for the judiciary to impose harsher sentences on offenders, and police departments urged the public to advocate for stricter enforcement of the law in the courts (Asbury, 1965), (Mandel, 1965). Thus, it comes as no surprise that 1966’s *Miranda* ruling—

²⁵ In the North, 53 percent of respondents supported laws forbidding interracial marriage.

²⁶ Curiously, the *Chicago Daily Defender* devotes a large portion of its editorial to assuaging racists’ fears that interracial marriage suddenly will become usual, presenting evidence that couples tend to be of a single race even when law permits biracial unions.

which prohibited police from using confessions obtained during questioning without an attorney present—was unpopular among the public. An article in the *New York Times* states that Americans opposed the court's restrictions by a margin of two to one, and in 1969, 51 percent of Americans cited the court's expansion of the rights of the accused (including those enumerated in *Miranda*) as a "major cause" of rising crime ("63% in Gallup Poll Think Courts Are Too Lenient on Criminals," 1968), (Erskine, 1974). The *Miranda* decision clearly contradicted public opinion, so it is fair to characterize it as significantly depleting the legitimacy store.

Terry v. Ohio, on the contrary, is a deposit in the account, albeit on a smaller scale than the withdrawal effected by *Miranda*. In *Terry*, decided near the end of the Warren Court, the justices upheld the constitutionality of the police practice of stopping and frisking people without probable cause, provided the officer in question has an articulable suspicion to justify it. In an editorial, the *Chicago Tribune's* editorial board lauded the decision as "tak[ing] the issue out of the realm of partisanship," in the process encouraging city lawmakers to pursue the implementation of such a policy in Chicago ("An Issue Beyond Partisanship," 1968). Also notable is that the editorial evaluates public support: The Democratic Party had long supported stop-and-frisk policies in Chicago, and the city's leaders were almost all Democrats. While the *Tribune* speaks only for Chicago, if Erskine's (1974) data are reliable indicators, most Americans would regard *Terry* as a step in the right direction. Thus, *Terry* represents a legitimacy deposit.

As the preceding analyses indicate, the Warren Court primarily diminished the high court's legitimacy store via its sweeping expansions of civil liberties. As Caldeira (1986) indicates, the first years of the more conservative Burger Court were characterized by similar legitimacy losses, perhaps due to voting that more closely resembled the Warren Court's final

years. Indeed, Chief Justice Burger's first terms were marked by decisions mandating faster desegregation (most notably *Swann v. Charlotte-Mecklenburg Board of Education*, which upheld highly unpopular busing programs). The Burger Court further compromised its legitimacy by calling into question the validity of the death penalty (*Furman*) and protecting women's right to abortion (*Roe v. Wade*). The 1974 case *United States v. Nixon*, which essentially prompted the president to resign in the aftermath of the Watergate scandal, bolstered the court's public standing, but these gains were short-lived, perhaps due to the fiery backlash *Roe* inspired (Caldeira, 1986). By *Gregg*, public regard for the court had reached a trough, and, as discussed at length above, I posit that the court's ruling in that case was partially a result of its concern for its public legitimacy.

My analysis of the Burger Court begins with 1969's *Alexander v. Holmes County Board of Education*, in which the court, after considerable internal turmoil, issued a unanimous ruling ordering southern schools to desegregate immediately (Woodward and Armstrong, 1979). In a powerfully worded *per curiam* opinion, the court declared that "allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible" and that desegregation had to proceed "at once" (*Alexander*, 1969). Anger, especially in the South, was palpable. Mississippi Governor John Bell Williams said his state's schoolchildren had been "offered as sacrificial lambs on the altar of social experimentation, and the state's attorney general frantically searched for legal weaknesses in the court's ruling (Milius, 1969). School officials were shocked and incensed by the decision, and Louisiana Governor John McKeithen challenged the federal government to send marshals to compel him to comply ("Court Order Stuns South School Heads," 1969). Louisiana officials filed an unsuccessful appeal for a hearing before the Supreme Court, and a Virginia judge rebuffed the ruling's validity ("High Court Denies Louisianans'

Plea,” 1969), (“Norfolk Desegregation Hearings to Continue,” 1969). Meanwhile, private actors waged their own battle against the ruling: Concerned white parents moved their children out of public schools and into the spate of newly opened private schools, where segregation continued to reign (Graham, 1969). Clearly, the court’s decision faced animosity and even resistance across the South. Thus, one can categorize the *Alexander* ruling as a significant withdrawal, at least in that region, and the legitimacy losses incurred during the Warren Court continued.

