

ESSAY

THE SECOND DEATH OF CAPITAL PUNISHMENT

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I. INTRODUCTION

Political life is sometimes tragic.¹ As a conservative instrument for safeguarding the government’s obligation and ability to control the governed (which, as Madison reminds us, is a prerequisite for the exercise of self-control on the part of the government),² and for preserving tolerable political and social order, our constitutional framework recognizes the necessity of exercising sovereign power to define and enforce criminal and penal laws against its citizens, sometimes in aggressive and seemingly harsh ways.³ On occasion, this means that the state will determine, based on the lived experiences and moral sentiment of the community as expressed by its political institutions, that some wrongdoers should be

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1. I am indebted to my academic mentors for reminding me of this reality and its importance. See DAVID E. MARION, *THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN, JR.: THE LAW AND POLITICS OF “LIBERTARIAN DIGNITY”* 166 (1997).

2. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

3. See THE FEDERALIST NO. 49, at 317 (James Madison) (Clinton Rossiter ed., 1961) (stating that public passions “ought to be controlled and regulated by the government”).

punished with death. No aspect of modern penal law is subjected to more efforts to influence public attitudes or to more intense litigation than the death penalty. The inquiries (they are distinct) concerning the constitutional propriety and political wisdom of capital punishment, then, reflect substantially our acknowledgment that who and how we punish are defining characteristics of the political community.⁴

The contemporary discourse on capital punishment, however, also offers important commentary on the broader—and dangerous—modern impulse to satisfy public appetites and relieve the citizenry of the pains of life in a democratic republic, an impulse that has become all too prevalent in the contemporary American legal and political mind.⁵ The impulse has its roots, of course, in the modern concern for rights⁶—a concern which, when validated, necessarily constrains official power.⁷ Such constraints are not necessarily undesirable. But when the vindication of rights implicates, indeed contravenes, the community's sovereign power to express tolerably a moral sentiment about defining and punishing crime, particularly when courts do so in the name of an abstract and perfected version of "liberty" that seeks to maximize human dignity through autonomous individualism and minimize reasoned restraints to control the people, these actions have unique potential to intolerably undermine the government's ability to control the people and compromise the prescribed roles of political institutions in the constitutional structure.⁸ In related ways, this impulse also is rooted in modern government's continuing obsession with placating the factious spirit and passions of an increasingly demanding public, an obsession that would have been troubling to members of the Founding generation who devised a constitutional system that consciously places some distance between the government and the governed.⁹ Formal institutional arrangements—the institutions and the "auxiliary precautions" that anchor them—are therefore critical to preserving proper equilibrium in the day-to-day exercise of self-government of and by human beings

4. See William J. Stuntz, *The Court and Law Enforcement: Police Powers*, NEW REPUBLIC, July 25, 2005, at 20 (stating that "[c]ivilizations define themselves by when, how, and whom they punish").

5. See ROGER M. BARRUS ET AL., *THE DECONSTITUTIONALIZATION OF AMERICA* 153 (2004).

6. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 2d ed. 1967). For excellent academic coverage of the constitutional and political claims of rights and the consequences of those claims, compare MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) with RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (6th prtg. 1979).

7. See MARION, *supra* note 1, at 166.

8. For an excellent discussion of this concept in the context of Justice Brennan's thought and writing, see *id.* at 159-67.

9. Harvey Mansfield referred to this distance as "constitutional space." See HARVEY C. MANSFIELD, JR., *AMERICA'S CONSTITUTIONAL SOUL* 16 (1991).

rather than angels, guided by the power of reason.¹⁰

For now, however, capital punishment in America is withering towards its death—slowly, gradually, and incrementally—but surely nonetheless. Particularly in light of the many newsworthy events that marked capital punishment law and practice during 2005, which was an important year in the life of the death penalty, much has been written recently about this trend.¹¹ This commentary, however, consistently overlooks the complex institutional consequences of the primary factors affecting the death penalty's demise. Although crime statistics, public concerns about actual innocence, and legislatively-adopted sentencing alternatives are cited as factors,¹² two other simultaneous developments deserve special focus as noteworthy contributors: a mass media—television, film, news organizations, and the Internet—that possesses enormous potential to influence and shape public attitudes and perception of capital

10. See THE FEDERALIST NO. 49, at 317, NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

11. See Dustin Arand, *Death Penalty Foes Look for Support in '06*, MISSOURIAN NEWS, Jan. 11, 2006; Al Knight, Column, *Death Penalty Under Fire*, DENVER POST, Dec. 7, 2005, at B7; Charles Lane, Column, *Changing Attitudes About the Death Penalty*, WASH. POST, Jan. 2, 2006, at A11; Peter Loge, Op-Ed., *The Death Penalty Has Lost Its Power*, HILL, Dec. 2, 2005, at 19; Maurice Possley & Steve Mills, *Will Execution Move the Debate?*, CHI. TRIB., Dec. 13, 2005, at C1; Robert Tharp, *Is Death Penalty Losing Capital?*, DALLAS MORNING NEWS, Dec. 30, 2005, at 1A; Editorial, *Death Penalty: Time to Rethink?*, DAILY HERALD, Dec. 2, 2005, at A6; Editorial, *The Year in Death*, WASH. POST, Dec. 31, 2005, at A18; Douglas A. Berman, *Death Sentences Continue to Decline*, Sentencing Law and Policy Blog, Dec. 22, 2005, http://sentencing.typepad.com/sentencing_law_and_policy/2005/12death_sentences.html; Jane Roh, *Death Penalty Concerns Don't Translate on Political Stage*, FOXNEWS.COM, Dec. 15, 2005, <http://www.foxnews.com/story/0,2933,178757,00.html>.

12. See, e.g., Lane, *supra* note 11, at A11 (citing a drop in the number of homicides nationwide and public concern about the potential innocence of the accused as reasons for changing attitudes toward capital punishment); Tharp, *supra* note 11, at 1A (discussing public concern over actual innocence and sentencing alternatives to the death penalty); Henry Weinstein, *Death Sentences Show Decline Nationwide*, L.A. TIMES, Dec. 22, 2005, at A26 (quoting the spokesman for the National District Attorneys Association on death penalty issues Joshua Marquis, who stated that executions are down “because of the overall decrease in violent crime around the country”); Roh, *supra* note 11 (discussing the “[n]ational awareness of the risk of wrongful capital convictions”).

Joshua Marquis, the District Attorney in Astoria, Oregon, and Ward Campbell, the Supervising Deputy Attorney General for the State of California, offer compelling critiques of the actual innocence concern. See, e.g., Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 505 (2005) (describing the abolitionist proposition that “a remarkable number of people on death row are innocent” as an “urban legend[.]”); Ward A. Campbell, *The Truth About Actual Innocence: Critique of DPIC List*, Remarks at the Association of Government Attorneys in Capital Litigation Annual Conference (July 25, 2002) (demonstrating that most of the inmates listed by the Death Penalty Information Center as innocents are not “actually innocent” as that concept is properly understood).

punishment;¹³ and a legal regime that, with the blessing and generous assistance of the United States Supreme Court, has defined political opposition to capital punishment as a proper subject for constitutional litigation, which is increasingly successful.¹⁴ Both, in their own ways, can affect the integrity of the institutional arrangements of our constitutional republic, though as a contributor to the demise of capital punishment, the former is more attenuated; the latter is the more deeply troubling.

