

# THE CAPITAL SHADOW DOCKET AND THE DEATH OF JUDICIAL RESTRAINT

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## INTRODUCTION

The Supreme Court’s recent approach to late-state execution challenges on its otherwise opaque shadow docket<sup>1</sup> illuminates a court comfortable with playing an aggressive, decisive role in America’s system of state killing. The Court would prefer for us to think of its role differently—as a passive, mere agnostic participant in a process defined by judicial restraint. The Court promotes this vision when it invokes judicial restraint to justify its refusal to second-guess the cruelty of challenged execution methods<sup>2</sup> or when Justices cite federalism-

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<sup>1</sup> Professor William Baude coined this term. See William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015).

<sup>2</sup> See, e.g., *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123, 1134 (2019) (“[T]he question of capital punishment belongs to the people and their representatives, not the courts, to resolve.”). This was a curious point given that the legality of capital punishment was not at

based rationales for refusing to delay state enforcement of death sentences.<sup>3</sup> Even the oft-quoted refrain that “death is different”—the notion that the Court proceeds carefully to enforce the Eighth Amendment as applied to capital punishment<sup>4</sup>—advances a narrative of the Court as careful, constrained, and once removed. In this telling, judicial restraint and constitutional regulation of the death penalty go hand in hand.

And yet, on the Supreme Court’s shadow docket, the Court’s death penalty jurisprudence is anything but restrained. For the last several years, the Court has regularly reversed lower court stays in a series of death cases presenting substantial issues.<sup>5</sup> While decisions addressing death penalty cases on the Court’s emergency orders docket is nothing new,<sup>6</sup> the Court’s willingness to issue momentous, dispositive rulings in death cases through the shadow docket has emerged as an important feature of the Court’s constitutional regulation of the death penalty.<sup>7</sup> As Lee Kovarsky has shown, the Court is more willing than

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issue in *Bucklew*, only the validity under the Eighth Amendment of a particular execution method as applied to a particular condemned person. See Jenny-Brooke Condon, *A Cruel and Unusual Term: The Distortion of Decency and Restraint in the Supreme Court’s 2018–2019 Death Penalty Decisions*, 32 FED. SENT’G REP. 15, 16–17 (2019).

<sup>3</sup> See, e.g., *Murphy v. Collier*, 139 S. Ct. 1475, 1478, 1481, 1485 (2019) (Alito, J., dissenting from grant of application for stay) (mem.); see also Lee Kovarsky, *Delay in the Shadow of Death*, 95 N.Y.U. L. REV. 1319, 1333 (2020).

<sup>4</sup> The Court has suggested that because “[the death penalty] is unique in its severity and irrevocability[.]” the Court must carefully evaluate its compliance with the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 187–88 (1976).

<sup>5</sup> *Dunn v. Price*, 139 S. Ct. 1312, 1313–14 (2019) (Breyer, J., dissenting); Will Baude, *Death and the Shadow Docket*, REASON: THE VOLOKH CONSPIRACY (Apr. 12, 2019, 3:30 PM), <https://reason.com/2019/04/12/death-and-the-shadow-docket/> [<https://perma.cc/H2ZX-NSNZ>] (noting that changing the standards and norms for obtaining eleventh hour stays of execution through the “shadow docket” creates uncertainty and the risk of arbitrary implementation); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 157 (2019) (noting that starting in October 2018 the Justices changed their approach to stays of execution in capital cases “ratcheting up . . . the standard for relief . . . through a series of summary rulings denying or vacating stays”).

<sup>6</sup> See The Supreme Court’s Shadow Docket: Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the House Committee on the Judiciary (Feb. 18, 2021) (testimony of Stephen I. Vladeck), <https://www.justsecurity.org/wp-content/uploads/2021/02/Vladeck-Shadow-Docket-Testimony-02-18-2021.pdf> [<https://perma.cc/MQ9N-WEN4>] (noting that the “shadow docket” which is as old as the Supreme Court “comprises the thousands [of non-merits] decisions the Justices hand down each Term—almost always as ‘orders’ from either a single Justice (in their capacity as ‘Circuit Justice’ for a particular U.S. Court of Appeals) or the entire Court”).

<sup>7</sup> Anti-death penalty advocate Sister Helen Prejean criticized this new reality following the September 22, 2022 shadow docket ruling that overturned a lower court stay over the objection of four members of the Court in the case of Alabama death row prisoner Alan Miller. She tweeted: “The U.S. Supreme Court now routinely overrides the measured decisions of lower courts without ever hearing arguments or fully considering the merits of cases. This Court has abandoned its moral responsibilities and become a rubber stamp in the machinery of death.” Sister Helen Prejean (@helenprejean), TWITTER (Sept. 22, 2022, 7:50 PM), <https://mobile.twitter.com/helenprejean/status/1573142753793507328> [<https://perma.cc/7LV8-4882>].

ever before to eliminate lower court stays of execution in order to carry out executions, even when those seeking such extraordinary relief have not shown a likelihood of success on the merits.<sup>8</sup> This has, at times, frayed collegiality on the Court<sup>9</sup> and has raised questions about the Court's dispassionate commitment to the restraint it rhetorically endorses.<sup>10</sup> In these shadow docket cases, the Court clears the way for state killing without full briefing, oral argument, and written decisions explaining the Justices' rationales in matters of life and death. Indeed, the public no longer hears the Justices' concerns or receives insight into their thinking during oral argument.<sup>11</sup> Interested parties can no longer share their perspectives as *amicus curiae*.<sup>12</sup>