The court issued an even less popular ruling during the 1971 term in *Swann v. Charlotte-Mecklenburg Board of Education*, which, as mentioned above, upheld the constitutionality of busing. Unlike *Alexander*, which faced opposition almost exclusively in the South, *Swann* drew consternation from districts and parents on both sides of the Mason-Dixon line. Indeed, the 1971 Gallup poll found that 76 percent of Americans opposed busing of both white and black children, with little variation in opposition even across regions (Gallup, 1971). Even a plurality (47 percent) of blacks opposed busing, Gallup (1971) found. As one might conclude from these figures, reactions were widespread and prompt. The parents of some 1,000 elementary school students in Richmond, Virginia, declined to send their children to school in the wake of the ruling, and school bus drivers threatened to strike. As the Ku Klux Klan launched a new membership campaign, one parent wrote a letter to the editor including the ominous phrase, “We have just begun to fight” (Wooten, 1971). Residents of Richmond and elsewhere flooded school offices with calls about busing, asking questions and condemning the policies *Swann* mandated (“Busing Order Triggers Flood of Va. Phone Calls,” 1971).irate parents picketed outside of the Supreme Court, and two black educators decried the decision on the basis that it would create divisions among members of the black community and would harm the cause of the Civil Rights Movement as a whole (Milius, 1971), (“2 educators rap busing edict,” 1971). Even the Chinese

community in San Francisco, not typically associated with the civil rights struggles of the 1960s and 1970s, vocally opposed the ruling, unsuccessfully petitioning the Supreme Court to allow Chinese children to remain in their neighborhood schools (“Chinese Ask Court To Bar Busing Plan For San Francisco,” 1971). From all of the above, one might conclude that *Swann* was not particularly popular among any group. Meanwhile, this was exacerbated by the resulting invalidation of anti-busing laws, which some perceived as the court intruding in affairs that were rightfully the business of the legislature. Senator James Eastland of Mississippi, an outspoken opponent of busing and racial integration as a whole, condemned the ruling as “giv[ing] an all-powerful federal judiciary an unrestricted license to impose burdens on southern schools” (“South Stirred by Busing Rule,” 1971). *Swann* evidently hurt the court’s legitimacy nationwide. It is in this atmosphere, with public confidence in the Supreme Court at one of its lowest points on record, that the high court ruled in *Furman*.

Furman presents an interesting case in that while it certainly weakened the court’s standing in the long run, the justices had no reason to expect this would be the case. As Vidmar and Ellsworth (1974) note, only 50 percent of Americans expressed support for capital punishment in 1972—a tepid showing indicative of death’s declining viability as a criminal sanction, one might conclude. Thus, one could argue that part of the court’s reasoning in invalidating capital punishment was that it would trigger a much needed legitimacy infusion. As Mandery (2013) notes, however, Gallup and other polls reported sharp rises in support for the death penalty shortly after the court’s ruling. Political scorn also followed. Louisiana Lieutenant Governor Winfield Dunn called *Furman* “a license for anarchy, rape and murder,” and Alabama Lieutenant Governor Jere Beasley said the justices voting to invalidate the death penalty had “lost touch with the real world” (Mintz, 1972). Reporting on the celebrations of death row

inmates likely did not help matters (“Protests by Lawmen: Death Rows Cheer Ruling,” 1972). Mintz (1972) also described Ronald Reagan, then California’s governor, urging California voters in 1972 to support Proposition 17, which would amend California’s constitution to invalidate the state supreme court’s death penalty ban and declare in explicit language that capital punishment was not cruel or unusual. As further indication of shifting public opinion on the death penalty, Proposition 17 passed with 67.5 percent of the vote (Mandery, 2013). *Furman* could easily be categorized as a legitimacy withdrawal, albeit perhaps an unexpected one, given public sentiment just before the release of the decision.

