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From *Furman* to *Gregg*: Examining the Constitutionality of Capital Punishment

OTMU1114 Rights-Thinking: Exploratory Workshop
on Current Legal Issues in the U.S.A
Bachelor's thesis

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In my bachelor's thesis "From *Furman* to *Gregg*: Examining the Constitutionality of Capital Punishment" I analyse two US Supreme Court cases *Furman v. Georgia, 408 U.S. 238 (1972)* and *Gregg v. Georgia, 428 U.S. 153 (1976)* . The cases addressed the constitutionality of capital punishment under the 8th and 14th amendments. The ruling in *Furman* was that capital punishment was unconstitutional in this specific situation. The result of the decision was 5-4 and all the Justices wrote their own opinions. The value of the case as precedent has been greatly debated because the concurring opinions did not agree on all matters. The main arguments of the case in the concurring opinions deal with the clause in the 8th amendment that forbids 'cruel and unusual' punishments. The dissenting opinions base their arguments more on whether capital punishment should be decided on the legislative or judicial level. Their conclusion was that capital punishment does not violate the constitution so it should be decided on the legislative level. In *Gregg* the decision was that the Georgia legislation after *Furman* is constitutional. The main argumentation is very similar in both cases. The main results were that the concurring opinions in *Furman* and the dissenting in *Gregg* leaned heavily on the fact that society changes and the interpretation of the 'cruel and unusual' should change with it because there was never one correct definition of if. This is a more liberal take. This is different in the rest of the opinions that argued on behalf of the tradition and that the constitutionality of capital punishment as a whole had not been questioned before, taking a more conservative side.

Key words: Furman, Gregg, capital punishment, death penalty, constitutionality, cruel, unusual.

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ON-työ

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Opinnäytetyössäni "From Furman to Gregg: Examining the constitutionality of death punishment" analysoin kahta Yhdysvaltain korkeimman oikeuden tapausta *Furman v. Georgia, 408 U.S. 238 (1972)* ja *Gregg v. Georgia, 428 U.S. 153 (1976)*. Tapaukset käsittelivät kuolemanrangaistuksen perustuslaillisuutta yhdysvasltain perustuslain kahdeksannen ja neljännentoista lisäyksen nojalla. *Furmanin* päätös oli, että kuolemanrangaistus oli perustuslain vastainen tässä nimenomaisessa tilanteessa. Päätös äänestettiin äänin 5-4 ja kaikki tuomarit kirjoittivat omat mielipiteensä. Tapauksen arvosta ennakkotapauksena on keskusteltu paljon, koska keskenään kilpailevat mielipiteet eivät olleet kaikissa asioissa yksimielisiä. Tapauksen pääargumentit mielipiteissä puolesta käsittelevät 8. lisäyksen kohtaa, joka kieltää "julmat ja epätavalliset" rangaistukset. Eriävät mielipiteet perustavat argumenttinsa enemmän siihen, pitäisikö kuolemanrangaistuksesta päättää lainsäädännöllisellä vai oikeudellisella tasolla. Heidän johtopäätöksensä oli, että kuolemanrangaistus ei riko perustuslakia, joten siitä pitäisi päättää lainsäädännön tasolla. *Greggissä* päätös oli, että Georgian lainsäädäntö Furmanin jälkeen on perustuslain mukainen. Pääargumentit on molemmissa tapauksissa olivat hyvin samankaltaisia. Tärkeimmät johtopäätökset olivat, että Furmanin mielipiteet puolesta ja Greggin eriävät mielipiteet perustuivat voimakkaasti siihen, että yhteiskunta muuttuu ja "julman ja epätavallisen" tulkinnan pitäisi muuttua sen mukana. Koskaan aikaisemmin ei annettu yhtä oikeaa määritelmää Tämä on liberaalimpi näkemys. Loput mielipiteet argumentoivat perinteen puolesta ja että kuolemanrangaistuksen perustuslaillisuutta kokonaisuudessaan ei ollut aiemmin kyseenalaistettu, ottaen konservatiivisemman puolen.

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Weems v. United States, 217 U.S. 349 (1910).

Wilkerson v. Utah, 99 U.S. 130 (1878).

Williams v. New York, 337 U.S. 241 (1949).

List of Abbreviations

Joined opinion	Opinion of Stewart, Powell and Stevens in *Gregg v. Georgia*.

1 Introduction

The United States of America is the only western developed country that still to this day holds capital punishment as an acceptable form of punishment.[1] Capital punishment has been a very common form of punishment around the world but during the last century it has been abolished or limited heavily. Capital punishment as we know it came to America along with the British colonists and started to develop its own tradition. In this paper, I will focus on two United States Supreme Court cases from the 1970s: *Furman v. Georgia*[2] and *Gregg v. Georgia*[3]. *Furman* is said to have banned capital punishment. However, the legal questions are not as simple as they are made to seem. It did not entirely ban capital punishment or make it unconstitutional. This misconception is very strongly accepted and was named the "Furman narrative"[4]. This is because the 5-4 decision's majority did not write one opinion of the court but separate concurring opinions and the arguments and conclusions differ from one another. Gregg came only four years after Furman. Both the cases made an impact on the capital punishment system in the USA and I want to explore it.