This also leaves the lower courts without direction.<sup>13</sup> As Ngozi Ndulue has pointed out, lower courts have read middle-of-the-night shadow docket decisions as substantive judgments about merits issues affecting death penalty challenges, rather than as decisions enforcing norms related to stay requests.<sup>14</sup>

<sup>8</sup> See Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 621, 666–67 (2022); Lee Kovarsky, *Abortion, the Death Penalty, and the Shadow Docket*, SCOTUSBLOG (Sept. 6, 2021, 12:03 PM), <https://www.scotusblog.com/2021/09/abortion-the-death-penalty-and-the-shadow-docket/> [<https://perma.cc/6TGL-CJQY>].

<sup>9</sup> As the *New York Times* noted, the Court's decision in *Bucklew* capped off a Term marked by "considerable friction" and raw feelings regarding the Court's recent death penalty decisions. Adam Liptak, *Rancor and Raw Emotion Surface in Supreme Court Death Penalty Ruling*, N.Y. TIMES (Apr. 1, 2019), <https://www.nytimes.com/2019/04/01/us/politics/supreme-court-death-penalty.html> [<https://perma.cc/BN7P-QZ2S>].

<sup>10</sup> As one commentator recently put it:

[T]his is not how a Supreme Court should behave. . . . They should always act cautiously, with proper deference to other branches of government, to the factual findings of lower courts, and to the reasoned opinions of their fellow justices. They should act with proper time for reflection and deliberation wherever possible. And they should always explain their decisions with legitimate rational arguments. Otherwise, they are simply rulers in robes and will squander the institutional legitimacy of the court system, thereby destroying one more key pillar supporting the rule of law.

Paul Schiff Berman, *The Supreme Court Kills Its Principles in Service to the Death Penalty*, NAT'L L.J. (Jan. 31, 2022), <https://www.law.com/nationallawjournal/2022/01/31/the-supreme-court-kills-its-principles-in-service-to-the-death-penalty/?sreturn=20230109152228> [<https://perma.cc/MS4R-NYMX>].

<sup>11</sup> Vladeck, *supra* note 5, at 157.

<sup>12</sup> *Id.*

<sup>13</sup> Mark Joseph Stern, *Did Backlash over the Shadow Docket Spook the Supreme Court?*, SLATE (Sept. 10, 2021, 2:34 PM), <https://slate.com/news-and-politics/2021/09/supreme-court-shadow-docket-death-penalty-religious-freedom.html> [<https://perma.cc/EP2J-LJLA>]

(noting that a debate about condemned persons' right to bring spiritual advisors into the execution chamber occurred for two years "almost exclusively through concurring and dissenting opinions accompanying rushed, late-night orders with no majority opinion."). Stern notes that this abbreviated process "has deprived lower courts of any authoritative ruling, forcing them to scour cryptic, threadbare decisions for guidance." *Id.*

<sup>14</sup> Ngozi Ndulue, *Symposium: The Shadow Docket is Shaping the Future of Death Penalty Litigation*, SCOTUSBLOG (Oct. 26, 2020, 10:42 AM), <https://www.scotusblog.com/2020/10/symposium-the-shadow-docket-is-shaping-the-future-of-death-penalty-litigation/> [<https://perma.cc/QS23-82P3>].

This abbreviated process has profound consequences for our current system of capital punishment, which since the mid-1970s has proceeded on the premise that the Supreme Court's close regulation of capital punishment's constitutionality ensures its fairness and legitimacy.<sup>15</sup> In short, the Supreme Court is playing a decisive role in the administration of capital punishment but with less restraint, transparency, and accountability than ever before.<sup>16</sup>

On one view, the Court's expedited decision-making on the shadow docket may suggest that the Court is weary of the long-term project of "tinker[ing] with the machinery of death."<sup>17</sup> Justice Blackmun famously used those words when he announced that he could no longer accept the premise that the Court's careful regulation of the death penalty could cure it of "its inherent constitutional deficiencies."<sup>18</sup> The Court's resort to shadow docket decision-making may arguably reflect a different variety of weariness regarding the judicial role. This version favors less careful deliberation and greater executions, and may, ironically, further the longevity of capital punishment for years to come.<sup>19</sup>

<sup>15</sup> See generally CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 244 (2016); Carol S. Steiker, *Capital Punishment and Contingency*, 125 HARV. L. REV. 760, 782 (2012) (citing "the legitimizing role of the Supreme Court's constitutional imprimatur on capital punishment"); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 429, 433–34, 437 (1995) (discussing the legitimating function of the Supreme Court's death penalty jurisprudence).

<sup>16</sup> Vladeck, *supra* note 5, at 127 ("Allowing months (if not years) of government policy to be shaped solely by the Justices' unwritten, subjective predictions about how the litigation is likely to unfold is troubling at best—especially when it comes at the expense of extensive written rulings by lower court judges who are, of necessity, far closer to the facts and the parties.").