Curiously, however, Caldeira’s (1986) graph shows rising regard for the court between 1972 and 1973²⁷. As Caldeira (1986) suggests, some of this may be due to factors exogenous to the court, such as the state of the economy (which grew at a more-than-healthy rate of 5.5 percent in 1972) or President Nixon’s approval rating (which stood at more than 60 percent just before his landslide victory in the 1972 general election). Given the strength of both of the aforementioned factors, one might expect more than 33 percent of Gallup respondents to voice great confidence in the Supreme Court in 1973, so one could argue that public distaste for *Furman* blunted the legitimacy deposits these exogenous factors provided. Additionally, a series of deposits in the form of rulings favorable to the majority of the public may have bolstered the court’s legitimacy to offset *Furman*. In 1971, in *New York Times Co. v. United States*, the court upheld the ability of the New York Times and the Washington Post to publish the Pentagon Papers, contrary to Nixon’s claims of executive authority to prevent it. Such a ruling is consistent with public values—according to Immerwahr and Doble (1982), Americans oppose censorship on the basis that content is unflattering to the government by a ratio of two to one—so it is fair to

²⁷ Confidence in the court grew more significantly between 1971 and 1972, but the data upon which Caldeira’s (1986) analysis is based were gathered prior to *Furman*. The increase between 1972 and 1973 is much smaller, and approval flattened in the subsequent year.

consider *New York Times Co.* a significant legitimacy deposit. The court's ruling in *Eisenstadt v. Baird* (1972), which expanded the result of 1965's *Griswold* decision to unmarried couples, also met favorable reception and added to the legitimacy account. Thus, one could reasonably assume that the effect of these decisions and others aligned with the public consciousness in part mitigated the strong negative effect of *Furman*.

In 1973, the court ruled in what was perhaps the most controversial case of the period under consideration. In *Roe v. Wade*, Justice Blackmun, writing for the majority, declared laws prohibiting abortion except in the case when the mother's life is at risk unconstitutional, offering a definition for the legal beginning of life in the process. Describing the ruling as polarizing would be an understatement. According to De Boer (1977), the Harris poll reported nearly even distribution among supporters and opponents of *Roe* in 1972²⁸, with a slightly greater proportion opposed. In April of 1973, in the first Harris poll conducted after *Roe*, this had shifted somewhat in favor of abortion-rights supporters, but sizable opposition remained. Those critical of *Roe* were particularly vociferous, in large part due to the vehement condemnation of the Catholic Church. A prominent Philadelphia cardinal said the ruling "opened the door to the greatest slaughter of innocent life in the history of mankind," and his strong language was by no means atypical among Catholic leaders (Page, 1973). Outspoken opposition was not confined to moral concerns arising from Catholicism, either. Columnists and academicians took issue with the Supreme Court's intrusion into matters they felt were better left to the legislature, and others found Blackmun's attempt to define the start of life and personhood troubling (Degnan, 1973), (Chamberlain, 1973). Letters to the editor abhorred the decision on both moral and

²⁸ Asking this question prior to the release of the ruling was possible because *Roe* initially appeared before the Supreme Court in 1971 and was reargued the following year before the decision finally was issued in January of 1973.

jurisprudential grounds²⁹, with one comparing *Roe* to the infamous *Dred Scott* decision, which gave constitutional legitimacy to slavery in the mid-1800s (McCourt, 1973), (Robinson, 1973).

Roe differs from other cases of the period under consideration here in that it created a significant divide even in the academic community, which, as mentioned above, was mostly unified in support of the court's ruling in *Furman*. In what is perhaps the most cited work on *Roe*, Yale constitutional law scholar John Hart Ely (1973) condemned the decision as based in something other than constitutional doctrine due to its supposed fabrication of a right to privacy, which, he argued, was not the place of the Supreme Court to create. Others, such as Rice (1973) opposed *Roe* on moral grounds, in a manner similar to that of the Catholic Church. On the other side, supporters offered arguments in favor of *Roe* with similar central rationales. Georgius (1974), for example, suggested that inhibiting a woman's access to abortion was reprehensible for moral reasons, as doing so infringes on her control over her person. Moreover, Cane's (1973) reasoning is similar to that of Ely, although she instead concluded that a constitutional right to privacy does exist, given the abundance of scholarship devoted to the matter. The fissure in the academic community further illustrates the polarizing nature of *Roe*.