Indeed, the federal judiciary, and the Supreme Court specifically, is not merely a participant in the demise of capital punishment it is a driving force, without which much of the progress of contemporary abolitionists would be more significantly constrained. We have seen its likeness in the past, when in 1972, *Furman v. Georgia*¹⁵ first killed capital punishment, albeit temporarily, in the modern era by invalidating existing laws and requiring entirely new systems of “guided discretion” in imposing the death penalty.¹⁶ The *Furman*-era dismantling was sudden and wholesale, not incremental, as the dismantling is occurring today. Indeed, perhaps it is the complex post-*Furman* “process” regime that has made contemporary abolition so cumbersome and slow. Although the Rehnquist Court, in particular, revived a sense of deference to political action that respected the criminal justice system’s interest in comity, finality, and federalism,¹⁷ the Court never quite overcame its post-*Furman* compulsion for specialized rule-making in death penalty cases. The Court, rather, continued employing its confusing, confused, and ultimately unprincipled “death is different” rationale for intervention, which in recent years has culminated in an unprecedented (and, frankly, arrogant) description of the Court’s role in capital litigation.¹⁸ *Atkins v. Virginia*,¹⁹ which recognized

13. See J. Richard Broughton, *Every Day More Wicked: Reflections on Culture, Politics, and Punishment by Death*, 22 J.L. & POL. (forthcoming 2006).

14. See Carol S. Steiker & Jordan M. Steiker, *Abolition in Our Time*, 1 OHIO ST. J. CRIM. L. 323, 340 (2003).

15. 408 U.S. 238 (1972) (per curiam).

16. *Id.* at 239-58 (Douglas, J., concurring) (finding that unguided discretion in imposing the death penalty resulted in the death penalty’s application in a discriminatory manner); see also Daniel D. Polsby, *The Death of Capital Punishment?: Furman v. Georgia*, 1972 SUP. CT. REV. 1 (analyzing *Furman*).

17. See J. Richard Broughton, *Habeas Corpus and the Safeguards of Federalism*, 2 GEO. J.L. & PUB. POL’Y 109, 134-54 (2004) (detailing the Rehnquist Court’s protection for state law enforcement interests in the habeas arena).

18. See *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (announcing that the Constitution contemplates that the Court’s own independent “judgment” governs in determining the propriety of capital sentencing practices); see also *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (plurality opinion) (explaining, in a non-capital case, how “death is different”); Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 29 (1995) (suggesting that the Court’s Eighth Amendment jurisprudence “will continue to give opponents a legitimate platform from which to impede even the most determined efforts to carry

a categorical exemption from capital punishment for the mentally retarded,²⁰ and *Roper v. Simmons*,²¹ which recognized a categorical exemption for those who commit their offense while under the age of eighteen,²² are leading recent examples, though by no means the only ones in the categorical exemption area.²³ They are also examples of the modern incrementalist strategy for killing capital punishment: As per se challenges to capital punishment are unlikely to succeed, death penalty opponents today instead target narrow and discrete death penalty practices primarily through litigation, creating seemingly small but significant court victories that, over time, slowly erode the scope and availability of death sentencing. Thus, the Court's understanding and enforcement of its largely uncircumscribed role in restricting the government's ability to employ capital punishment, and in interfering with fair and reasonably conducted capital litigation proceedings, may be welcome news for death penalty opponents. Indeed, notwithstanding public misunderstanding about the proper role of the Court, public respect for the Court's pronouncements is quite high, and thus the Court has awesome potential to influence public perception, opinion, and action (or inaction) on this subject and others.²⁴ But this judicial phenomenon—what the authors of the *Deconstitutionalization of America* have aptly termed the “judicialization of American life”²⁵—has only weakened the Court's legitimacy as an independent voice for the rule of law and has undermined the vitality both of political institutions and of responsible self-government in America.

Whether a decent and just society should punish wrongdoers with death is, like political life itself, complicated. Even those of us (in my case, retributivists) who think that it should (indeed, that in some circumstances, it *must*, in order to remain decent and just), are compelled to acknowledge the concerns that animate the opposition on that question. This Essay, though, does not rehash the arguments concerning the political wisdom

out the death penalty on a routine basis”).

19. 536 U.S. 304 (2002).

20. *Id.* at 321.

21. 543 U.S. 551 (2005).

22. *Id.* at 578-79.

23. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion) (holding that the Eighth Amendment prohibits a death sentence for offenders aged fifteen or younger); *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that the Eighth Amendment prohibits the execution of the insane); *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that the Eighth Amendment does not permit the imposition of capital punishment for one who does not kill, attempt to kill, or intend to kill); *Coker*, 433 U.S. at 597 (invalidating a Georgia law authorizing capital punishment for the rape of an adult woman).

24. Cf. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* 96 (1996) (arguing that the Court is the most powerful shaping force in American culture).

25. See BARRUS ET AL., *supra* note 5, at 121.

and expediency of capital punishment. Rather, as a constitutionalist critique, this Essay explains that there is great danger to constitutional and republican government when those arguments, and public opinion and public sentiment associated with them, become the foundation for judicial action.

Accordingly, I seek here to reexamine, indeed to reformulate, the national discourse on capital punishment by urging greater consideration of the consequences for form—the forms of the Constitution and its institutional arrangements—that attend contemporary death penalty jurisprudence. This Essay identifies capital litigation as a factor significantly affecting the vitality of capital punishment in modern America, and one in which arguments about the wisdom and desirability of death penalty practices find expression in requests for judicial relief. This Essay thus offers a normative critique of two significant strands of recent Supreme Court death penalty cases. Primarily, it examines those recent cases involving categorical exclusions from capital punishment—*Atkins* and *Roper*—both of which have simultaneously distorted the objective national consensus standard and rendered it irrelevant in light of the Court's intolerably immodest understanding of its own authority under the Eighth Amendment. Secondly, this Essay examines those cases involving reliance on federal collateral litigation to restrict imposition of capital punishment, cases that appear to soften the traditionally rigorous standards for collateral relief. These actions are helping to incrementally erode capital punishment, though in a manner distinct from the *Furman*-era dismantling. More importantly, I argue that omnipotent and omniscient judicial regulation of capital sentencing endangers the political institutions responsible for controlling the people in our constitutional system. By serving as a forum for determining which criminal punishments are morally right and desirable, and by compromising the integrity of legal structures that safeguard vital state law enforcement interests, the Court diminishes the essential distance that the Constitution places between the government and the governed, and between the institutions that govern. It also undermines the authority of the political branches as the primary institutional media for filtering out public passions and building coalitions for responsible democratic action to control the people. Consequently, this Essay concludes that essentially political arguments are now—more than ever before—dominating both the Supreme Court's capital punishment jurisprudence and constitutional litigation involving the death penalty in ways that threaten the Court and constitutional democracy.

II. JUDICIAL OMNIPOTENCE, OMNISCIENCE, AND THE DEATH PENALTY

Although numerous factors are driving the demise of capital punishment in America, perhaps the most troubling feature of the modern capital punishment dialogue is the omnipotent and omniscient role that the Supreme Court has arrogated to itself.²⁶ In its capital jurisprudence, the Court today appears to assume, and subsequently announces, that it knows what is good and desirable for the political community (omniscience) and that it has the absolute power to so declare (omnipotence). It is this circumstance, quite apart from the results of the Court's death penalty cases, that is most disturbing for constitutionalists.

A. *The Categorical Exemption Cases: National Consensus or "Independent" Judgment?*

Atkins and *Roper* are the most recent, and the primary, symbols of the Court's self-claimed omnipotence in constitutional adjudication of capital cases. In each case the Court reiterated its approach to Eighth Amendment challenges regarding the propriety of imposing capital punishment upon a particular class of offenders, relying once again upon *Trop v. Dulles*'s contrivance that the Eighth Amendment forbids those practices that are inconsistent with the "evolving standards of decency that mark the progress of a maturing society."²⁷ As applied in these two cases, the *Trop* standard (itself unconnected to the text or relevant history of the Eighth Amendment)²⁸ was simply a rhetorical device for creating the illusion that the Court was doing something other than acting politically.²⁹ Ultimately, though, the Court tipped its own hand: regardless of whether the objective evidence of societal standards of decency favored or disfavored the

26. In his fine critique of *Roper*, Judge Richard Posner states that the existence of some constraints means that "the Court is not omnipotent; but no branch of government is." Richard A. Posner, *The Supreme Court, 2004 Term, Foreword: A Political Court*, 119 HARV. L. REV. 31, 42 (2005). I wholly agree that no branch of government really *is* omnipotent. Whether a particular branch *conducts* itself that way, or *fancies* itself as such, however, is quite a different matter. So, I argue, the Court is announcing itself as omnipotent, though it is not, for the reasons I discuss here.

27. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). For some historical context about the insertion of this language into the opinion, see ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 358-59 (1997).

28. See Raoul Berger, *The Cruel and Unusual Punishments Clause*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 303-08 (Eugene W. Hickok, Jr., ed. 1991).

29. See Benjamin Wittes, *What is "Cruel and Unusual?"*, 134 POL'Y REV. 15, 19 (2005) ("It is in [*Trop*'s] language . . . that the invitation for judicial subjectivity lies."); see also Charles Hobson, *Atkins v. Virginia, Federalism, and Judicial Review*, 11 WIDENER L. REV. 23, 39 (2004) (explaining how *Atkins* exposes the unprincipled nature of "*Trop*'s evolving standards of decency test").

practice at issue, the Court frankly admitted that its “own [independent] judgment [would] be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”³⁰

To determine which punishments are so disproportionate as to be cruel and unusual (as understood by *Trop*’s language), the Court invoked the familiar national consensus standard, looking at the objective evidence of societal standards of decency, legislative enactments and practices within a state’s criminal justice system.³¹ In recognizing a categorical exemption from capital punishment for the mentally retarded, the *Atkins* Court concluded that a national consensus had evolved against the practice.³² The Court had rejected the same Eighth Amendment claim in 1989 in *Penry v. Lynaugh* (*Penry I*),³³ but recognized in *Atkins* that thirty states had prohibited capital punishment for the mentally retarded.³⁴ This included twelve states that did not impose capital punishment at all.³⁵ And of the remaining states that maintained capital punishment for the mentally retarded, the practice was infrequent.³⁶ Therefore, although the Court could not establish a meaningful numeric majority of jurisdictions that imposed capital punishment but prohibited the practice of executing the mentally retarded,³⁷ the Court instead determined that what was significant was “the consistency of the direction of change” after *Penry I*.³⁸

In *Roper*, which found an Eighth Amendment prohibition upon the execution of those who commit their crimes under age eighteen,³⁹ the evidence of a national consensus was even more tenuous,⁴⁰ and the Court conceded as much.⁴¹ Still, although the Court had rejected *this* Eighth Amendment claim also in 1989 in *Stanford v. Kentucky*,⁴² which provided an intelligible articulation of the national consensus standard,⁴³ the *Roper* Court determined that the change from *Stanford* to *Roper* was, though not

30. See *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting, in turn, *Coker v. Georgia*, 433 U.S. 584, 597 (1977))).

31. See *Roper*, 543 U.S. at 564-67; *Atkins*, 536 U.S. at 314-17.

32. *Atkins*, 536 U.S. at 313-16.

33. 492 U.S. 302, 335 (1989).

34. *Atkins*, 536 U.S. at 313-15.

35. *Id.* at 314.

36. *Id.* at 316.

37. See *id.* at 342-44 (Scalia, J., dissenting).

38. *Id.* at 315 (majority opinion).

39. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

40. See *id.* at 595 (O’Connor, J., dissenting); *id.* at 609-11 (Scalia, J., dissenting).

41. *Id.* at 565-66 (majority opinion); see also *Atkins*, 536 U.S. at 316 n.18 (distinguishing legislative reforms concerning the eligibility of offenders under the age of eighteen).

42. 492 U.S. 361, 380 (1989). *Stanford* came a year after the Court reversed the conviction of an Oklahoma defendant who was fifteen when he committed capital murder. See *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

43. Cf. *Stanford*, 492 U.S. at 369-77.

“dramatic,” nonetheless “significant.”⁴⁴ Once again, despite the acknowledged differences of the objective evidence in *Atkins*, the Court concluded that “the same consistency of the direction of change has been demonstrated.”⁴⁵

The Court therefore created a new understanding of what constitutes a national consensus against a particular death penalty practice. National consensus now may be understood simply as a significant trend.⁴⁶ As conceived in earlier cases and articulated in *Stanford*, the search for a national consensus as a mechanism for enforcing the dictates of the Eighth Amendment is intelligible and justifiable.⁴⁷ But a trend does not a consensus make. And unlike other trends, there are in this area no constitutionally permissible counter-trends. By constitutionalizing its understanding of “cruel and unusual” in this way, the Court ensured that even if a clear majority of states (indeed, even if *all* of them) desired to adopt a system of capital punishment in which both the mentally retarded and those who commit heinous crimes at age sixteen or seventeen would be at least eligible for capital punishment and still permitted to introduce evidence of their low intelligence or youth in mitigation, they could not do so. The Court’s new understanding of the national consensus standard (to the extent that it can be called that) thus eviscerates any possibility of further democratic action on these subjects within the political branches, short of a federal constitutional amendment. Political action to combat and punish crime, based upon the lived experiences of the political community and subject to the institutional constraints placed upon political actors, is impermissible in a regime where politics have been judicialized and the Court’s preferences constitutionalized.

But troubling though this development is, it is not the most troubling aspect of the *Atkins* and *Roper* methodology. More troubling, rather, is the Court’s apparent understanding that the objective evidence of society’s moral judgments about criminal punishment is subordinate to the Court’s own moral (and hence, in this context, political) preferences.⁴⁸ Focused on the death penalty’s “suitability” and “acceptability”—a curious way to describe the interpretive function—once the Court dictates that “‘in the end *our own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment,’”⁴⁹ the

44. *Roper*, 543 U.S. at 565.

45. *Id.* at 566.

46. *See id.* at 565-67.

47. *Cf. Stanford*, 492 U.S. at 377-78.

48. *Roper*, 543 U.S. at 563-64; *Atkins v. Virginia*, 536 U.S. 304, 313 (2002).

49. *Roper*, 543 U.S. at 563 (emphasis added) (quoting *Atkins*, 536 U.S. at 312-13 (quoting, in turn, *Coker v. Georgia*, 433 U.S. 584, 597 (1977))). The Court plurality also used this language in a footnote in *Thompson v. Oklahoma*, 487 U.S. 815, 823 n.8 (1988), invalidating an Oklahoma

constitutional text and historical practice become irrelevant, and the national consensus analysis becomes a useful rhetorical ruse for rationalizing the Court's imposition of its own preferences. What is most troubling is the Court's unembarrassed articulation of the principle; as *Atkins* stated, "[g]uided by our approach in these cases, we shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded *and then consider reasons for agreeing or disagreeing with their judgment.*"⁵⁰ Such a disturbingly clear statement of the Court's vision for its role in these cases leaves little doubt about the soundness of Judge Richard Posner's observation of *Roper*, that the Court "was doing what a legislature asked to allow the execution of seventeen-year-old murderers would be doing: making a political judgment."⁵¹ Quite apart from the desirability of the Court's decisions and the institutional consequences of its methodology, there is something unseemly about this kind of official immodesty. As Judge Posner again notes, "[j]udicial modesty is not the order of the day in the Supreme Court."⁵²

As a consequence of the Court's troubled decision-making in this area, Benjamin Wittes has recently referred to the Eighth Amendment as a "jurisprudential train wreck" and has described the Court's Eighth Amendment case law as marked by "rank subjectivity."⁵³ Of course, the Eighth Amendment is constitutionally unique to the extent that, unlike other provisions of the Constitution, which ordinarily do not engage abstract moral philosophizing but rather function as a practical charter of governance for a large commercial republic,⁵⁴ the term "cruel" inevitably possesses moral content.⁵⁵ But to assert that this fact alone empowers the Court to enforce its understanding of which criminal justice policies are most morally suitable or acceptable merely begs the question, and certainly is no answer to the compelling critiques of Wittes and Judge Posner. It is one thing to discern the consistency of a punishment practice with historical judgments about—and social, political, and cultural traditions enforcing a view of—what is moral. It is quite another to judicialize, and thus decree normatively through constitutional

conviction for a defendant who committed the crime at age fifteen.