<sup>17</sup> Justice Blackmun announced his opposition to capital punishment after many years of participating in the Court's enforcement of constitutional rules in death cases, stating that he would "no longer . . . tinker with the machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

<sup>18</sup> Justice Blackmun explained:

Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—cannot be answered in the affirmative.

*Id.*

<sup>19</sup> The shadow docket may be another twist in the death penalty's ambivalent path of constitutional regulation. For example, one scholar noted in the 1990s after the departure of several Justices in the *Furman* majority, that "[a] sleeker death penalty jurisprudence, built more for speed and efficiency than for normative safety, is coming on line." Louis D. Bilionis, *Legitimizing Death*, 91 MICH. L. REV. 1643, 1659 (1993).

There is, however, another possibility. With capital punishment disrobed of its shell of judicially regulated legitimacy, the Court's decisive role in the brutality of state killing might be more plainly evident and intolerable.<sup>20</sup>

The dynamics driving increased use of the shadow docket may not be death penalty specific;<sup>21</sup> but the shadow docket reinforces features of constitutional regulation of the death penalty that thrive on diminished transparency and the insulation of the judiciary from the consequences of its close involvement in state killing.<sup>22</sup>

This Article will contend that the Court's capital shadow docket does not merely reflect changes in how the Court now approaches norms surrounding requests for emergency relief, as others have illuminated.<sup>23</sup> The capital shadow docket is also a window into judicial regulation of the death penalty devoid of judicial restraint.

Part I will address the role of judicial restraint, doctrinally and rhetorically, in the Court's jurisprudence with particular attention to the meaning and contradictions of judicial restraint in the capital context. Part II will chronicle the emergence of the capital shadow docket. Part III will explain how the capital shadow docket subverts the narrative of judicial restraint to aggressively implement death sentences. Finally, this Article will offer concluding thoughts about the shadow docket's role in the Court's constitutional regulation of capital punishment and what it may mean for the future of capital punishment in the United States.

## I. JUDICIAL RESTRAINT AND STATE-KILLING

The narrative of judicial restraint has centered prominently in the saga of the Supreme Court's constitutional regulation of the death penalty. The Court's capital jurisprudence has reflected an enduring push and pull between deference to other bodies—juries, legislatures, and lower courts—and bold assertions of the Court's power as guardian of fairness and just punishments.<sup>24</sup> The

<sup>20</sup> Justice Brennan, in his concurrence in *Furman v. Georgia*, emphasized the ways in which enforcing the Eighth Amendment furthers a constitutional commitment to human dignity. See *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (“The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is ‘cruel and unusual,’ therefore, if it does not comport with human dignity.”).

<sup>21</sup> See Vladeck, *supra* note 5, at 160; Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 ADMIN. L. REV. 1, 10 (2022).

<sup>22</sup> See generally Jenny-Brooke Condon, *Denialism and the Death Penalty*, 97 WASH. U. L. REV. 1397 (2020).

<sup>23</sup> See Vladeck, *supra* note 5, at 155 (describing quiet shifts in recent years in how the Court has applied “established standards for evaluating an application for emergency or extraordinary relief . . . especially with regard to what a party must show to demonstrate irreparable injury.”).

<sup>24</sup> Compare *Furman*, 408 U.S. at 258 (Brennan, J., concurring) (“[T]he Clause imposes upon this Court the duty, when the issue is properly presented, to determine the constitutional va-

push and pull has at times been dramatic with several Supreme Court Justices professing fidelity to the notion of judicial restraint throughout their careers and deference to capital sentences—only to later conclude that the death penalty cannot be sustained as a fair, just or constitutional punishment.<sup>25</sup>

But how “judicial restraint” actually functions with respect to capital punishment is rarely examined.<sup>26</sup> Understanding judicial restraint and its permutations in the capital context provides important context for examining the capital shadow docket and its implications.

#### A. *The Vagaries of Restraint*

Judicial restraint is a term used to capture distinct ideas and features of judicial decision-making.<sup>27</sup> Most often, it describes a philosophy that judges should respect their limited role, the will of the people, and the respective powers of coordinate branches.<sup>28</sup> As Stephen F. Smith has explained, judicial restraint, though often invoked and celebrated as an ideological approach of conservative judges, “[p]roperly understood” does not have a political valence.<sup>29</sup>

The Court’s decisions—in and out of the death penalty context—reflect a spectrum of ideological views on judicial restraint, while also revealing how the justices harness the principle for a range of rationales. Take *Dobbs v. Jackson Women’s Health Organization*, discussed below, the Court’s recent deci-

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lidity of a challenged punishment, whatever that punishment may be. In these cases, ‘that issue confronts us, and the task of resolving it is inescapably ours.’”), with *Furman*, 408 U.S. at 405 (Burger, C.J., dissenting) (noting that “[t]he highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits” and criticizing five Justices joining in the judgment for “go[ing] beyond the limits of judicial power”).

<sup>25</sup> For example, prior to his repudiation of the death penalty, Justice Blackmun deferred to the “legislature’s considered judgment that capital punishment is an appropriate sanction” notwithstanding his personal views of the practice. See *Sawyer v. Whitley*, 505 U.S. 333, 358 (1992) (Blackmun, J., concurring).