The 8th amendment of the US Constitution states "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". Basically all the discussion about capital punishment's constitutionality is centred around the clause about cruel and unusual punishment. In both cases the meaning of these words is debated because there has not been a more precise explanation of what they mean. The 14th amendment's first section is connected to the 8th amendment and is important in both cases. It reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[5]

Let me provide a short synopsis of my research paper. I will focus on the opinions of the case. First, I will tell you about the materials and methods I use. In section three, I will go through

[1] Steiker 2002, 97.
[2] *Furman v. Georgia,* 408 U.S. 238 (1972).
[3] *Gregg v. Georgia,* 428 U.S. 153 (1976).
[4] Jouet 2022, 126.
[5] Constitution annotated.

the concurring opinions in *Furman.* In section four, I go through dissenting opinions in *Gregg*. In section five, I explore reasons why *Gregg* came so quickly after *Furman*. In sections six and seven, I analyse the opinions in *Gregg*. Lastly, I will be presenting the conclusions I made.

2 Research materials and methods

This research paper, as mentioned previously, focuses on *Furman v. Georgia* and *Gregg v. Georgia*. There have been numerous cases regarding capital punishment tried in the US Supreme Court but I chose *Furman* because it was the first time the US Supreme Court considered the constitutionality of capital punishment as a whole. Previously the court had only considered the constitutionality of execution methods and who is eligible for the death penalty. Secondly, I chose *Gregg v. Georgia* because the judiciary was mostly the same as in *Furman* and referenced it a lot as well. *Gregg* also set a limit to the constitutionality of capital punishment, limiting *Furman*'s decision and making a final point in defining the constitutionality of capital punishment in the US.

Capital punishment is a very polarising topic that divides populations greatly both in the United States and around the world. Due to this there are numerous amounts of literature produced about the topic in general and also about this specific case. As mentioned before, this is because *Furman* was the first time the constitutionality of capital punishment was handled this way in the Supreme Court. I searched articles from Volter, Google Scholar and Heinonline and found both specific and general information about the topic. The website Constitution Annotated has been a great help. As stated before, the 8th amendment, along with 14th and 5th amendments, is in the centre of the debate regarding capital punishment and its constitutionality. The website gives meaning to the clauses of the constitution and explains how it can be and has been interpreted. There I also confirmed the other amendments mentioned in the opinions and checked whether there was some interpretation mentioned as the most established.

My main research method is case argumentation analysis. This means that I will take each of the opinions in this case and analyse the argumentation used. I will look at the types of arguments that are similar and different between the concurring and dissenting opinions and see what make the different approaches and conclusions. The main types of arguments are, for example, historical argumentation, previous case law, moral arguments and general perception argumentation. After analysing the arguments I will compare both the cases to each other.

3 Furman v. Georgia Concurring opinions

3.1 Mr. Justice Douglas

The *Furman v. Georgia* case consists of three separate lower court cases. Jackson, Furman and Branch were all black men who committed rape or murder. The concurring opinions in *Furman* are in favour of restricting capital punishment. The first concurring opinion is by Mr. Justice Douglas. He first approaches the question of the 8th amendment's clause about cruel and unusual punishment from a historical point of view. He goes all the way back to 1066 to the Norman conquest of England where excessiveness in punishments became more clear. This seems to be kind of a starting point for the regulation of capital punishment. The 1689 English Bill of Rights is one of Douglas' main sources.[6] The bill of rights was considered primarily with selective and irregular application of harsh penalties. Its aim was to forbid the severe penalties that were discriminatory. Douglas states that when the words cruel and unusual are read in the light of the English bill of right proscription against selective and irregular use of penalties, they suggest that it would be cruel and unusual to apply the death penalty, or any other penalty to be clear, selectively to minorities.[7] He quotes *Novak v. Beto* where it was said that society is willing to see the minorities whose number are few, who are outcasts and unpopular, suffer.[8] This shows the prejudice, especially racism, the capital punishment system has.

McGautha v. California[9] is a case that is quoted many times throughout the opinions. The case held that it is impossible to say that leaving the jury the power to pronounce life and death in capital cases would violate any provision of the constitution. From *McGautha* Douglas quotes that there is an increase in recognising the fact that equal protection is implicit in cruel and unusual punishments.[10] This ties the 8th and 14th amendments together. These arguments used by Douglas show that he views capital punishment as violating equal protection of the 14th amendment and unproportional as it is now imposed. Douglas brings

[6] The English Bill of Rights 1689.
[7] *Furman*, Douglas concurring, 245.
[8] *Novak v. Beto* 320 F. Supp. 1206 (S.D. Tex. 1970), 673-679.
[9] *McGautha v. California,* 402 U.S. 183 (1971*)*.
[10] *McGautha v. California,* 198.

out a study of capital cases in Texas 1924-1968[11] which shows that punishment convictions were unequally given. Most of the executed were poor, young and/or ignorant. Another statistic that he used to shed light to the racism in the capital punishment system is that co-defendants, who get separate trials, are in many cases treated differently if one of them is white and the other one black. These statistics aren't mirroring the US entirely but these still show how there is a divide on how different race people are treated when they have committed the same crime.

3.2 Mr. Justice Brennan

It seems like Mr. Justice Brennan took every possible point of view into consideration when writing his concurring opinion and I will analyse it next. In the historical arguments he makes, the main one is that we cannot precisely know what the Framers intended with the words in the Bill of Rights. It has been said before that the Framers meant the cruel and unusual punishment to mean that a punishment cannot be torturous or linger the death of a person.
Congress' legislative power versus the Supreme Court's power is a question that is in the centre of all the dissenting opinions in *Furman*. Brennan takes this into consideration as well. He states that the Congress must be limited in its powers to punish.[12] In constitutional cases the Court has powers to seemingly overturn cases[13]. Brennan's argument that the court has powers in constitutional cases is valid. It is clear from the whole opinion that Justice Brennan thinks capital punishment is unconstitutional, thus it should not be a punishment at all. Before *Furman* the constitutionality of capital punishment had not been discussed generally but only regarding specific punishments or scenarios. This is the argument many of the dissenting opinions raise but Brennan brings up the concept of evolving standards of decency in a maturing society. In this light the death penalty shouldn't be considered from the historical point of view because society changes with time.