50. *Atkins*, 536 U.S. at 313 (emphasis added).

51. See Posner, *supra* note 26, at 47. Judge Posner's broader point is that this "is true of most of the Court's constitutional decisions" because the Court usually acts as a political organ when engaging in constitutional adjudication. *Id.*

52. *Id.* at 56.

53. Wittes, *supra* note 29, at 15, 17-20.

54. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 134 (Amy Gutmann, ed. 1997).

55. See *id.* at 146. For a new and provocative understanding of the Eighth Amendment, see Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119 (2004).

adjudication, the political community's values about the proper punishment of crime.

Indeed, the flimsiness of the Court's national consensus analysis in *Atkins* and *Roper*, and of the authority for its ultimate decision in each case, further evinces an essentially moral and, in this context, political (as opposed to legal) judgment. A dialogue about the morality of imposing the death penalty for the mentally retarded, or for those who commit their crimes under age eighteen, is desirable and one that our society has had even in the absence of the Supreme Court's moral stamp of approval. But it is not an appropriate one for the judiciary, which is structured to (and must, to function properly) retain the most distance from popular sentiment and passion.⁵⁶

The Court's methodology also reflects an incoherent approach to stare decisis in constitutional adjudication.⁵⁷ In well-known decisions like

56. See THE FEDERALIST NO. 78, at 467-68 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

57. The recent Supreme Court confirmation hearings for Chief Justice John Roberts, Jr. and Justice Samuel Alito, Jr. demonstrate that a judge's understanding of stare decisis carries political significance. See, e.g., *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be Associate Justice of the United States Supreme Court, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 318-19 (2006) (statement of Samuel A. Alito, Jr., Judge, U.S. Court of Appeals of the Third Circuit); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 141-42 (2005) (statement of Hon. Arlen Specter, Chairman, Senate Comm. on the Judiciary). Of course, the Constitution says nothing about the role that precedent should play in adjudicating cases and controversies. It is conceivable that, because of their experience with the common law, the Framers contemplated that Article III judges would rely on precedent as part of the exercise of "the judicial power," much as they contemplated that the unmentioned authority of judicial review would be part of "the judicial power." See THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). But the text does not provide any basis for believing that precedent should play any special role in adjudication generally, and in fact gives us even less reason to believe that it should play a special role in *constitutional* adjudication. This is true even if we assume that the text contemplates the power of judicial review.

Constitutional (and statutory) interpretation, which is based on a written document approved by the people acting politically, is a much different process than that of common law judging, which explicates legal norms based on the accumulated wisdom of adjudicative tradition rather than any written text. See SCALIA, *supra* note 54, at 37-41. Also, structurally the judiciary is placed third among the branches and was designed with neither the power of the purse nor the sword; it was, as Hamilton described it, designed as the least dangerous of the branches. See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). See generally Akhil Reed Amar, *Architecture*, 77 IND. L.J. 671 (2002) (explaining the importance of placement of various provisions in the constitutional scheme). Because it was to be so, and because the text so tightly circumscribes the judicial power and places such substantial distance between the judiciary and the people, there is every reason to believe that the text contemplates a limited role for judicial precedent that interprets the Constitution.

This is particularly true when we consider that Article V provides the sole mechanisms for changing the Constitution: amendment or convention. U.S. CONST. art. V. Consequently, based on

Planned Parenthood of Southeastern Pennsylvania v. Casey,⁵⁸ which reaffirmed the “essential holding” of *Roe v. Wade* that the Due Process Clause protects a substantive right to an abortion,⁵⁹ and *Dickerson v. United States*,⁶⁰ which held that *Miranda v. Arizona* announced a constitutional rule that could not be altered by ordinary legislation,⁶¹ the Court justified its adherence to precedent by discussing the reliance interests associated with particular precedents.⁶² So how can it be that *Stanford* commanded overruling in *Roper*? Or that *Penry I* commanded overruling in *Atkins*?

Apparently, it matters not that most of the states that employed capital punishment prior to *Atkins* and *Roper*, in ordering their penal law and criminal justice systems, actually relied upon the previously-validated option of imposing the death penalty for serious crimes where the offender had the opportunity to offer evidence of his youth or low intelligence as a mitigating factor.⁶³ This is not an endorsement, or a rejection, of the Court’s employment of stare decisis in *Casey* or *Dickerson*. Rather, it is a normative observation that, to the extent stare decisis continues to function as a desirable element of constitutional adjudication, the Court should be intellectually honest in employing it. States *have* historically ordered their criminal justice systems in reliance upon the availability of capital punishment as a sentencing option in certain cases of profound seriousness, even where the offender was under age eighteen or possessed low intelligence.⁶⁴ If the offense to state reliance interests was great in *Atkins* and *Roper* (and it was), then the magnitude of the offense increases every time the Court constitutionalizes a categorical exclusion to the death penalty or otherwise imposes its own moral sensibilities to limit the ability

the structure and content of the constitutional text, precedents that change the Constitution—those that expand constitutional protections for the individual or governmental limits beyond those that are enumerated and fairly contained within the meaning of the text (as evident from structural and historical considerations)—ought to command no particular deference.

58. 505 U.S. 833 (1992).

59. *Id.* at 846.

60. 530 U.S. 428 (2000).

61. *Id.* at 444.

62. *Id.* at 443.

63. See *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (holding that youth is a mitigating factor “that must be within the effective reach of a capital sentencing jury”); *Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989) (holding that mental retardation is a mitigating factor that must be considered by a capital sentencing jury who can give it mitigating effect).

64. See, e.g., Guy Goldbert & Gena Bunn, *Balancing Fairness and Finality: A Comprehensive Review of the Texas Death Penalty*, 5 TEX. REV. L. & POL. 49, 138-39 (2000) (explaining how Texas reordered its capital sentencing law to allow consideration for mitigation evidence after *Penry I*); Joseph E. Wilhelm & Kelly L. Culshaw, *Ohio’s Death Penalty Statute: The Good, the Bad, and the Ugly*, 63 OHIO ST. L.J. 549 (2002) (explaining that Ohio broadens the scope of relevant mitigation evidence).

of the political community to tolerably employ capital punishment.

The Court justifies its departure from precedent by citing changed societal and political conditions.⁶⁵ But this reinforces the problem inherent in the Court's approach. After all, if the Court means what it says that changed conditions have now resulted in a national consensus against executing the mentally retarded or offenders under age eighteen, then why would the Court's "independent judgment" about those punishments matter at all? Rather, under such reasoning, the judgments of the people, viewed objectively, would matter most. And yet, the Court tells us that in the end, it is the Court's own independent judgment that must be brought to bear in determining the suitability or acceptability of the death penalty.⁶⁶ But if the Court means what it says in *that* regard, then why would it matter whether there was a national consensus against a particular practice? Again, these incompatible lines of reasoning demonstrate the intellectual difficulty of an approach that appears to simply be made up by the Court in the middle of the game. The "national consensus" aspect of the Eighth Amendment test is rendered meaningless once the Court admits that its own judgment will be brought to bear. This, in turn, suggests that the Court uses the "national consensus" language to provide cover for what it is really doing—substituting its own moral convictions for those of the people acting politically. It also underscores the fragility of arguments about *stare decisis*, which ironically offers no protection for democratically adopted criminal punishments in a regime where the judiciary's "independent judgment" is supreme.