<sup>26</sup> For notable exceptions, see generally William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441 (2011); RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT’S OBSTACLE COURSE* (1982); THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 181 (Mark V. Tushnet ed., 2001).

<sup>27</sup> See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 520 (2012) (stating that the term “‘judicial self-restraint’ is a chameleon” that can mean many things).

<sup>28</sup> See Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1061 (2002) (“Properly understood, ‘restraint’ may be either liberal or conservative depending on the type of policies the political branches are pursuing at any given time.”).

<sup>29</sup> Smith notes that during the New Deal “judicial restraint would have favored politically liberal ends (such as the growth of the modern welfare state) because that was the orientation of reform-minded national and state legislatures at the time.” *Id.* Judicial restraint may, in contrast, serve conservative ends when the political branches pursue initiatives such as “limiting welfare and habeas corpus and bringing back the federal death penalty.” *Id.*

sion overturning the right to abortion protected in *Roe*<sup>30</sup> and *Casey*.<sup>31</sup> It provides a dramatic example of the variable nature of judicial restraint.<sup>32</sup> The several opinions in the case each relied upon the notion of judicial restraint in support of vastly different approaches and outcomes. Before examining *Dobbs* and *New York Rifle and Pistol Association, Inc. v. Bruen*,<sup>33</sup> also decided at the end of the 2022 Term, as case studies in the vagaries of judicial restraint, I first explore the various justifications, forms, and functions of this concept.

### 1. *Conceptions of Restraint*

Though the idea of judicial restraint may take many forms, its most basic version is the one directed by Article III and recognized since *Marbury v. Madison*: the principle that the Court only decides cases and controversies arising under the Constitution and does not opine on the wisdom of policy choices that are the domain of the political branches.<sup>34</sup> Respect for that proper judicial role has given rise to multiple justiciability doctrines that prompt courts to limit decisions to the matters before them; to avoid prejudging future cases, litigants, or issues; and to only decide extant and adversarial controversies.<sup>35</sup> This notion of role restraint is not only dictated by Article III, it is structural and intersects with principles of separation of powers.<sup>36</sup>

Beyond justiciability doctrines, other versions of judicial restraint show humility about the nature of the judicial role with respect to contested issues in a democratic society. In cases of great controversy and significance, Chief Justice John Roberts, for example, has emphasized that courts should decide cases on the narrowest ground possible to avoid reaching unnecessary controversies.<sup>37</sup> Others have questioned how faithful Chief Justice Roberts is to this principle given his willingness to dramatically reshape doctrine.<sup>38</sup>

<sup>30</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>31</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>32</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022) (reasoning that *stare decisis* did “not compel unending adherence to *Roe*’s abuse of judicial authority”).

<sup>33</sup> *N.Y. Rifle & Pistol Ass’n Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

<sup>34</sup> *Marbury v. Madison*, 5 U.S. 137, 170 (1803) (“The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”).

<sup>35</sup> William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1998) (describing “[t]he stated purposes and black-letter doctrine of standing” as “numbingly familiar” and including “preventing the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches”).

<sup>36</sup> See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK UNIV. L. REV. 881, 881 (1983).

<sup>37</sup> See, e.g., *Dobbs*, 142 S. Ct. at 2313 (Roberts, C.J., concurring in the judgment); *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020) (deciding challenge to Deferred Action for Childhood Arrivals program by narrowly rejecting the Department of Homeland Security’s contemporaneous justification for ending the program); see

This tracks with a theory of judicial minimalism developed by Professor Cass Sunstein who contends that when courts confine themselves to the most specific issues before them necessary to resolve a dispute they make space for democratic solutions to take shape.<sup>39</sup> Some have lauded this approach for its judicial modesty.<sup>40</sup> Others are skeptical of the theory and its capacity to spur democratic activity.<sup>41</sup> Judge Richard A. Posner, for example, has contended that “judicial minimalism is not the same as judicial restraint.”<sup>42</sup> Although the theory aims “for judges to avoid mistakes by acknowledging the limitations of their knowledge[,]” in practice, he contends, it conceals the “pursuit of an activist judicial agenda” by obscuring the various value choices courts make when conflicting conceptions of the judicial role and the benefits of deference are at stake.<sup>43</sup>

Another subset of judicial restraint reflects courts’ awareness that certain decisions warrant caution or militate against disruption of the status quo. Adherence to precedent is a doctrine premised upon judicial restraint to achieve regularity and stability, and to cabin judicial overreaching.<sup>44</sup> In writing after his retirement from the Court, Justice Lewis F. Powell, Jr., cited “stability and moderation” as values “uniquely important to the law” that are achieved by adherence to precedent.<sup>45</sup> According to Powell, “restraint in decisionmaking and

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also Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 362 (2006) (describing Chief Justice Roberts as a supporter of narrow decision-making).

<sup>38</sup> See Jamal Greene, *Maximimalism*, 38 CARDOZO L. REV. 623, 625 (2016) (arguing that Chief Justice Roberts’s judicial approach is both maximalist and minimalist because he is “temperamentally and institutionally constrained not to reach out to decide cases, but his merits decisions are typically ambitious and generative”). Greene cites *Citizens United v. Federal Election Commission*, *Shelby County v. Holder*, and *National Federation of Independent Business v. Sebelius*, as examples.