Brennan gives examples of four principles that speak against the constitutionality of the death penalty. These focus on human dignity. The first, primary principle, reads that the punishment

[11] Koeninger 1969.
[12] *Furman v. Georgia,* Brennan concurring, 259.
[13] Segal, Westerland, Lindquist 2011, 93.

must not be as severe as to be degrading to human dignity. In *Weems v. United States*[14] it was stated that pain is one factor in judging this. Framers also stated that bodily pain or mutilation are factors but not the only ones. In *Trop v. Dulles*[15] it was stated that severity includes severe mental pain. Studies have shown that death row inmates are in many cases severely mentally ill.[16] Brennan makes clear that more than the pain, the severity of a punishment degrades human dignity. The second principle is that states must not arbitrarily inflict a severe punishment. He again quotes *Trop v. Dulles* where it was established that the punishment was inflicted arbitrarily if it is severe and done differently from that which is generally done. Thirdly, severe punishment must not be unacceptable to contemporary society. Brennan quotes, for example, *Weems v. United States that* stated that capital punishment has been equipped historically but that the evolving of the society needs to be taken into consideration. The final principle is that severe punishment must not be excessive. Brennan states:

> A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering.[17]

It has been argued in Justice Burger, Powell and Rehnquist's dissenting opinions that capital punishment is traditional. Brennan argues that the once traditional capital punishment has become increasingly rare and raises more moral debate and that the tradition must be reconsidered.

Brennan lists more considerations regarding the constitutionality of capital punishment. First, there is the textual consideration of the Bill of rights where Brennan points out that the Framers recognised the existence of the 5th amendment's[18] common punishment but we cannot expect that they meant death to not be that way. For capital punishment there were no exceptions made but still these do not tell us whether they believed the bill of rights immediately to prevent the infliction of the punishment of death. Another consideration is that the Court has decided three different cases that challenged the constitutionality of particular methods of inflicting the death penalty. The court has debated constitutionality of, for

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[14] *Weems v. United States,* 217 U.S. 349 (1910).
[15] *Trop v. Dulles,* 356 U.S. 86 (1958).
[16] Slobogin 2000.
[17] *Furman v. Georgia,* Brennan Concurring, 279.
[18] US Constitution 5th amendment.

example, shooting[19] and electrocuting again after a failed attempt, basically torturing the person[20]. Brennan concludes that the question is whether the deliberate infliction of death is today consistent with the command of the Clause that the State may not inflict punishments that do not comport with human dignity. Brennan states:

> The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering.[21]

It is a more liberal interpretation to argue that the death penalty has changed from the Framers' interpretation. The final principle to be considered is that capital punishment being an unusually severe and degrading punishment does not mean it is excessive in the view of the purposes for which it is inflicted. The states do claim that death is necessary as a punishment for numerous reasons like deterrence. These are more broadly looked at in Marshall's concurring opinion. Brennan claims that there is no evidence suggesting that capital punishment is necessary in any way and that the public opinion is not a reason enough.

3.3 Justices Stewart, White and Marshall

Mr. Justice Stewart starts by quoting *Weems v. United States* where it was stated that capital punishment differs from other punishments in kind but not in degree. This can be interpreted as him saying capital punishment is not inherently cruel. His arguments tell that its irrevocability and how rarely it is used makes it unusual in these cases and that capital punishment cannot be entirely banned but it should be less wantonly and freakishly imposed. He brings up the fear people will take matters into their own hands if they think the punishments given by the states aren't enough. He states this possible anarchy as a valid concern but does not give any evidence that this has happened or would happen.

Mr Justice White addresses the case from a narrower point of view than the other concurring opinions. He breaks his opinion down to three points:

> 1. The legislature authorises the imposition of the death penalty for murder or rape, 2. the legislature does not itself mandate the penalty in any particular class or kind, but

[19] *Wilkerson v. Utah,* 99 U.S. 130 (1878) and *In re Kemmler,* 136 U.S. 436 (1890*)*.
[20] *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459 (1947).
[21] *Furman v. Georgia*, Brennan concurring, 287.

> delegates to judges or juries the decisions as to those cases, if any, in which the penalty will be utilised; 3. judges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer or rapist.[22]

The imposition of capital punishment is, according to White, so seldom that it is not a credible deterrent or contribute to any other end of punishment. He also states that before the capital punishment was not considered cruel and unusual because it was justified by the social ends it was deemed to serve. Seemingly he implies here that this has changed.

Mr. Justice Marshall has many of the same arguments as the concurring opinions before so I will not be repeating all of them. He makes it clear in the beginning of his opinion that opposing capital punishment does not mean minimising or condoling murder or rape. Marshall also made a list of his points. The first point comes from *O'Neil v. Vermont*[23] where it was said that certain punishments inherently involve so much physical pain and suffering that civilised people cannot tolerate them, so those are cruel and unusual. This is also clear from the previous interpretation of the 8th amendment in other case law. Point number two is that there are unusual punishments even if previously the same punishment was usually given. He argues that if the punishments were invented to serve humane purposes they would be constitutionally permissible. The next point quotes *Weems v. United States* where it was said that a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose. Lastly, he states that where a punishment is not excessive nor serves a valid legislative purpose, it still may be invalid if popular sentiment abhords it. He gives an example that punishment might serve a valid legislative purpose but be unconstitutional if the people found it morally unacceptable. These arguments touch on morality and constitutionality of capital punishment.