Although *Roe* certainly should be categorized as a legitimacy withdrawal, Caldeira's (1986) graph shows only a weak decline in confidence in the court in 1973. This might be due to strong, if mostly unspoken, support for the ruling to match the vocal opposition. Also possible—and perhaps more likely—is that the fallout from *Roe* was delayed due to the court's ruling in *United States v. Nixon* (1974), in which the court dismissed President Nixon's claim of executive privilege and ordered him to release critical evidence to the special prosecutor in the wake of the Watergate scandal: "The generalized assertion of privilege must yield to the demonstrated,

²⁹ One should note that those in agreement with the decision wrote to newspapers as well, but letters from the opposition were more common and usually more vivid.

specific need for evidence in a pending criminal trial.” The court’s curbing of the embattled executive’s power was immensely popular, and it directly caused the pronounced—and short-lived—spike in the court’s legitimacy in 1974 (Caldeira, 1986). Confidence declined precipitously afterward, and one could posit that this still was a result of *Roe*, given the case’s heated controversy. Attesting to this is the case’s continuing influence in 1976: An article in the Los Angeles Times quoted a justice as saying that the Supreme Court still received vast quantities of mail regarding *Roe*, and the abortion issue loomed over numerous political races as the general election approached (Mathews, 1976). It is thus reasonable to attribute the court’s legitimacy struggles of the mid-1970s to *Roe*’s fallout.

Confidence eventually settled at a trough of about 28 percent in 1975 (Caldeira, 1986). Perhaps due to the justices’ concerns about legitimacy, the court issued a series of rulings more aligned with public opinion (with a few exceptions) for the remainder of the 1970s. Indeed, even contemporary observers noticed this trend. In a 1976 article in the Chicago Tribune, columnist Glen Elsasser noted how the Burger Court’s decisions “lack the sweep” of the Warren era, and he went on to detail how the court’s rulings had largely come to mirror public preferences. Thus, I characterize *Gregg* as one of many cases in which the court placed legitimacy at the forefront of its decision-making process.

The Supreme Court’s first critical ruling of this period was in *Buckley v. Valeo* (1976), which limited individuals’ political campaign donations while removing restrictions on total spending by candidates. Although newspapers’ editorial boards³⁰ attacked the decision as anathema to fairness in politics, Persily and Lammie (2004) suggest the public felt otherwise, noting that the justices expressed particular concern with the appearance of corruption arising

³⁰ Particularly notable (and prescient of objections to 2010’s *Citizens United v. FEC*), the New York Times chided the court for legitimizing the “dubious notion” that money was equivalent to speech (“Divided Judgment...,” 1976).

from immense campaign contributions, rather than just the existence of it. Persily and Lammie (2004) also describe public sentiment regarding campaign finance prior to *Buckley*, and prominent among opinions is preoccupation with the size of contributions and the corruption that, in the eyes of the public, results. In upholding individual limits while framing the decision as a whole as a defense of freedom of speech, the court made a deposit in its legitimacy account, and Caldeira's (1986) graph indicates the effect, showing a sharp increase in court confidence in early 1976³¹.

The court's next deposit occurred in *Gregg*, which proved more divisive than *Buckley*, perhaps due to its greater comprehensibility to the average citizen. Indeed, in the months after *Gregg*, advocates for both sides took to the newspapers, writing columns and letters attacking and commending the Supreme Court. The Chicago Tribune's editorial board demonstrated particularly strong support for *Gregg*, publishing three editorials in the six months after the ruling in praise of the justices' reasoning ("So the death penalty is legal," 1976), ("Weighing the death penalty," 1976), ("A good Supreme Court," 1976). In the most vociferous of these, which was published closest to the release of the decision, the Tribune's editors supported the court's ruling on the basis of the rising crime rate³² and urged states not only to restore the death penalty but also to resume administering it ("So the death penalty is legal," 1976). Pat Buchanan (1976) hailed the return of the death penalty as a "symptom of society regaining its health" in an op-ed in the Tribune, and he declared that the burden of proof regarding deterrence was on the doubters, not the state. The public appeared to endorse this sentiment: According to Sarat and

³¹ The *Buckley* ruling was issued in January of 1976, so it is reasonable to factor it into perceptions of court legitimacy in that year's first polls.