<sup>39</sup> See generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825 (2008); Sunstein, *supra* note 37, at 356, 365.

<sup>40</sup> Matthew Steilen, *Minimalism and Deliberative Democracy: A Closer Look at the Virtues of “Shallowness,”* 33 SEATTLE UNIV. L. REV. 391, 391 (2010) (describing this as a modest approach marked by narrow, fact-specific decisions that avoid opining on or resolving larger, more foundational questions or how they should be resolved).

<sup>41</sup> *Id.* at 392 n.6 (summarizing critical work).

<sup>42</sup> Posner, *supra* note 27, at 521.

<sup>43</sup> *Id.* For example, Judge Posner cites internal contradictions in various conceptions of judicial restraint. Courts must choose “between deferring to one court, agency, or branch of government and refusing to defer to another” or applying “the doctrine that statutes should be interpreted to avoid raising constitutional questions [which] reduces the frequency with which statutes are held unconstitutional, but does so by reducing the scope of legislation and thus the power of legislatures.” *Id.*

<sup>44</sup> See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”).

<sup>45</sup> Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 289 (1990).



respect for decisions once made are the keys to preservation of an independent judiciary and public respect for the judiciary's role as a guardian of rights."<sup>46</sup>

Judicial modesty is also evident in doctrines trusting in the superior ability of lower courts to fully develop a record and address legal issues in the first instance.<sup>47</sup> Steve Vladeck describes the Court's unwillingness to "reach out to decide important questions, even on an interim basis, before the lower courts have had a full opportunity to do so" as "almost an article of faith."<sup>48</sup> These norms may be partially attributable to the Court's recognition of its own limited resources.<sup>49</sup> It also likely reflects, as Justice Kagan described in her dissent in *Dunn v. Ray*, the reality that claims and issues will not be properly developed without lower courts having the ability to hear a claim "in full" below before the Supreme Court orders relief.<sup>50</sup>

All these versions of judicial restraint overlap to some extent. And most likely serve common normative goals: among them accuracy, separation of powers, and the consistency and predictability that ultimately undergird the democratic rule of law.<sup>51</sup> Those common goals, of course, in and of themselves, do not consistently predict the outcomes of particular cases. Nor does the invocation of judicial restraint translate into a single jurisprudential philosophy,<sup>52</sup> as demonstrated by the *Dobbs* and *Bruen* decisions, detailed next, and likely countless other decisions of the Supreme Court.

## 2. *The Pliability of Restraint: Dobbs & Bruen*

The 2021–2022 Supreme Court Term is a useful case study in the vagaries of judicial restraint given the multiple ways the Justices invoked the principle in support of divergent rationales and outcomes. In *Dobbs*, for example, the majority invoked judicial restraint as a philosophy of deference to the political process to defend its nonadherence to the principle of stare decisis.<sup>53</sup> Indeed, the Court framed its jettisoning of settled precedent as a necessary correction to

<sup>46</sup> *Id.* at 289–90.

<sup>47</sup> Posner, *supra* note 27, at 520–21 (defining "judicial self-restraint" to include the process of "appellate judges defer[ing] to trial judges and administrative agencies" based upon conceptions of "'modesty,' or 'institutional competence,' or 'process jurisprudence'").

<sup>48</sup> Vladeck, *supra* note 5, at 158.

<sup>49</sup> *Id.* at 158.

<sup>50</sup> *Dunn v. Ray*, 139 S. Ct. 661, 662 (2019) (Kagan, J., dissenting) (criticizing majority for "short-circuit[ing]" with "little briefing and no argument" the "ordinary process" that would allow the lower court to fully consider a condemned person's First Amendment claims).

<sup>51</sup> See J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 7 (1981) (citing the "intrinsic value of democracy [as] a general theoretical underpinning for judicial restraint" as well as "[c]oncern for legal predictability and for the coherence of the legal system as a whole[.]" "[l]egal economy[.]" and preserving the "balance of power among the three independent branches").

<sup>52</sup> See Smith, *supra* note 28, at 1061; Posner, *supra* note 27, at 520–21.

<sup>53</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022).

judicial overreaching.<sup>54</sup> According to the majority, because *Roe*, “‘wield[ed] nothing but ‘raw judicial power,’ [and] the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people[,]” the Court was forced to restrike the proper balance and return the Court to a role of limited and constrained power.<sup>55</sup>

Critics of the decision, however, viewed this invocation of judicial restraint as paradoxical, or hypocritical, given their view of *Dobbs* itself as an unmistakable power grab by the Court’s newly constituted conservative 6-3 majority.<sup>56</sup> The dissent, for example, criticized the Court’s retreat from decades of precedent “at practically the first moment possible” once the composition of the Court had changed.<sup>57</sup> The dissenters charged the majority with the opposite of restraint, characterizing its constricted assessment of reliance interests in its *stare decisis* analysis as “a radical claim to power.”<sup>58</sup> The dissent extolled the role of *stare decisis* as a paramount feature of judicial restraint that tempers judicial overreaching.<sup>59</sup> For them, this “doctrine of judicial modesty and humility” is “central to the rule of law.”<sup>60</sup>

Chief Justice Roberts’s *Dobbs* concurrence also starkly differed from the majority’s vision of judicial restraint and its application to the issue of abortion.<sup>61</sup> The Chief Justice would have upheld the Mississippi abortion law at issue, thereby eliminating *Roe* and *Casey*’s “viability” standard, but without overturning those decisions and their recognition of a constitutionally protected right to abortion.<sup>62</sup>

Roberts framed this approach as the one most faithful to the “simple yet fundamental principle of judicial restraint[.]”<sup>63</sup> This version of judicial restraint focuses less on deference to the political process, and instead prioritizes incre-

<sup>54</sup> *Id.* at 2265.