Marshall states that in order to assess if capital punishment is an excessive or unnecessary penalty he must consider the reasons why it might be considered a necessary punishment. He starts by saying that retribution is misunderstood in the United States. He says the question should be "What justifies men in punishing?" not the commonly asked "Why do men punish?" He argues that the Court has consistently denigrated retribution as a permissible goal

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[22] *Furman v. Georgia,* White concurring, 311.
[23] *O'Neil v. Vermont,* 144 U.S. 323 (1892).

of punishment and he thinks it is wrong due to the history of the 8th amendment as discussed in previous opinions. Deterrence is the most often used argument when people are in favour of capital punishment because people would think death scares us more than imprisonment. Marshall, however, brings out statistics that show the effectiveness of it being questionable. For the deterrence to work there should be less murders in states that have capital murder, but this is not the case.[24] Virtually every study that time showed similar results. Prevention of repetitive criminal acts is another argument quite understandable, a murderer cannot commit another crime if they are dead. Marshall argues that murderers are more unlikely to commit more crimes than other criminals, in prison and after. The prevention logic is only a flawed logic that has not been backed up by studies. Encouragement of guilty pleas and confessions is another goal with capital punishment. It can result in deterring the suspects from exercising their rights under the 6th amendment.[25] Eugenic arguments have also been used, for example, that a murderer has something inherently wrong with them and we want them out of our society. It is not possible to know whether someone would benefit from treatment and be a functioning member of society if they are not given a chance. Lastly, the economic arguments that Marshall shows are false. People on death row cost more money than someone with a life sentence because they are granted more appeals that take time and work. The execution in itself also costs more because the lethal injection consists of expensive medication that is hard to get access to.

[24] Chalfin, Haviland, Raphael 2012, 41.
[25] US Constitution 6th amendment.

4 Furman v. Georgia Dissenting opinions

4.1 The Chief Justice Burger

I noticed that the dissenting opinions used more rhetorical language, such as painting the concurring side as having their personal opinions influence the decision. Mr. Justice Burger starts the first dissenting opinion by stating that he would personally restrict capital punishment but he doesn't see it as something the court has powers to do. He also states that, in his opinion, the concurring opinions have not given an adequate proof of the unconstitutionality. The words "cruel and unusual" are, to Burger's understanding, one of the most difficult ones to translate into judicially manageable terms. Burger interprets the words of the 1968 Bill of rights as meaning punishments that are not legally authorised and not within the jurisdiction of the courts to impose. He says that the Framers intended the 8th amendment to have a different meaning than this. Burger states that when including the terms "cruel and unusual" there was no further discussion among the Founding Fathers about the meaning of the words. This can be interpreted in a way that he doesn't see the historical background to give precise answers to whether capital punishment in itself is cruel or unusual.

He quotes *Wilkerson v. Utah*[26] and *In re Kemmler*[27] bringing up arguments regarding the term unusual in the 8th amendment. In the first case the Court made no reference to the role of unusuality in the constitutional guarantee and in the latter one the court quoted *Weems v. United* States which said the unusuality was not relevant in the Court's reasoning. Burger does still state that he doesn't think the term unusual has no relevance but that it is not contemplated as much as the term cruel. He also quotes case law that has stated that capital punishment would not be unnecessarily cruel. The term unnecessarily cruel comes from the fact that capital punishment is not seen as needed to achieve legitimate penal aims, thus it being unnecessarily cruel. He quotes *Louisiana ex rel. Francis v. Resweber*[28] where the court only discussed unnecessary pain, not cruelty as a whole. He states that the general public does not see capital punishment to be so bad that traditional deference to the legislative judgement should be abandoned. This is a conservative argument. They say that the petitioners rely on a

[26] *Wilkerson v. Utah,* 99 U.S. 130 (1878).

[27] *In re Kemmler,* 136 U.S. 436 (1890).

[28] *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459 (1947), 463-464.

different body of empirical evidence than him. He doesn't think the death sentence was then regarded as intolerably cruel and uncivilised. He brings up two arguments against capital punishment: that it takes away the possibility of retribution, and the deterrence effect. He quotes *Williams v. New York*:

> There is no authority suggesting that the Eighth Amendment was intended to purge the law of its retributive elements, and the Court has consistently assumed that retribution is a legitimate dimension of the punishment of crimes.[29]

He thinks that it would be reading far into the 8th amendment to hold that the punishments authorised by legislatures cannot constitutionally reflect a retributive purpose and that the lack of deterrence of capital punishment is not proven and that some are challenging the deterrence of any crime.

4.2 Mr Justice Blackmun

To the other dissenting opinions, Mr. Justice Blackmun added a ten point list of, in his words, somewhat personal comments. He has the same argument as all the other dissenting opinions that capital punishment is not something to be decided in the Court. He then goes on to say that statistics prove little, if anything, for the concurring opinions. He does not specify which statistics he is referring to or give more explanations. In three points he talks about how there has been no precedence for abolishment of capital punishment, that there are numerous state laws the punishment would interfere with and that the states should have a right to their own legislation. These points are mostly the same that the other dissenting opinions also bring up. Blackmun does give examples of recent legislation that had added capital punishment to new scenarios, for example, the aircraft piracy statute[30]. Some of the concurring opinions create an impression that capital punishment has only been restricted and these laws show evidence against that. Lastly, Blackmun addresses the morality of capital punishment. He states that the Court's task is to pass upon the constitutionality of legislation and personal preferences or morality should not play a part in it. This makes Blackmun's statement sound like there is nothing to debate about the constitutionality of the legislation of capital punishment. He also states that capital punishment sends a message to the victim's loved ones that the crime was taken seriously. His opinion as a whole states the ten points shortly and the evidence behind

[29] *Williams v. New York* 337 U.S. 241 (1949), 248.
[30] The aircraft piracy statute, 49 U. S. C. § 1472 (i), 1961.

the arguments lacks, for example the last statement has no proof. Doesn't life in prison indicate an atrocious character of the offence and authorities taking it seriously as well? However, there are the other dissenting opinions giving context to the topics.