B. *The Capital Habeas Cases: Never Mind the Statute, Death is Different*

Another strand of recent decisions that are helping to kill capital punishment, though perhaps less directly and with greater subtlety, is the Supreme Court's capital habeas cases. These cases differ from the categorical exemption cases to the extent they do not involve questions about the constitutionality of a particular death penalty practice. Rather, they involve the procedural regularity of trials in which a conviction has been obtained and capital punishment imposed.⁶⁷ Most importantly, habeas courts, in both capital and non-capital cases, are subject to a variety of statutory and doctrinal constraints that are not present on direct review of

65. See *Roper v. Simmons*, 543 U.S. 551, 564-66 (2005); *Atkins v. Virginia*, 536 U.S. 304, 313-17 (2002).

66. See *Roper*, 543 U.S. at 563; *Atkins*, 536 U.S. at 312-13.

67. See, e.g., *Rompilla v. Beard*, 125 S. Ct. 2456 (2005) (reversing a capital conviction because the defendant's counsel gave ineffective assistance).

criminal judgments.⁶⁸ Despite these distinctions, however, a number of the Court's recent capital habeas decisions suggest that the habeas remedy has re-emerged as yet another mechanism limiting the government's ability to employ capital punishment.⁶⁹

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)⁷⁰ placed several important procedural reforms into the previously existing habeas regime.⁷¹ The most prominent of those reforms was the provision, § 2254(d), that federal habeas relief be unavailable to a state prisoner unless the prisoner demonstrates that the state court's decision on the merits of his constitutional claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."⁷² During the debates about the AEDPA in Congress, lawmakers hotly contested this provision. Supporters saw this reform as a way of promoting comity between the state and federal courts and assuring that federal judges did not have unrestrained freedom to interfere with the state's administration of its own criminal justice system; opponents feared that it would displace federal courts as the chief arbiters of federal constitutional rights.⁷³ The Court has since stated that the state court deference provisions of § 2254(d) require a showing that the state court's decision was objectively unreasonable, not simply incorrect.⁷⁴ In addition, under § 2254(e)(1), the AEDPA provides

68. See Broughton, *supra* note 17, at 117-54.

69. See *infra* notes 82-101 and accompanying text.

70. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. §§ 2244, 2253-2255, 2261-2266 (2000)).

71. For additional discussions of AEDPA (beyond my own), see Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1 (2002) (discussing habeas reform); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997) (discussing the statutory interpretation and constitutional issues raised by AEDPA); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996) (discussing the effect of AEDPA on federal habeas adjudication).

72. 28 U.S.C. § 2254(d)(1)-(2) (2000).

73. Compare, e.g., 141 CONG. REC. S7803-01, S7820-23 (daily ed. June 7, 1995) (statement of Sen. Nickels), and *id.* at S7845-46 (statement of Sen. Hatch), with *id.* at S7815-17 (statement of Sen. Feingold), and *id.* at S7808-09 (statement of Sen. Kennedy); see also Broughton, *supra* note 17, at 125-33 (discussing the legislative history of AEDPA); Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535 (1999) (analyzing Section 2254's limitation on the judicial standard of review); Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103, 112-15 (1998) (same); Yackle, *supra* note 71, at 438-43 (same).

74. See *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002); (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 411 (2000).

that federal courts owe deference to state court fact-findings, absent clear and convincing evidence to rebut those findings.⁷⁵

In the five years since the Court first articulated its approach under the AEDPA, in both capital and non-capital cases, the Court has given substantial deference to state courts, consistent with the AEDPA's scheme and with the expressions of those who crafted the statute.⁷⁶ Notably, however, the Court has proven less deferential (though certainly not undeferential) in *capital* habeas cases.⁷⁷ Over the past five years, only death-sentenced inmates have prevailed in challenging a state court's decision as objectively unreasonable under § 2254(d).⁷⁸ Interestingly, three of those cases involved ineffective assistance of counsel claims,⁷⁹ which are ordinarily among the most difficult to prove on collateral review, given the combination of the AEDPA's deference scheme⁸⁰ and the high threshold for relief established in *Strickland v. Washington*'s requirement that such challenges demonstrate both deficient performance and actual prejudice.⁸¹

In *Rompilla v. Beard*⁸² and *Wiggins v. Smith*,⁸³ the Court softened its application of the prejudice prong, and found objectively unreasonable two state court decisions that had rejected the claims of death row inmates that they had constitutionally ineffective punishment-phase counsel.⁸⁴ In (*Terry*) *Williams v. Taylor*,⁸⁵ the case that gave the Court its first opportunity to articulate its approach to AEDPA deference under § 2254(d), the Court determined, as in *Rompilla* and *Wiggins*, that the state court acted unreasonably in rejecting Williams' ineffective assistance of counsel claim.⁸⁶ In *Miller-El v. Dretke*,⁸⁷ the Court held that the state court acted unreasonably in rebuffing Thomas Joe Miller-El's *Batson* claim.⁸⁸ In *Penry v. Johnson (Penry II)*,⁸⁹ the Court held that the state courts once again misapplied relevant Eighth Amendment doctrine when they upheld a "nullification instruction" that failed to give jurors an adequate vehicle

75. 28 U.S.C. § 2254(e)(1) (2000).

76. See Broughton, *supra* note 17, at 133.

77. See *supra* text accompanying notes 66-76.

78. See *infra* notes 81-96 and accompanying text.

79. See *infra* notes 82-86 and accompanying text.

80. See 28 U.S.C. § 2254(d)(1)-(2) (2000).

81. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

82. 125 S. Ct. 2456 (2005).

83. 539 U.S. 510 (2003).

84. *Rompilla*, 125 S. Ct. at 2467; *Wiggins*, 539 U.S. at 534.

85. 529 U.S. 362 (2000).

86. *Id.* at 397-98.

87. 125 S. Ct. 2317 (2005).

88. *Id.* at 2340; see also *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids use of peremptory challenges based on race of prospective juror).

89. 532 U.S. 782 (2001).

for giving mitigating effect to Penry's alleged mental retardation.⁹⁰ Finally, though not a case involving deference under § 2254(d) or (e), the Court ruled unanimously in *(Michael Wayne) Williams v. Taylor*⁹¹ that a death row inmate was entitled to an evidentiary hearing on two constitutional claims, even under the AEDPA's strict requirements.⁹²

The Court also has ruled against the government, and in favor in the death row inmate, in several recent capital habeas cases from Texas that did not all involve AEDPA deference, but that signaled a budding doctrinal feud with the Fifth Circuit in the capital habeas arena.⁹³ In *Tennard v. Dretke*,⁹⁴ for example, the Court continued its ongoing capital habeas feud with the Fifth Circuit by holding that the lower court improperly denied Tennard a certificate of appealability (COA) on his claim that he was entitled to a mitigation instruction regarding his alleged low intelligence.⁹⁵ The Court also took the opportunity to rebuke the Fifth Circuit for misconstruing the prerequisites for a *Penry* instruction.⁹⁶ *Tennard* followed the original *Miller-El* decision, *Miller-El v. Cockrell*,⁹⁷ which held that Miller-El was entitled to a COA on his *Batson* claim.⁹⁸ There the Court used especially strong language (which foreshadowed its eventual decision in *Miller-El II*)⁹⁹ to question the jury selection practices of the Dallas County District Attorney's Office and to rebuff the Fifth Circuit for being too dismissive of Miller-El's claim.¹⁰⁰ Finally, in the non-AEDPA case of *Banks v. Dretke*,¹⁰¹ the Court again reversed the Fifth Circuit, holding that the lower court had wrongly adjudicated Delma Banks's *Brady* claim.¹⁰²

With these numerous victories for capital defendants, one might expect some record of success for non-capital inmates. After all, they, too, may raise ineffective assistance claims, *Brady* claims, due process claims, claims about the improper denial of a COA, and so on. Yet, over the past five Terms in non-capital cases where AEDPA deference was at issue

90. *Id.* at 798, 803-04.

91. 529 U.S. 420 (2000).

92. *Id.* at 436-37; *see also* 28 U.S.C. § 2254(e)(2) (2000).