³² Mandery (2013) and others convincingly question the validity of this argument, which was common among the public, on the grounds that the crime rate was rising sharply even before the launch of the moratorium strategy, but the public's belief that the death penalty deters crime is more important to this paper than the true cause of the crime spike.

Vidmar (1976), well over 60 percent of Americans favored reimplementation of capital punishment in 1976. Additionally, most of those polled expressed distaste for mandatory application of the death penalty, indicating that the court's ruling in *Woodson* was a legitimacy deposit in spite of the curbs it placed in capital punishment (Sarat and Vidmar, 1976).

As noted above, support for *Gregg* was not total nationwide. Vocal death penalty opponents wrote letters and editorials as well, with the New York Times and the Los Angeles Times³³ being their primary outlets. The latter newspaper is particularly interesting in that it served as a sort of forum for those on both sides of the issue in a state whose death penalty statute's legitimacy remained uncertain. Abolitionists' arguments primarily focused on the dubiousness of the death penalty's deterrent value. One Los Angeles Times columnist argued that murderers were created by their environments and that their behavior was thus beyond the reach of criminal sanctions (Kerby, 1976). Another writer chided the U.S. Supreme Court for making a regressive decision when, in the Warren era, the court had been an effective leader of social change (Lewin, 1976). The Los Angeles Times published a series of opposing opinions as well. A sheriff cited the lack of capital punishment as the reason for a surge in the murder rate in rural California, in particular arguing for the imposition of the death penalty for a set of crimes including murder for hire and murder of a police officer (Gates, 1976). In a separate article, the Los Angeles police chief said the unavailability of the death penalty was a blow to his department's "ability to control the criminally violent" (Blake, 1976). Clearly, divisions existed after *Gregg*. One should characterize the ruling as an immense legitimacy deposit, however, as a

³³ The prominence of abolitionists in the Los Angeles Times might be somewhat surprising, as California voters overwhelmingly approved the constitutional amendment guaranteeing the viability of capital punishment in 1972. It likely was a result of the Supreme Court's continued hearings on the death penalty and its eventual vote to re-abolish it on the grounds that it was still cruel and unusual in December (Skelton, 1972). The state's death penalty statute finally passed court muster in 1978.

majority of the nation supported capital punishment, and Caldeira's (1986) chart supports this hypothesis.

The gains following *Gregg*, however, proved to be short-lived. As Caldeira (1986) indicates, public confidence in the Supreme Court spiked in 1977, rising to its highest level since *United States v. Nixon*. Before the year was over, those gains had disappeared, and the legitimacy of the judiciary began a plunge even larger than its post-*Gregg* swell. Attributing this to external factors is somewhat dubious, as President Carter enjoyed healthy approval ratings above 60 percent for a near entirety of 1977, and the economy grew by a strong 4.6 percent. Concerns regarding inflation, which climbed at a worrisome 6.4 percent in 1977, may have dampened economic confidence—and thus confidence in the court—somewhat, but, given that inflation had fallen from 11 percent only three years prior, it is unlikely that the 1977 rate had outside influence on public perception on government as a whole³⁴. More probable is that the court's ruling in *Coker v. Georgia* (1977), which ruled out the imposition of the death penalty for rape, depleted the legitimacy store. The 1973 Harris poll attests to this, reporting that 69 percent of Americans supported capital punishment for rape under some circumstances, and there is no reason to believe opinion shifted toward opposition in the years preceding *Coker* (Vidmar and Ellsworth, 1974). *National Socialist Party of America v. Village of Skokie*³⁵ (1977), in which the Supreme Court reversed an Illinois Supreme Court decision that would have prohibited the Nazi Party from marching in a predominantly Jewish suburb, also may have contributed to 1977's confidence decline. Letters to the editor in various publications support this, with one in the

³⁴ One could argue that the effect of inflation is different in the years after my period of analysis. Inflation skyrocketed after 1977, reaching an astronomical peak of 13.5 percent in 1980 and leading policymakers and citizens alike to worry. Ultimately, a Federal Reserve-induced recession was necessary to curb the devaluation of the currency, and confidence in government as a whole (perhaps best captured by Caldeira's (1986) chart and Carter's plummeting approval rating) resulted.

³⁵ Abbreviated as *NSPA* in subsequent references.