4.3 Mr. Justice Powell

Mr. Justice Powell starts his opinion by stating he doesn't think the concurring opinions provide a constitutionally adequate foundation for their decision. To back up his claims he uses quotes from the concurring opinions which say something about the morality or human dignity of capital punishment. He also states that the concurring opinions were not all in favour of abolishing capital punishment so the practical consequences are not certain enough. The rest of Powell's opinion can mostly be summarised in the following quote from his opinion:

> The Court rejects as not decisive the clearest evidence that the Framers of the Constitution and the authors of the Fourteenth Amendment believed that those documents posed no barrier to the death penalty. The Court also brushes aside an unbroken line of precedent reaffirming the heretofore virtually unquestioned constitutionality of capital punishment. Because of the pervasiveness of the constitutional ruling sought by petitioners, and accepted in varying degrees by five members of the Court, today's departure from established precedent invalidates a staggering number of state and federal laws.[31]

He contemplates the first points about the Framers' intent and the clear evidence with the fact that 5th and 8th amendments of the Constitution show nothing to indicate the capital punishment would be cruel and unusual. In this he also quotes *McGautha* where Mr. Justice Black stated in his separate opinion:

> That history need not be restated here since, whatever punishments the Framers of the Constitution may have intended to prohibit under the "cruel and unusual" language, there cannot be the slightest doubt that they intended no absolute bar on the Government's authority to impose the death penalty.[32]

Lastly about this, he states that the concepts and meaning of the 8th and 14th amendments are designed to be dynamic and applied to specific circumstances but the Court is not free to read into the Constitution. He states that nothing in the history or language of the amendments indicates doubt that capital punishment was considered to be constitutionally permissible.

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[31] *Furman v. Georgia,* Powell dissenting, 417.
[32] *McGautha v. California,* Black separate, 226.

He uses multiple cases to give reasoning to his arguments and especially the plurality opinion in *Tropp v. Dulles, supra*. Powell states it was that opinion which provided the grounds for the "present attack on the death penalty" because it stated that evolving standards of decency that mark the progress of a maturing society should be taken into consideration.[33] He does point out that other cases such as *McGautha* have shown opposing arguments and that there is no precedent about the absolute abolition. He thinks the Court is ignoring the traditional approach it should take. He uses the rhetoric that the Court is making decisions according to their personal preference and lacking rationality. He as well talks about how the separation of powers and that wiping out so many state laws is not correct. He suggests that the general public wouldn't get outraged if they knew about the reality of capital punishment which seems like an argument taken out of its context. Usually, when capital punishment is discussed widely opposing it is twisted as nullifying the crime. This happens many times when there is a high profile execution happening. There are numerous issues about capital punishment regarding racial issues that have been mentioned in the concurring opinions and different articles. For example, the prosecutorial issues regarding capital punishment are something that are not taken into consideration in *Furman* at all. Nowadays those are studied more[34] but also inflict racism even more. Powell, however, denies it. The article also touches on the fact that people with lower socioeconomic status are way more likely to get sentenced to death. This is something that Powell states is not rationally thinking likely to happen. Taken into consideration that other opinions touch on this as well, the problem isn't likely to have risen only after *Furman*. There is no evidence to support Powell's "rational thinking".

4.4 Mr. Justice Rehnquist

Lastly, we take a look at Mr. Justice Rehnquist's dissenting opinion. His opinion focuses mostly on the fact that capital punishment had been around for a very long time and the court does not have the power to decide about it. He starts with stating "The court's judgements today strike down a penalty that our Nation's legislators have thought necessary since our

[33] *Trop v. Dulles,* 101.
[34] Burke 2023.

country was founded".[35] This indicates that Rhenquist also values the tradition capital punishment has, and questions why the Court now has a differing standing.

He heavily questions the fundamental question of the role of judicial review in a democratic society. He does say that the Supreme Court has the last word in making judicial precedents but the court has to keep in mind the limits. Rhenquist writes that the point in *Furman* is not necessarily the constitutionality of capital punishment but the amount of power the Court may exercise. He argues that the government consisting of elected representatives of the people have to co-exist with the power of the federal judiciary, implying that the judiciary makes it hard by invalidating laws. In the US numerous states have legislation about capital punishment and the judiciary in Furman wanted to nullify all of them by abolishing it.

[35] *Furman v. Georgia,* Rehnquist dissenting, 465.