<sup>55</sup> Indeed, much of the opinion focuses on why the Justices should have never arrogated to themselves the power to decide the legality of abortion as a constitutional matter because abortion was a deeply divisive issue. *Id.*; see also *id.* at 2305 (Kavanaugh, J., concurring) (contending that the Court should have remained neutral on the issue of abortion).

<sup>56</sup> See, e.g., Jeannie Suk Gersen, *The Supreme Court’s Conservatives Have Asserted Their Power*, NEW YORKER (July 3, 2022), <https://www.newyorker.com/magazine/2022/07/11/the-supreme-courts-conservatives-have-asserted-their-power> [<https://perma.cc/27TM-M9S8>]

(“In a single week in late June, the conservative Justices asserted their recently consolidated power by expanding gun rights, demolishing the right to abortion, blowing a hole in the wall between church and state, and curtailing the ability to combat climate change.”).

<sup>57</sup> *Dobbs*, 142 S. Ct. at 2350 (Breyer, J., dissenting).

<sup>58</sup> *Id.* at 2346 (chastising the majority for “disclaiming any need to consider broad swaths of individuals’ [reliance] interests” created by *Roe* and *Casey*).

<sup>59</sup> *Id.* at 2319–20.

<sup>60</sup> *Id.* at 2319, 2333, 2335 (criticizing the majority’s approach to *stare decisis* as allowing for “radical change . . . based on nothing more than the new views of new judges . . . thereby substitut[ing] a rule by judges for the rule of law”).

<sup>61</sup> *Id.* at 2311, 2316 (Roberts, C.J., concurring in the judgment).

<sup>62</sup> *Id.* at 2316 (describing his approach to dispense with viability as “grounded in basic principles of *stare decisis* and judicial restraint”).

<sup>63</sup> *Id.* at 2311.

mentalism and institutional integrity. For Roberts, judicial restraint reflects an imperative to only resolve controversies “with the narrowest basis for disposition, proceeding to consider a broader one only if necessary to resolve the case at hand.”<sup>64</sup> As he put it: “It is only where there is no valid narrower ground of decision that we should go on to address a broader issue, such as whether a constitutional decision should be overturned.”<sup>65</sup> Acknowledging that the Court is “not always perfect in following that command,” he emphasized that close adherence to “the principles of judicial restraint” is most important where, as in *Dobbs*, “the broader path the Court chooses entails repudiating a constitutional right . . . not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*.”<sup>66</sup>

*Dobbs* sets into particularly sharp relief the variegated nature of judicial restraint both as a philosophy of the proper judicial role and as a practical analytical tool or method of judging. Each justification for a different mode of judicial restraint identified above can easily be flipped in service of an opposing value. Of course, *Dobbs* is not alone.

So too was the case in *New York Rifle and Pistol Association, Inc. v. Bruen*, also decided at the end of the 2022 Term.<sup>67</sup> There, the majority declined to assess the New York legislature’s rules on concealed carry licenses under any level of scrutiny even while recognizing that “judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate[.]”<sup>68</sup> According to Justice Thomas, the Second Amendment changes that calculus because it “‘is the very product of an interest balancing by the people,’ and it ‘surely elevates above all other interests the right of law-abiding, responsible citizens to use arms’ for self-defense.”<sup>69</sup> Again the Court sounded its reasoning in judicial restraint, declaring that the balance of interests struck in the Second Amendment “by the traditions of the American people” demanded the Court’s “unqualified deference.”<sup>70</sup>

Justice Breyer, in dissent, however, urged deference to “elected bodies, such as legislatures” as the entities best in the position to evaluate the dangers of guns and their varied uses.<sup>71</sup> He identified a host of fact-specific and value-laden judgments that legislatures must make when regulating guns, which he said “counsels modesty and restraint on the part of judges when they interpret

<sup>64</sup> *Id.* at 2313 (quoting *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 423 (1990)).

<sup>65</sup> *Id.* (quoting *Fed. Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 482 (2007)).

<sup>66</sup> *Id.* at 2311.

<sup>67</sup> *N.Y. Rifle & Pistol Club Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

<sup>68</sup> *Id.* at 2118.

<sup>69</sup> *Id.* at 2131 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2167 (Breyer, J., dissenting).

and apply the Second Amendment.”<sup>72</sup> Once again, judicial restraint was put to service toward polar opposite ends with the majority and dissent disagreeing upon whether deference to the Second Amendment or to the people’s elected representatives better reflected judicial modesty and self-containment.

*Dobbs* and *Bruen*, the most controversial decisions from the Term ending in June 2022, demonstrate that one justice’s reliance upon judicial restraint is another justice’s conviction that the Court is overreaching. This pliable nature of judicial restraint is also on full display when justices accuse each other of manipulating the principle or, at least, being nontransparent about their reasons for invoking it.