Chicago Tribune calling the court's ruling an "abomination" of the body's purpose of protecting the people (Yelich, 1977). Additionally, the ACLU, which represented the Nazi Party, lost 2,000 members as a result of its role, indicating violent distaste for the notion of protecting the Nazis' rights even among those most in favor of unrestricted free speech (Kneeland, 1977). Still, the legitimacy withdrawals of 1977 present an aberration in an era otherwise characterized by deposits, perhaps because the justices incorrectly posited that the legitimacy amassed in *Gregg* and, less significantly, *Buckley* was sufficient to offset the losses brought on by *Coker* and *NSPA*.

The court's ruling in *Regents of the University of California v. Bakke* (1978) in the following year indicates the justices were aware of their miscalculation, as its result satisfied parties on either side of the affirmative action debate. Indeed, as the Wall Street Journal noted in a headline on the front page on the day after the ruling, *Bakke* was a "Decision Everyone Won" (Falk and Lehner, 1978). This was so because the court struck down the aspect of affirmative action programs most loathsome to opponents while upholding the provisions dearest to affirmative action advocates. The facts of *Bakke* were straightforward. Bakke, a white man, sued after being denied admission UC Davis Medical School. He argued that he had been rejected due to UC Davis' affirmative action program, which reserved sixteen out of one hundred seats in each entering class for minority applicants—in essence, UC Davis practiced a quota system. In his controlling opinion for a fractured court, Justice Powell ordered Bakke admitted, striking down quota-based affirmative action programs in the process while upholding organizations' ability to consider criteria such as race in admissions or hiring.

As one might expect in the wake of any momentous ruling, members of the extreme left and right reacted vociferously in the press. What was notable in these responses, however, was that those on both sides expressed support for some parts of the *Bakke* decision. On the right,

Robert Bork (1978) praised Powell for striking down quotas but lambasted him for inconsistent legal reasoning in allowing affirmative action generally to stand. Conservative pundit Pat Buchanan considered *Bakke* in a series of columns, urging the court to outlaw racial quotas in one before the ruling and chiding the justices for leaving most of affirmative action intact in one released shortly after the decision (Buchanan, 1977), (Buchanan, 1978). Those on the far left reacted with similar vitriol. The Rev. Jesse Jackson, a longtime bastion of the Civil Rights Movement, advocated mass protests outside of university admissions offices in support of restoring quotas, but he expressed tepid support for the court's endorsement of affirmative action as a whole (" 'Creative' Revolt Against Bakke Decision Urged," 1978). The NAACP's executive director took similar issue with the ban on quotas, calling the ruling "a cynical affirmation" of institutionalized racism while simultaneously (and somewhat paradoxically) praising the court's retention of race-based affirmative action programs ("NAACP Chief Hits Court's Bakke Rule," 1978). Equally telling were the responses from the relatively centrist newspaper editorial boards. In a glowingly favorable editorial, the Chicago Tribune called the ruling a "balanced, judicious decision" ("A well balanced Bakke decision," 1978). The Washington Post was similarly supportive, noting, like the Wall Street Journal, that "[e]verybody won" and that the decision "removed the element that appeared unfair without disturbing the foundation" on which more universally acceptable affirmative action programs could be built ("The Bakke Decision," 1978). In short, *Bakke* was perceived as at least a partial victory by those on both sides of the debate, and, as a result, it can be categorized as a legitimacy deposit. Caldeira (1986) supports this, as the proportion of those expressing "great confidence" in the court rose in the latter half of 1978³⁶.

³⁶ *Bakke* was released in June 1978, so it is reasonable to consider its influence on public perception of the Supreme Court in the second half of that year.

In summary, the Supreme Court's ruling in *Gregg* was in significant part a result of the justices' concern about the legitimacy of the judiciary. In particular, *Gregg* was part of a larger trend of decisions aligned with public attitudes beginning in 1976 as the Burger Court sought to restore the legitimacy depleted during the Warren years and in the wake of *Swann*, *Furman* and *Roe*.

VI. *Gregg* and the congressional court-curbing model

The court may have an even stronger barometer of its public legitimacy in legislative actions in response to its rulings. Indeed, public distaste for *Furman* was perhaps most evident in the passage of thirty-six revised death penalty statutes in the years before *Gregg*, with lawmakers at both the state and the federal level expressing their—and, by proxy, the people's—support for capital punishment. The justices were acutely aware of this. Both Stewart and White noted the number of jurisdictions that had restored the death penalty in their *Gregg* opinions, and, as detailed above, White even questioned the wisdom of issuing a decision that would be so contrary to public values. Thus, as Clark (2009) would argue, one could conclude that legislative court-curbing played a significant role in the court's retreat from abolition.