5 From *Furman* to *Gregg*

Only four years after *Furman*, the issue of capital punishment's constitutionality was being discussed in the Supreme Court in *Gregg v. Georgia*[36]. One big question about these cases is why *Gregg* was needed only four years after *Furman* set a new precedence about capital punishment. Analysing all the literature and *Furman*, there is clearly a frustration with the decision in *Furman* because the result was not entirely clear. *Gregg* was a response to this frustration and it gave a more clear result even when it is seen controversial as well.[37] Many state laws had to be revised to be in line with the decision and the most immediate consequence was that over 600 men had to be re-sentenced. There were no clear guidelines to how the states should revise the capital punishment laws because all the concurring justices wrote their own opinions. Some states decided to interpret *Furman* as condemning statutory discretion. They usually decided to seek abolition of capital punishment but on the other side some states made the death penalty mandatory for some crimes. Some states decided that *Furman* condemns statutory discretion if there are no standards for it. Those states provided those standards. Many states chose to provide a list of aggravating circumstances and Georgia did this too.[38]

To be sentenced to death in Georgia after *Furman* there had to be a trial where a judge or jury determined the innocence or guilt of the defendant. In jury trials the judge is required to charge lesser included offences. After this there must be a sentencing hearing for the punishment. If the jury or judge reaches a guilty verdict, they must show the aggravating circumstance(s) they found. There are ten aggravating circumstances listed and only one needed to be found.[39] If there are aggravating circumstances, the penalty may be a maximum of life in prison which in the US literally means life, possibly without possibility of parole at all.

[36] *Gregg v. Georgia,* 428 U.S. 153 (1976).
[37] Thorne 2022, 160.
[38] Barry 1979, 84-87.
[39] Statute § 27-2534.1 **(c)** (Supp. 1975),

6 Gregg v. Georgia concurring opinions

6.1 Justices Stevart, Powell and Stewens Joined opinion

First, I will lay out the general facts about the case. The petitioner, Gregg, was charged with armed robbery and murder. He and his companion, Allen, were hitchhiking and were picked up by two men. Later, along the journey bodies of the two shot men were found and Gregg and Allen were arrested the next day while still using the victim's car. Gregg argued that he had shot the victims in self defence but later stated otherwise. The jury convicted him to be sentenced to death. In *Furman* five judges concurred and four dissented. In *Gregg* three judges wrote a joint opinion, one wrote their own concurring opinion and the last three joined the other opinions and quoted their own opinions from *Furman*. These two cases are not directly comparable, however, there were still two judges, Stewart and White, who were in *Furman* favouring the restriction of capital punishment but here in *Gregg* they are on the opposite side. In my opinion, this is interesting because the cases are similar in many ways and the legal issue of capital punishment is usually very polarising and it isn't usual to see people change their views.

In the Joint opinion of Mr. Justice Stewart, Powell and Stewens it is stated:

> The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments[40].

We see from the definition of the issue already the fact that they consider this case to be only about this specifically, not generally about capital punishment. This is a difference in the opinions here like it was in *Furman*. The joined opinion concludes that capital punishment does not violate the constitution. They start with the English Bill of Rights like many did in *Furman*, arguing that it prohibited torturous and barbaric punishments. Death was not included in it then and the joined opinion wants to interpret it similarly. They reference the same cases as they did in *Furman*[41] and mostly use all the same arguments about the history and interpretation of the 8th amendment.

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[40] *Gregg v. Georgia,* Joined opinion, 158.
[41] *Wilkerson v. Utah and In re Kenmler.*

The joined opinion contemplates both capital punishment in general and capital murder specifically. The arguments are the same here. A very big argument for the concurring side in *Furman* was that the capital punishment system is against the evolving standards of decency in society. The joined opinion argues against that by saying that a large proportion of the US population continues to support capital punishment. They argue that there have been numerous cases about capital punishment but the constitutionality had not been debated widely before *Furman* so there is more precedent to prove capital punishment is in line with the moral majority of the population. They base this, for example, on the fact that only California held a referendum that abolished capital punishment while other states made capital punishment mandatory for some crimes. Burger argued in *Furman* that capital punishment should be available for the most extreme cases and the joined opinion here agrees. However, they do not take into consideration that there are different interpretations for extreme crimes as well.

More arguments handle, again, about the power of the Court. The joined opinion argues that the Court does not have the powers to decide on the abolition of capital punishment because it is not a constitutional issue, as established before. They argue that the democratically elected legislators can make decisions on it and those decisions are valid. These arguments are very broadly discussed in *Furman* but here in *Gregg* the joined opinion just states the argument.
Moral arguments they bring up are, for example, the argument Marshall brings up that the criminal has to be treated with human dignity. They respond to this by arguing that the Court must ask whether it comports with the basic concept of human dignity at the core of the 8th amendment. They bring up retribution and deterrence again as arguments. They argued that retribution is no longer the dominant objective of criminal law.[42] They justified this by saying that extreme criminals may only deserve the death penalty because it is seen as appropriate and proportionate. They acknowledge that death is a different punishment but it does not mean that it should never be imposed. Deterrence is not dealt with too much in the joined opinion other than that it is a factor for capital punishment. Most studies have shown that the deterrence of capital punishment is very inconclusive and not statistically strong enough. However, there are arguments that even a small amount of deterrence effect is enough.[43]

[42] *Williams v. New York,* 337 U. S. 241, 248 (1949).
[43] Sunstein, Vermeule 2005.