93. *See* Allen Pusey, *Taking the Fifth to Task*, DALLAS MORNING NEWS, July 25, 2004, at 1H (discussing the the Supreme Court's dissatisfaction with the Fifth Circuit's decisions in capital habeas cases).

94. 542 U.S. 274 (2004).

95. *Id.* at 288-89.

96. *Id.* at 283-88.

97. 537 U.S. 322 (2003).

98. *Id.* at 348.

99. 125 S. Ct. 2317 (2005).

100. *Miller-El II*, at 331-35.

101. 540 U.S. 668 (2004).

102. *Id.* at 705-06.

(*Middleton v. McNeil*,¹⁰³ *Yarborough v. Alvarado*,¹⁰⁴ *Yarborough v. Gentry*,¹⁰⁵ *Holland v. Jackson*,¹⁰⁶ *Lockyer v. Andrade*,¹⁰⁷ *Price v. Vincent*,¹⁰⁸ and *Early v. Packer*¹⁰⁹), the Court sided with the government in finding that the state court decisions were not objectively unreasonable.¹¹⁰ Indeed, the Court has sided with the government in almost every non-capital habeas case in which a decision was rendered on the merits of the granted issue.¹¹¹ Only in *Dye v. Hofbauer*,¹¹² which did not involve AEDPA deference but rather found that the prisoner had fairly presented his constitutional claim in the state courts and could therefore have it considered on federal habeas review,¹¹³ and *Lee v. Kemna*,¹¹⁴ which did not involve the deference scheme of §§ 2254(d) or (e) or any other basis for substantive habeas relief, but ruled that a state rule of procedure did not constitute an adequate and independent state law ground because it had been “exorbitantly” applied, did a non-capital inmate prevail.¹¹⁵

Of course, it is important not to overstate the point. Whether on the merits pursuant to § 2254(d) or pursuant to one of the doctrinal rules that reinforce the traditional narrowness of the habeas remedy—the non-retroactivity doctrine of *Teague v. Lane*,¹¹⁶ the exhaustion and procedural default doctrines,¹¹⁷ or the harmless error doctrine,¹¹⁸ which is far more friendly to the government on collateral review than on direct review—the Court often has rejected the constitutional claims of capital defendants on federal habeas review in recent Terms.¹¹⁹

103. 541 U.S. 433, 437-38 (2004) (per curiam), *reh'g denied*, 542 U.S. 946 (2004).

104. 541 U.S. 652, 668-69 (2004) (holding that the California court was reasonable in finding a non-custodial interrogation).

105. 540 U.S. 1, 5-7 (2003).

106. 542 U.S. 649, 652-54 (2004).

107. 538 U.S. 63, 75-76 (2003).

108. 538 U.S. 634, 643 (2003).

109. 537 U.S. 3, 10-11 (2002).

110. *See supra* notes 103-09.

111. *See, e.g.*, *Evans v. Chavis*, 126 S. Ct. 846, 853-54 (2006); *Mayle v. Felix*, 125 S. Ct. 2562, 2574-75 (2005); *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1815 (2005); *Pliler v. Ford*, 542 U.S. 225, 231-34 (2004); *Dretke v. Haley*, 541 U.S. 386, 393-96 (2004); *Baldwin v. Reese*, 541 U.S. 27, 30-34 (2004); *Tyler v. Cain*, 533 U.S. 656, 661-68 (2001); *Duncan v. Walker*, 533 U.S. 167 (2001).

112. 126 S. Ct. 5 (2005).

113. *Id.* at 6-7.

114. 534 U.S. 362 (2002).

115. *Id.* at 376, 387-88.

116. 489 U.S. 288, 300-17 (1989).

117. *See Coleman v. Thompson*, 501 U.S. 722, 729-32, 750 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 81-91 (1977).

118. *See Brecht v. Abrahamson*, 507 U.S. 619, 630-38 (1993).

119. *See, e.g.*, *Brown v. Sanders*, 126 S. Ct. 884, 894 (2006) (pre-AEDPA case); *Bradshaw v. Richey*, 126 S. Ct. 602, 605 (2005); *Bell v. Thompson*, 125 S. Ct. 2825, 2836-37 (2005); *Medellin v. Dretke*, 125 S. Ct. 2088, 2090-92 (2005); *Brown v. Payton*, 125 S. Ct. 1432, 1438-42

But it also is important not to underestimate the significance of the trend even in the deferential AEDPA regime in recent Terms, which suggests that the Court is giving greater scrutiny, even on collateral review, to state court decisions on a variety of procedural claims (ineffective assistance claims, *Batson* claims, *Brady* claims, etc.) in cases where capital punishment has been imposed and is substantially more likely to grant certiorari in such a case and to grant relief. The trend implies that the Court has imported the pernicious “death is different” rationale into the habeas statute. This is unremarkable, given the legacy of the “death is different” rationale and the Court’s continued insistence that courts give extra care to cases in which the death penalty has been imposed. But however unremarkable it is, it remains undesirable.

First, the plain language of the habeas statute’s governing provisions makes no distinction between the scope and kind of review to be employed in a capital case and a non-capital case.¹²⁰ Moreover, the Court’s habeas jurisprudence has, for the past two decades, properly accounted for the differences between direct and collateral review, recognizing the unique place of state courts in the adjudication of constitutional claims and the burdens that collateral review imposes upon the government’s ability to define and enforce its criminal law and bring its criminal judgments to finality.¹²¹ The tri-pillars of comity, finality, and federalism have defined

(2005); *Bell v. Cone*, 125 S. Ct. 847, 855-56 (2005); *Beard v. Banks*, 542 U.S. 406, 420 (2004); *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004); *Mitchell v. Esparza*, 540 U.S. 12, 18-19 (2003); *Woodford v. Garceau*, 538 U.S. 202, 210 (2003); *Horn v. Banks*, 536 U.S. 266, 271-72 (2002); *Bell v. Cone*, 535 U.S. 685, 698-703 (2002); *Mickens v. Taylor*, 535 U.S. 162, 173-76 (2002).

120. See 28 U.S.C. § 2254(d), (e) (2000). But see Dwight Aarons, *Reflections on the Killing State: A Cultural Study of the Death Penalty in the Twentieth Century United States?*, 70 TENN. L. REV. 391, 428 (2003) (stating that the AEDPA is remarkable because it distinguishes between capital and non-capital cases). Professor Aarons is referring to the provisions of the statute that provide “fast-track” procedures for considering capital habeas cases. See 28 U.S.C. §§ 2261-2265 (2000). Those provisions, however, apply only in qualifying jurisdictions, of which there are currently none. The primary and governing provisions of AEDPA do not distinguish capital and non-capital cases.

121. See, e.g., (Michael Wayne) *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (stating that “we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States’ interest in the integrity of their criminal and collateral proceedings”); *Calderon v. Thompson*, 523 U.S. 538, 554 (1998) (recognizing “the profound societal costs that attend the exercise of habeas jurisdiction” (quoting *Smith v. Murray*, 477 U.S. 527, 539 (1986))); *Coleman*, 501 U.S. at 726, 738-39 (explaining that “[t]his is a case about federalism” and that when state prisoners bring claims on federal habeas review “it is the State that must respond. It is the State that pays the price in terms of the uncertainty and delay added to the enforcement of its criminal laws”); *Teague v. Lane*, 489 U.S. 288, 309 (1989) (explaining that habeas cases implicate finality, and “[w]ithout finality, the criminal law is deprived of much of its deterrent effect”); *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (stating that “[f]ederal intrusions into state criminal trials frustrate both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights”).

habeas law and jurisprudence since the mid-1970s.¹²² But by incorporating the “death is different” contrivance into its habeas jurisprudence, and, worse yet, into the text of the AEDPA, the Court further contributes to the demise of the death penalty by enhancing the burdens already imposed upon state capital litigators and state courts. Comity, finality, and federalism thus face an obstacle to realization—heightened scrutiny—that they do not face in non-capital habeas cases. As a result, in this narrow context, the Court is coming dangerously close to returning to the Warren Court’s misguided project of using habeas as a mechanism for explicating constitutional and procedural norms, at least for capital cases, and thus again inflating its own function in the machinery of criminal justice.¹²³