This appears to be what Justice Scalia intended in his biting dissent in *Martinez v. Ryan*.<sup>73</sup> That 2012 case held that a criminal defendant may raise an ineffective assistance of trial counsel claim in federal habeas, even if that claim was procedurally defaulted in state post-conviction proceedings, where state post-conviction counsel was ineffective.<sup>74</sup> The Court avoided deciding whether the Constitution mandates counsel in state post-conviction proceedings, ruling only that ineffective assistance of counsel at the state post-conviction phase constitutes just cause for procedural default under the statutory rules governing federal habeas.<sup>75</sup> Justice Scalia mocked the Court’s invocation of judicial restraint to explain this result, stating:

Let me get this straight: Out of concern for the values of federalism; to preserve the ability of our States to provide prompt justice; and in light of our longstanding jurisprudence holding that there is no constitutional right to counsel in state collateral review; the Court, in what it portrays as an admirable exercise of judicial restraint, abstains from holding that there is a constitutional right to counsel in initial-review state habeas.<sup>76</sup>

In Justice Scalia’s view, the majority’s pseudo-restraint did not mask its overreaching into matters appropriate for the state courts.<sup>77</sup>

The examples could go on to further show that judicial restraint is not a one-dimensional philosophy or methodology that yields predictable results in the Supreme Court.<sup>78</sup> Understanding this variable nature of judicial restraint is

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<sup>72</sup> *Id.* Justice Breyer cited “consideration of facts, statistics, expert opinions, predictive judgments, relevant values, and a host of other circumstances, which together make decisions about how, when, and where to regulate guns more appropriately legislative work.” *Id.*

<sup>73</sup> *Martinez v. Ryan*, 566 U.S. 1, 19 (2012) (Scalia, J., dissenting).

<sup>74</sup> *Id.* at 17; Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839, 847–48 (2013) (noting that this holding applied “at least in those states where the law requires” ineffective assistance of trial counsel claims to be raised in state postconviction proceedings).

<sup>75</sup> Alper, *supra* note 74, at 847–48.

<sup>76</sup> *Martinez*, 566 U.S. at 18 (Scalia, J., dissenting).

<sup>77</sup> *Id.* at 26 (“Noticeably absent from the Court’s equitable analysis, moreover, is any consideration of the very reason for a procedural-default rule: the comity and respect that federal courts must accord state-court judgments.”).

<sup>78</sup> *See* Smith, *supra* note 28, at 1061.

important to understanding the shadow docket's impact upon judicial regulation of capital punishment. Even before the shadow docket's emergence, the Court's capital jurisprudence employed varied—and sometimes opposing—conceptions of judicial restraint. Section I.B.1 distills how the Court has invoked the principle in capital cases in a variety of ways. It notes that most recently and consistently the Court has relied upon it to portray its role in state killing as reserved and deferential. This history provides a foundation for assessing how developments in the Court's shadow docket are unravelling the Court's narrative of restraint.

## B. Regulation and Restraint: The Judicial Role in the Death Penalty

### 1. The Furman-Gregg Pendulum

Perhaps most representative of the Court's conflicted approach to judicial restraint in the capital context is the Court's whiplash approach to the death penalty in the 1970s. In 1972, in *Furman v. Georgia*, in an unusual, per curiam decision without a majority opinion, the Court held that the death penalty could not, in three cases before it, be fairly administered without arbitrary results.<sup>79</sup> This decision effectively invalidated the death penalty.<sup>80</sup> In the nine separate *Furman* opinions, five of them concurring in the judgment, judicial restraint was a common theme.

For example, Justice Brennan, one of two Justices who concluded that the death penalty violates the Eighth Amendment in all circumstances, acknowledged “the obvious truth that legislatures have the power to prescribe punishments for crimes.”<sup>81</sup> But that, he said, did not answer the question before the Court, it merely gave rise to an inevitable conflict. Indeed, he noted that the power of the legislature to punish was “precisely the reason the [Cruel and Unusual Punishment] Clause appears in the Bill of Rights.”<sup>82</sup> When the Court evaluates the boundaries of the Eighth Amendment, Brennan acknowledged it “must avoid the insertion of ‘judicial conception(s) of . . . wisdom or proprie-

<sup>79</sup> *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

<sup>80</sup> Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C.L. REV. 771 (2005). As Hoeffel explains:

Furman can too easily be dispensed with as standing for no more than the narrow proposition in the per curiam opinion. The one-paragraph opinion held simply that “the imposition and carrying out of the death penalty in these [three] cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” However, a unifying principle of *Furman* can be loosely ascertained from the separately written opinions of the concurring Justices. The core commonality of the concurring opinions was the underlying concern that the jurors had made their decisions to impose death arbitrarily.

*Id.* at 774–75.

<sup>81</sup> *Furman*, 408 U.S. at 268 (Brennan, J., concurring).