After all the arguments generally about capital punishment and capital punishment according to Georgia legislation, the joined opinion discusses whether in this specific case capital punishment may be imposed on the petitioner. In their opinion, there is nothing discriminatory going on with the conviction. First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. Second, they argued that Georgia's procedures after *Furman* still have the danger of arbitrariness that violates 8th and 14th amendments. The joined opinion responds by saying that according to Georgia's law there is an additional provision designed to assure that the capital punishment will not be imposed discriminatorily and that the legislation is as good as it can get. The basis in the arguments in the joined opinion is that the Georgia legislation has been renewed after *Furman* so it is no longer unconstitutional. The meaning of the 8th amendment has been discussed widely even after *Gregg.* Antonin Scalia and Ronald Sworkin debated this very famously in the 1990s. Scalia favoured the more traditional approach to interpreting the 8th amendment where we should take into consideration what the Framers said in the drafting of the text of the amendment.[44] Dworking, however, took a similar approach as the dissenting side in *Gregg*. He stated that:

> The textualist, he maintains, can read the amendment in either of two ways:
>
> (1) as prohibiting punishment that, *at the time of its writing* (1791), was thought to be cruel and unusual;
>
> (2) as prohibiting punishment that, *according to some unchang- ing, community-independent standard*, is cruel and unusual. (*The Principled Reading.*)[45]

The second makes the difference between their interpretations. It is similar to the evolving standards of decency in society that is mentioned in the dissenting opinions. The joined opinion and concurring opinions reject this. All this shows how this is an issue very much up for interpretation still to this day.

[44] Ostertag 2018, 423.
[45] Ostertag 2018, 427.

6.2 Mr. Justice White and other concurring opinions

Mr. Justice White states that the Georgia statutory scheme may be constitutionally carried out. He adds points that the joined opinion before did not take into consideration. In *Furman* the decision was that the old Georgia legislation was unconstitutional, imposed discriminatorily, wantonly and freakishly and infrequently. In *Furman,* White argued that the standards for capital punishment wouldn't be enough to make it not discriminatory. Here in *Gregg*, however, he argued that it is enough to have standards and guidelines for capital punishment to be constitutional and in line with *Furman*'s precedent.[46] He states that the court found three statutory aggravating circumstances for Gregg so it is clear that the capital murder conviction is according to the law. He agrees that removing the death penalty conviction on robbery counts was the right decision because it would have been excessive. The petitioner argues here that jury being the sentencer does not correct the problem. Capital punishment will still be imposed in the same discriminatory, standardless and rare manner which was banned in *Furman*. White uses the same argument as the joined opinion to respond to this. He says that the legislation in Georgia has made a great effort to guide the jury while giving them permission to make decisions. According to him, this is enough to say that there is no reasonable doubt to expect the system to still be discriminatory. Georgia's supreme court did consider that capital punishment was too infrequently imposed in robbery cases so it is unusual. White argues that this was enough and that the punishment after that is constitutional. He still quotes *Jarrell v. State*[47] which concluded that there have been multiple cases where a person who murdered witnesses to a robbery was sentenced to death, similarly to *Gregg.* This, however, is not very strong as an argument because the sentence comes from the murder, not the robbery. Furthermore, petitioners argue that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies. White argues that the incompetence of the prosecutors is not backed up by facts. There have later been studies showing that there is discrimination in the way prosecutors prosecute capital punishment cases[48] that shows the problem being there at the time of *Gregg*. Lastly, White concludes that he does not agree with the petitioner's arguments by quoting his opinion in *Roberts* v.

[46] Liebman 2007, 30.
[47] *Jarrell v. State, 234 Ga.* 410, 216 S. E. 2d 258 (1975).
[48] Burke 2023.

Louisiana[49]. There he concluded, for example, that the Framers intended the 8th amendment to mean tortuous punishments, as established before.

The last three concurring justices Chief Justice Burger and Justices Rehnquist and Blaackmun did not wholly write their own opinions. Burger and Rehnquist concur in Justice White's opinion. They state that Georgia's system after the revision is in line with the *Furman* judgement, thus constitutional. Blackmun concurs with the judgement.

[49] *Roberts v. Louisiana,* 428 U.S. 325 (1976), 350-356.

7 Gregg v. Georgia dissenting opinions

Opposing the Joined opinion, it seems that the dissenting opinions consider *Gregg* to be more generally about capital punishment's constitutionality, like *Furman* was considered to be. Mr. Justice Brennan's concurring opinion in *Furman* went very deep into the problematics of capital punishment. He does state that opinion in his dissenting opinion in *Gregg,* which we will go through next. He states that the cruel and usual punishments clause of 8th amendment must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society".[50] The majority side stated that the evolving standards of decency shouldn't focus on capital punishment in itself but more on the procedures employed by the state to single out persons to suffer the death penalty. According to Brennan, those views hold that the clause invalidates the mandatory infliction of capital punishment but not its infliction of sentencing procedures that the majority safeguard against the risk that capital punishment was imposed in an arbitrary manner. In *Furman,* Brennan defines evolving standards of decency as requiring focus upon the death penalty itself and not just the procedures under which the determination to inflict the penalty upon a particular person was made. The words of evolving standards of decency in society can be interpreted differently and the different sides do not see eye to eye. This was first brought as an argument by Brennan in *Furman* and the dissenting side did not take it into consideration in their opinions. Here the majority, the same people, made their own interpretation.

Brennan says that society has progressed to the point death is cruel and unusual as a punishment in all circumstances, violating the 8th amendment and human dignity. Here Brennan also brings up the moral concepts that should tell us that the law has progressed as it should but that capital punishment is no longer tolerable in the society. Thus, the law should progress more. He calls capital punishment the calculated killing of a human being by the State which denies the humanity of the executed person. This is a very good example of the rhetorical argumentation that is seen especially in the dissenting side's arguments. Brennan states briefly the reasons why capital punishment is cruel and unusual. It's unusual according to him because it is unusually severe, unusual in its pain, finality, and enormity. It also does not serve penal purposes more effectively than other punishments. He states that capital

[50] *Furman v. Georgia,* Brennan concurring, 269-270.

punishment is cruel because it treats "members of the human race as nonhumans, as objects to be toyed with and discarded".[51] His conclusion is that it violates the 8th amendment fundamentally and that even the vilest criminal should be possessed human dignity.