In December 1972, only six months after *Furman*, Florida became the first state to enact a revised death penalty statute. Florida's reenactment process itself served as a testament to the degree of support for capital punishment; the state's legislature passed a new statute in only four days, during a special session the governor called expressly for that purpose (Lain, 2007). The centerpiece of the revised Florida law was the requirement of a separate sentencing phase of the trial, in which the prosecution and the defendant were to introduce evidence of aggravating or mitigating circumstances, respectively, to persuade the jury to recommend either death or life

imprisonment (Fla. Stat. Ann. § 921.141). The statute included lists of the aforementioned factors, with aggravating circumstances including possession of a criminal record and commission of the offense in question for financial gain and mitigating circumstances including lack of a criminal record and impairment of some form that would leave the defendant ignorant of the illegality of his act. The jury was to weigh these factors and to issue a recommendation to the judge, who, in turn, would impose a sentence not necessarily aligned with the jury's suggestion. All capital sentences were subject to state supreme court review.

The Florida law, a guided-discretion statute, drew heavily upon the stipulations of the Model Penal Code's optional death penalty section, which the National Association of Attorneys General endorsed at its December 1972 meeting (Mandery, 2013). In fact, Florida's statute was almost identical to that of the Model Penal Code, with the former's only significant difference being that all death sentences were subject to the state supreme court's review. Even the lists of aggravating and mitigating circumstances in each statute were nearly invariant. Other states followed suit, although with perhaps somewhat greater deviation from the Model Penal Code's statute. Georgia's new law, for example, lacked specification of mitigating factors, and other states introduced other variations into their death penalty codes (Banner, 2002).

Other states, such as Louisiana and North Carolina, ignored the Model Penal Code's suggested statute in favor of the alternative remedy Chief Justice Burger suggested, mandatory capital punishment statutes. Under this arrangement, states designated a set of transgressions—murder of a police officer and murder for financial gain, for example—as “capital crimes,” and if one was convicted of these offenses, that person would be sentenced to death (Lain, 2007). Absent was the process of weighing aggravating and mitigating circumstances, and a bifurcated trial was unnecessary.

Mandatory statutes were implemented in fewer jurisdictions than were guided-discretion laws, perhaps steering the court in its decision to ban mandatory sentencing in *Woodson* while upholding guided-discretion procedures in *Gregg*. The primary argument Stewart offered against mandatory statutes in his majority opinion in *Woodson* was that history condemned inflexible death penalty laws as contrary to evolving standards of decency, as nearly all states moved away from mandatory sentencing in the nineteenth century. Furthermore, Stewart noted, mandatory procedures did little to eliminate the arbitrariness that plagued pre-*Furman* statutes, as they led to juries acquitting defendants on charges requiring death rather than convicting even when guilt seemed obvious. Such a presumption indicates a lack of confidence in jury rationality and predictability. Simultaneously, in *Gregg*, Stewart simply summarily dismissed Amsterdam's contention that aggravating and mitigating circumstances permit flexibility to an extent that no real controls are placed on jury discretion. In particular, the petitioners in *Gregg* took issue with the seventh aggravating circumstance of Georgia's statute, which allowed the imposition of a death sentence if the offense in question was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" (*Gregg v. Georgia*, 1976). According to this passage, the petitioners argued, a jury could "authorize capital punishment for *any* murder or armed robbery," apparently perpetuating pre-*Furman* untrammelled discretion ("Brief for Petitioner," *Gregg v. Georgia*, 1976, emphasis in original). Stewart, by contrast, seemed to take for granted that juries and the Georgia Supreme Court, which, as in Florida, was required to review all capital convictions, would interpret such language in a manner that reined in caprice. This presumes rationality and predictability on the part of the jury. It thus seems curious that the high court struck down mandatory sentencing partially on the basis of it being insufficient to control discretion but upheld guided-discretion

sentencing that offers a jury equal flexibility in decision-making. Rather, one could reasonably conclude that the court opted for guided statutes at least in part because most states adopted them after *Furman*.