III. THE INSTITUTIONAL CONSEQUENCES OF JUDICIAL OMNIPOTENCE AND OMNISCIENCE IN DEATH PENALTY JURISPRUDENCE

Our constitutional design contemplates institutions with distance, to ensure the safe and competent control of imperfect human beings by other imperfect human beings.¹²⁴ There is distance between those who govern and those who are governed. And there is space between the institutions that do the governing. Indeed, the key structural characteristics of the Constitution’s institutional design—the “auxiliary precautions” of separated and subdivided powers (including a legislative branch subdivided into two distinct chambers with differing responsibilities and characteristics, and an executive with power to veto legislation to protect institutional prerogatives and individual liberty), and the oft-forgotten auxiliary precaution of federalism—provide both formal and literal space between institutions.¹²⁵ The Court’s contemporary capital punishment jurisprudence compromises both aspects of constitutional distance, and, consequently, the strength of the governmental institutions themselves. Thus, it is critical to consider the institutional and structural consequences

I have elsewhere discussed these important limitations on collateral review. See J. Richard Broughton, *Off the Rails on a Crazy Train?: The Structural Consequences of Atkins and Modern Death Penalty Jurisprudence*, 11 WIDENER L. REV. 1, 13-15 (2004).

122. See Broughton, *supra* note 17, at 133-54; see also *Woodford*, 538 U.S. at 206 (stating that “Congress enacted AEDPA . . . ‘to further the principles of comity, finality, and federalism’” (quoting *(Terry) Williams v. Taylor*, 529 U.S. 420, 436 (2000))).

123. See John J. Dinan, *The Rehnquist Court’s Federalism Decisions in Perspective*, 15 J.L. & POL. 127, 153-54 (1999) (explaining that the Warren Court’s habeas decisions “expanded significantly the opportunities for petitioners to seek review of state court judgments”); Patrick E. Higginbotham, *Notes on Teague*, 66 S. CAL. L. REV. 2433, 2437-38 (1993) (explaining the breadth of the Warren Court’s habeas theory); Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1344-45 (2002) (describing the “broad, remedial vision of habeas corpus” in the Warren Court).

124. See MANSFIELD, *supra* note 9, at 16.

125. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

of the Court's all-knowing and all-powerful death penalty case law, and, in so doing, to avoid the error of viewing the Court's death penalty cases solely in the context of, and as significant only for, our concern for individual rights.

The categorical exemption decisions like *Atkins* and *Roper*, in particular, and to a lesser extent the recent capital habeas cases that I have mentioned here, undermine the Court's institutional independence from the political branches, and thus compromise the effectiveness of the auxiliary precaution of separated and subdivided powers. To refine and enlarge the public view, to filter and moderate public passion and factious spirit, the Constitution orders political decision-making through the formal arrangements of representation and administration, though not judicial review.¹²⁶ This formality obtains not simply from the absence of judicial review from the constitutional text (though I accept that "the judicial power" contemplates a form of judicial review), but from several textual, structural, and historical considerations: the textual limits on judicial authority (to hear only "cases" and "controversies"),¹²⁷ and from the Convention debates and the Convention's rejection of the Council of Revision,¹²⁸ including Madison's persuasive proposal at the Convention that the courts shall be limited to hearing cases of a "judiciary nature."¹²⁹

Yet, the Court is an institution no longer fond of the proposition that something is for someone else to decide. Consequently, these cases are part of a larger body of precedent that has led many Americans to view the Court as just another political decision-maker.¹³⁰ As Professor Barrus and his colleagues rightly observe, "the conviction that judicial officials are also political actors can have undesirable effects on the behavior of citizens."¹³¹ In particular, these recent capital cases aid in producing a citizenry that becomes accustomed to seeking policy changes through judicial action, rather than by forming political coalitions and persuading traditionally political institutions to engage in difficult and complex policy debates and subsequently to be held accountable for their decisions. As a consequence, responsible citizenship and self-government—manifest in elections for determining political representation and in coalitional politics—are transformed into a litigation culture that habitually seeks out

126. See THE FEDERALIST NO. 10, at 80-81 (James Madison) (Clinton Rossiter ed., 1961).

127. U.S. CONST. art. III, § 2.

128. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20-21, 97-98, 104, 108-09, 140 (Max Farrand ed., rev. ed. 1966); see also James T. Barry III, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235 (1989) (discussing the Convention's consideration and rejection of the proposed Council of Revision).

129. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 128, at 430.

130. See BARRUS ET AL., *supra* note 5, at 112; ROBERT H. BORK, *THE TEMPTING OF AMERICA* 2 (1990); MARION, *supra* note 1, at vii.

131. BARRUS ET AL., *supra* note 5, at 112.

the judiciary to avoid the pains and tragedies of political life, such as the aggressive enforcement of criminal and penal laws that impose severe punishments for serious offenses against the public.¹³² “Why even worry about building coalitions to influence electoral outcomes or legislative policy making,” the *Deconstitutionalization* authors ask, “if the courts are available to provide immediate protection for preferred interests and/or relief against unwanted governmental actions?”¹³³ It is an important rhetorical question, one that demonstrates the collateral consequences of pursuing a judiciary that practices a kind of death penalty imperialism. This is not to say that death penalty opponents have made the judiciary their exclusive theater of battle.¹³⁴ Legislative reforms are advocated, and some limited success therein has been achieved.¹³⁵ But even prominent and thoughtful abolitionists Carol and Jordan Steiker acknowledge that constitutional adjudication is the preferred route for abolition.¹³⁶

Consequently, this approach diminishes the distance between the Court and the people by conveying the impression to citizens that judges can act on their behalf to decide important policy questions. This is a special problem under the capital punishment regime endorsed in *Atkins* and *Roper*, leading examples of how “[t]he judgment of the judges trumps the

132. *See id.* at 122.

133. *Id.* at 121.

134. *See* Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 OHIO ST. L.J. 417, 418-21 (2002) (suggesting that death penalty opponents are directing their attention at executive and legislative reform rather than judicial).

135. *See id.* at 418 (discussing states’ legislative reform); *see also* Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396, 1412 (2005) (urging the American Law Institute to endorse abolition of the death penalty); Angela Delli Santi, *Death Penalty: Legislators Back Suspension, Study*, PHILA. INQUIRER, Jan. 10, 2006, at B1 (stating that New Jersey lawmakers passed a death penalty moratorium, pending the outcome of a study, which they expect the governor to sign); Peter Slevin, *More in U.S. Expressing Doubts About Death Penalty*, WASH. POST, Dec. 2, 2005, at A1 (discussing new state legislation on capital punishment); Weinstein, *supra* note 12, at A26 (noting that Illinois continued its death penalty moratorium for a sixth year and that the New Jersey Senate passed legislation to suspend executions until the state’s death penalty system can be studied by a commission); Editorial, *Embracing a Culture of Life*, BIRMINGHAM NEWS, Nov. 11, 2005, at 8 (advocating the abolition of the death penalty and discussing potential legislative reforms in Alabama).

136. *See* Steiker & Steiker, *supra* note 14, at 340. Professors Steiker and Steiker state that, because legislative reform is limited by considerations of federalism and political populism, “the route to nation-wide abolition in the United States is almost certainly through constitutional litigation in the courts rather than through state-by-state legislative abolition.” *Id.* Of course, this also is because, in their view, some legislative reforms could potentially legitimate and entrench capital punishment. *See* Steiker & Steiker, *supra* note 134, at 422-24; *cf.* Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97 (2002) (discussing why political abolition in the United States is less likely when compared to western Europe).

reasoning of all other persons since the courts are assumed to be entrusted with the final determination of what is acceptable in all significant matters that affect the way of life of the people.”¹³⁷ This, in turn, diminishes the constitutional distance between the judicial and the policy-making institutions. In such a regime, the Court cannot credibly maintain its status as a politically independent protector of the rule of law in a government of limited and enumerated powers. Furthermore, the legislative and executive branches cannot meaningfully fulfill their constitutional roles as the institutional mediums for filtering out and moderating public passions.¹³⁸ Consequently, auxiliary precautions for ensuring safe and competent government prove to be merely illusory.