Mr. Justice Marshall also wrote an in-depth opinion in *Furman* so he only adds to that in his dissenting opinion in *Gregg*. His view that capital punishment violates the 8th and 14th amendments of the US constitution remains in *Gregg*. His main argument here is that the purpose of *Furman* has been undercut by developments because the states have been able to interpret *Furman* very freely and it has not been constitutional. He concluded in *Furman* that capital punishment is constitutionally invalid, listing two reasons for it. First being capital punishment's excessivity which he justified, for example, with capital punishment not serving a punitive purpose or the retribution or deterrence a punishment should. Second reason is that he does not believe American people would accept capital punishment's morality if they were fully informed about it and its liabilities. There has been discussion that American people are largely unaware of the information regarding capital punishment.[52] Capital punishment being unacceptable is very debated because it is very polarising. For some people capital punishment is like the government purposely killing people and it should not be any more acceptable than the murderer's crime.[53] However, since *Furman* there have been new laws that widen the scope of capital punishment, for example the aircraft piracy statute.[54] The concurring opinion relies on this heavily but the evidence is very inconclusive and neither side is entirely correct.

Marshall gives two examples that people use to argue that capital punishment is not excessive. These are general deterrence and retribution, which the concurring side uses as arguments. In *Furman,* Marshall gives the data that shows that the deterrent effect of capital punishment is not enough to make capital punishment necessary,[55] for example, that the statistics about the deterrence are not convincing. He criticises Ehrlich's study[56] with the same reasoning, for example, the study compared crime rates in a way that Marshall thinks is flawed. In Marshall's opinion, the retribution is more of a multifaceted concept and that its role in the

[51] *Gregg v. Georgia,* Brennan dissenting, 230.
[52] Ellsworth, Ross 1983, 140.
[53] Steiker 2005, 764.
[54] The aircraft piracy statute, 49 U. S. C. § 1472 (i), 1961.
[55] *Furman v. Georgia,* 347-354.
[56] Ehrlich 1973.

criminal law is not entirely clear. He argues that retribution is the basis of the insistence that only people who broke the law should be punished and it plays a great role in determining who should be punished. However, he makes clear that the previous does not mean that retribution should be a general justification for punishing. Marshall doesn't think there is evidence that shows abolishing capital punishment encouraging people to take justice into their own hands, for example.

Marshall ends his opinion with:

> The death penalty, unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution, is an excessive penalty forbidden by the Eighth and Fourteenth Amendments. I respectfully dissent from the Court's judgement upholding the sentences of death imposed upon the petitioners in these cases.[57]

I think this summarises very well the side that opposes capital punishment, concurring in *Furman* and dissenting in *Gregg.* The amendments are mentioned along with retribution and deterrence which are the main things considered especially in *Gregg.* The last sentence also shows the passive aggressive tone the dissenting opinions have in both cases.

[57] *Gregg v. Georgia,* Brennan dissenting, 241.

8 Conclusions

The concurring opinions were divided into two. Douglas, Brennan and Marshall who wanted to abolish capital punishment wholly. and the other three justices, Stewart and White, more so argued that these specific cases have unconstitutional elements. All the concurring opinions, however, argue that historically the words cruel and unusual were not specifically defined so the evolving standards of society can be taken into consideration. This is something that a more liberal ideology usually argues. They argue that capital punishment is cruel because it violates human dignity and unusual because it targets minorities and poor people the most and is imposed irregularly. Therefore, the Court has powers to restrict capital punishment.

The dissenting opinions had mostly the same type of arguments. The main argument in the dissenting opinions was that there is no basis in the argument that capital punishment is cruel or unusual according to the 8th amendment. Because of this, the dissenting opinions argue that the Court does not have powers to decide on capital punishment so it is a legislative issue. They also argue that the Court should interpret the constitution traditionally as it has been interpreted before. This is clearly a more conservative approach.

The *Furman* case was not open and shut, where one could clearly see the other side was in the wrong. In the United States the system is built in the way that there must be balance in the powers of the judicial and legislative systems. The constitution can be interpreted in different ways, especially when the meaning of the wording of the 8th amendment was left open. Morality also does play a part in this but it cannot be the entire reason to deem something constitutional or unconstitutional.

Gregg Joined opinion and concurring opinions mainly argued that Georgia's capital punishment legislation was constitutional and in line with *Furman*. After *Furman* the Georgia legislation was changed. Majority side thinks that the new laws were enough for it to make the death sentence constitutional in Georgia. On the dissenting side in *Gregg* the justices relied heavily on their opinions in *Furman*. As stated before Brennan and Marshall wrote very in depth opinions there. They were continuing the principle that capital punishment should be

abolished and that the new legislation in Georgia was not enough to make capital punishment constitutional.

In both cases I noticed that the dissenting side used harsher language in their opinions as mentioned previously. For example, they made passive aggressive remarks about the concurring side and the decision being made. They also used rhetorical argumentation that seemed like it was written to appeal to the general public the most.

Even after *Furman* and *Gregg,* the public deception about capital punishment and popularity has varied with time. It is especially noted in studies that the popularity of capital punishment is connected to racial issues and racism. Capital punishment is and has been notoriously more popular within white Americans while black Americans are over represented in death row.[58] This is alarming considering the society and rising of far right values in The US and around the world. This is something I would like to research more in the future.

[58] Soss, Langbein, Metelko 2003.