That thirty-six jurisdictions passed revised statutes of either type in the wake of *Furman* was an indication in itself that the Supreme Court lost legitimacy through its invalidation of the existing capital punishment scheme. Political speech provides further evidence of governmental court-curbing; myriad officials proclaimed their support for enacting new statutes. Rockefeller, the governor of New York who had reservations about capital punishment, said before a crowd of business and professional leaders in 1973 that he would sign a death penalty statute if it came to his desk (“Rockefeller Says He Would Not Veto Death Penalty Bill,” 1973). Governor Reubin Askew of Florida, who also had questions about the death penalty’s validity, publicly called his state’s revised statute a “good product” of legislative cooperation (“Florida Becomes First to Reinstate the Death Penalty,” 1972). A New Jersey state senator expressed his support somewhat more vividly: “Killers should go into prison in chains and come out in a box” (“Death Penalty Has Been Restored by 13 States,” 1973). Even before revised capital punishment codes were enacted, lawmakers almost unequivocally advocated the restoration and persistence of the death penalty.

Perhaps more significantly, some political officials levied attacks on the Supreme Court, condemning the justices’ ruling in *Furman* as irresponsible and contrary to the public good. New York Governor Malcolm Wilson, who replaced Rockefeller following the latter’s resignation to serve on a private committee, called the court’s decision a “mistake,” inherently questioning the court’s capacity to pass proper judgment and, as a consequence, its legitimacy (“Wilson Rues End of Death Penalty,” 1974). Wilson’s violent rejection of the court’s ruling paled, however, in

comparison to President Nixon's condemnation of *Furman*. Nixon vocally opposed the decision, blasting the court both in his State of the Union address in 1973 and in a radio address later that year. He spoke especially harshly regarding Justices Brennan and Marshall, in whose view the death penalty never could be constitutional: "Contrary to the views of some social theorists³⁷, I am convinced that the death penalty can be an effective deterrent against specific crimes. The death penalty is not a deterrent so long as there is doubt whether it can be applied" (Nixon, 1973). In the face of such vocal opposition from the most powerful man in the country, it is likely the court's public legitimacy suffered. As Stewart's and White's opinions indicate, the court certainly considered this in restoring the death penalty's legitimacy in *Gregg*.

VII. Conclusion

In October 2013, Gallup reported that 60 percent of Americans favored the death penalty for murder (Jones, 2013). While this figure indicates that clear support for capital punishment persists, it is the lowest proportion in favor since November 1972—just after *Furman*—when 57 percent of Americans approved of executing murderers. Furthermore, unlike in 1972, when support for capital punishment was rising, the October 2013 percentage is part of a downward trend; approval has fallen precipitously and consistently from its all-time peak of 80 percent in 1994. Additionally, eighteen states and the District of Columbia currently prohibit capital punishment, with six of those states³⁸ abolishing the death penalty in the past ten years. After more than two decades of rising support for capital punishment, the tide is beginning to turn. If

³⁷ Although Nixon likely referred to actual social theorists here (likely Thorsten Sellin and Hugo Bedau in particular, whom Mandery (2013) describes as leaders of the abolitionist movement), it is wholly reasonable to suspect he also meant this remark as a jab at the court's liberal justices, given the context in which it appeared in his radio address.

³⁸ Those six, with the year of abolition in parentheses, are New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012) and Maryland (2013).

my findings are any indication, this could have profound implications for a challenge to the death penalty before the Supreme Court.

As I have demonstrated in this thesis, the court's actions are determined at least in part by public perception of the judiciary. The justices measure this according to the value of the legitimacy bank account, with their decisions reflecting concern for excessive and unexpected withdrawals, and by actions of lawmakers to counteract judicial rulings. In *Furman*, the court depleted its legitimacy store sharply, with a spate of legislative activity and vitriolic political speech following the ruling. This followed more than a decade of withdrawals, leaving confidence in a trough. *Gregg*, on the contrary, was part of a larger trend of legitimacy deposits, with the court issuing decisions clearly aligned with public values and preferences. The Supreme Court's retreat from abolition of the death penalty in the 1970s was a result of concern about judicial legitimacy, and, as the justices likely expected, an incline in confidence in the court followed.

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