In addition, the importation of enhanced judicial scrutiny for capital habeas cases under the AEDPA undermines the auxiliary precaution of federalism, and dangerously minimizes the federal government’s distance from the states. Forget the crude notion of federalism as “states’ rights” (whatever *that* means), mere deference to states, or mere decentralization for its own sake. A fuller, and more sophisticated, account recognizes that a robust federalism seeks a tolerable equilibrium between federal and state power; it provides, as Harvey Mansfield describes it, constitutional dimension for literal space, and offers a critical arrangement for structuring rational deliberation in the exercise of responsible self-government and for safeguarding political liberty.¹³⁹

True, as do the capital habeas cases, the direct review cases like *Atkins* and *Roper* have the effect of interfering with the state’s sovereign power to make and enforce its own criminal and penal law. But, as the Court itself recognized during the height of its judicially-enforced protection for state criminal law enforcement interests, habeas cases are “about federalism”¹⁴⁰ because “‘profound societal costs . . . attend the exercise of habeas jurisdiction’” and thus the offense to the states is dramatically enhanced on federal collateral review.¹⁴¹ Again, nothing in the statutory

137. BARRUS ET AL., *supra* note 5, at 122-23.

138. See THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961) (explaining how representation should “refine and enlarge” the public view); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 773-74 (2002) (explaining how the executive veto serves as a legislative filter).

139. See MANSFIELD, *supra* note 9, at 16; see also SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 279-301 (1993) (discussing federalism as one of Madison’s “auxiliary precautions”).

140. *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

141. *Calderon v. Thompson*, 523 U.S. 538, 554-55 (1998) (quoting *Smith v. Murray*, 477 U.S. 527, 539 (1986)); see also *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (“[W]e have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States’ interest in the integrity of their criminal and collateral proceedings.”); *Coleman*, 501 U.S. at 726, 738-39 (explaining that “[t]his is a case about federalism” and that when state prisoners bring

scheme authorizes the Court's methodological innovation. Judicially enhancing scrutiny of state death penalty decisions through the habeas statute compromises the Court's institutional character and diminishes the constitutional distance not just between it and the political branches, but between the federal and state judicial systems, contrary to much of what the Court has otherwise told us about its understanding of the habeas remedy.¹⁴² This is especially troubling, not simply in the context of capital punishment, but in the context of the Court's judicially-enforced federalism more broadly. After *Gonzales v. Raich*,¹⁴³ which upheld Congress's authority under the Commerce Clause to regulate the wholly intrastate, noncommercial possession of marijuana for personal medicinal use because such an activity was part of a class of activities that could substantially affect interstate commerce,¹⁴⁴ as well as recent cases in the areas of state sovereign immunity and federal preemption,¹⁴⁵ the Rehnquist Court's judicially-enforced federalism may have reached its outer limits, at least in those areas. Habeas, however, has remained the last holdout of the federalism revival (indeed, as I have argued previously, the habeas cases were among the origins of the revival).¹⁴⁶ That fact will be less likely to remain true if the Roberts Court follows the underlying normative theory of those cases that use the habeas remedy specifically to articulate legal norms that narrow the scope and availability of capital punishment, while simultaneously depreciating vital state criminal law enforcement interests and, consequently, the structural virtues of federalism and

claims on federal habeas review "it is the State that must respond. It is the State that pays the price in terms of the uncertainty and delay added to the enforcement of its criminal laws"); *McCleskey v. Zant*, 499 U.S. 467, 492 (1991) ("[I]f reexamination of convictions in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition."); *Teague v. Lane*, 489 U.S. 288, 309 (1989) (explaining that habeas cases implicate finality, and "[w]ithout finality, the criminal law is deprived of much of its deterrent effect"); *Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.").

142. See *supra* text accompanying note 139.

143. 125 S. Ct. 2195 (2005).

144. *Id.* at 2204-05, 2215.

145. See, e.g., *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding that Congress validly abrogated state sovereign immunity through Title II of the Americans with Disabilities Act); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (holding that the President's power to conduct foreign affairs preempted the California Holocaust Victim Insurance Relief Act); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that Congress validly abrogated state sovereign immunity through the Family and Medical Leave Act of 1993). See generally William D. Araiza, *The Section 5 Power After Tennessee v. Lane*, 32 PEPP. L. REV. 39 (2004) (discussing the impact of *Lane* upon the Court's Section 5 jurisprudence); Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 110-16 (2002) (explaining that the federal preemption cases have not followed the Court's federalism theory in other areas).

146. See Broughton, *supra* note 17, at 161.

institutional distance.

The Court's most recent capital cases therefore have not simply done damage to the vitality of the death penalty. They have also damaged the formal institutional arrangements of the Republic that are necessary to preserve constitutional order and the government's ability to tolerably control the governed.¹⁴⁷

IV. CONCLUSION

Institutions, and the formalities that characterize their place in the constitutional system, are only a part of the formula for a successful American experiment. Good habits and mores of the people are also critical aspects of responsible and competent self-government. Institutional arrangements, however, have special significance when ordering and administering a system for punishing violent crime. Criminal justice, more than any other aspect of life in the political community, confirms Madison's observation that humans are not angels and that, consequently, the government must be able, and have adequate latitude, to control the people. Judicial review, however, can serve as a unique mechanism for limiting the government's authority to accomplish that purpose. Such is the modern state of capital punishment law.

Thanks in substantial part to a judicial construct that allows the courts to supplant political institutions as a forum for debating the desirability of capital punishment practices, capital punishment opponents are now gaining litigation victories by challenging discrete categories of capital punishment practice and the legal procedures unique to death penalty cases. Simultaneously there is growing anecdotal and empirical evidence (though we should question its ultimate reliability and the methodology for obtaining it) that the public is increasingly concerned about the potential execution of the innocent, the quality of defense representation, and the availability of alternative sentences (all legitimate concerns, though hardly new ones). The litigation battle against capital punishment is today incremental and increasingly successful. Thanks to the judicial omnipotence and omniscience demonstrated by the *Atkins* and *Roper* Courts, the phenomenon is likely to know few boundaries, as the current debate about executing the mentally ill suggests.¹⁴⁸ None of this is to

147. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

148. See generally Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293 (2003) (arguing that imposing capital punishment on those who are mentally ill violates equal protection, particularly if it is unconstitutional to impose the death penalty upon the mentally retarded and those under age eighteen); Ronald J. Tabak, *Overview of Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U.L. REV. 1123 (2005) (discussing an American Bar Association proposal advocating a categorical exemption from the death penalty for persons with certain limits on their intellectual functioning and adaptive skills).

suggest that courts should not be available to protect rights; of course, they should be. But courts, no less than legislators and executives, are institutionally constrained even as they seek to protect rights. It is those structural concerns—concerns about the institutional role of the courts and about the distance that it must preserve between itself and the political institutions of a constitutional democracy—that animate my argument here concerning the state of death penalty jurisprudence.

Thus, capital punishment, at least as a popular and widely available sentencing option, is gradually dying. Bringing it back to life, to the extent the political community finds that desirable, will require more than just a commitment to improving capital practices and criminal justice procedures, and more than just a shift in public attitude and perception. It will require a commitment to restoring meaning to the formal institutional arrangements of our constitutional framework. Even this may not ultimately save capital punishment. It will, however, go a long way toward preserving decent and competent constitutional government.