<sup>82</sup> *Id.*

ty,' yet [it] must not, in the guise of 'judicial restraint,' abdicate [its] fundamental responsibility to enforce the Bill of Rights."<sup>83</sup>

Other Justices in *Furman* also acknowledged the tension between the Constitution's recognition of capital punishment as a presumably legitimate punishment and the Court's role as the enforcer of the Eighth Amendment.<sup>84</sup> Justice Marshall, for example, noted that fact and the risk that the "elasticity" of the Eighth Amendment could lead the Court to "too little or too much self-restraint."<sup>85</sup> For Justice Marshall, however, history and past construction of the Amendment, as well as an exploration of "the history and attributes of capital punishment in this country," permitted the Court to resolve the constitutionality of capital punishment "with objectivity and a proper measure of self-restraint."<sup>86</sup>

Contrast that with the dissenters in *Furman* who thought the decision was "lawless."<sup>87</sup> As Justice Blackmun put it, the majority's decision was "difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement."<sup>88</sup> Justice Powell, in his dissent, echoed that point and emphasized the "shattering effect" of the concurring opinions "on the root principles of *stare decisis*, federalism, judicial restraint and—most importantly—separation of powers."<sup>89</sup> Justice Powell wrote:

[T]he Court is not free to read into the Constitution a meaning that is plainly at variance with its language. Both the language of the Fifth and Fourteenth Amendments and the history of the Eighth Amendment confirm beyond doubt that the death penalty was considered to be a constitutionally permissible punishment.<sup>90</sup>

Thus, as Professor Berry has observed, both Justices Powell's and Blackmun's disagreement with the majority centered on "grounds of judicial

<sup>83</sup> *Id.* at 269 (quoting *Weems v. United States*, 217 U.S. 349, 379 (1910)).

<sup>84</sup> As some justices have long argued the Constitution expressly sanctions capital punishment in the grand jury provision of the Fifth Amendment, as well as the due process clause of that provision which is mirrored in the Fourteenth Amendment. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury," and no person shall "be deprived of life . . . without due process of law."); *see also* *Glossip v. Gross*, 576 U.S. 863, 894 (2015) (Scalia, J., concurring) (citing the Fifth Amendment and noting that "not once in the history of the American Republic has this Court ever suggested the death penalty is categorically impermissible. The reason is obvious: It is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*").

<sup>85</sup> *Furman*, 408 U.S. at 315 (Marshall, J., concurring).

<sup>86</sup> *Id.* at 316.

<sup>87</sup> Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 13 (2007) (summarizing state opposition).

<sup>88</sup> *Furman*, 408 U.S. at 414 (Blackmun, J., dissenting).

<sup>89</sup> *Id.* at 417 (Powell, J., dissenting) (suggesting that the textual references to capital crimes and due process protections before loss of life reflected 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").

<sup>90</sup> *Id.* at 420.

restraint—that is, neither believed that the problems identified with the capital system in Georgia were significant enough to permit the Justices to interpret the Constitution to prohibit the death penalty.”<sup>91</sup>

The tension at the heart of *Furman*—the Court’s obligation to enforce the Eighth Amendment against the reality that the Legislature defines crimes and their punishment<sup>92</sup>—had long been acknowledged by the Court prior to that decision. In one of the Court’s foundational Eighth Amendment precedents outside of the capital context, the Court rejected the notion that the tension was incapable of navigation and resolution.

Specifically, in 1910 in *Weems v. United States*, the Court “disclaim[ed]” a right to question “the expediency of the laws” or to “oppose . . . the legislative power to define crimes and fix their punishment,” but acknowledged that this power must yield when it “encounters in its exercise a constitutional prohibition.”<sup>93</sup> When the Eighth Amendment’s prohibition is implicated, the Court went on, it is not the Court’s “discretion, but [its] legal duty, strictly defined and imperative in its direction, [that] is invoked.”<sup>94</sup>

*Furman* simply continued this reasoning to the point of finding that the state death penalty schemes before the Court violated the threshold limitations imposed by the Constitution. But many did not see the Court’s decision that way. Though celebrated by many, the decision was roundly met with claims of judicial overreaching and federalism-driven complaints by the states regarding the disruption of their power to define and punish crimes.<sup>95</sup>

Ultimately, *Furman*’s resolution of the tension was short-lived. Four years later, the pendulum shifted back and the Court effectively reinstated capital punishment as a constitutional punishment in *Gregg v. Georgia*, after states enacted new capital statutes in response to *Furman*.<sup>96</sup> As legal scholars Carol and Jordan Steiker describe it, the Court then shifted toward “a novel third course between the options of abolition and retention: it authorized the continued use of capital punishment but sought to tame its arbitrary, discriminatory, and excessive applications through a growing set of constitutional doctrines.”<sup>97</sup>

The conflict over judicial restraint in the capital context was central to this unusual turnaround.<sup>98</sup> In particular, Justice Stewart, who concurred in the judgment in *Furman*, joined the judgment of the *Gregg* Court to effectively re-

<sup>91</sup> Berry, *supra* note 26, at 450.

<sup>92</sup> Billionis, *supra* note 19, at 1673 (“States that employ the death penalty have made a choice that the Constitution permits and their political processes have mandated.”).

<sup>93</sup> *Weems v. United States*, 217 U.S. 349, 378 (1910).

<sup>94</sup> *Id.*

<sup>95</sup> See Steiker & Steiker, *supra* note 15, at 358; Lain, *supra* note 87, at 46–48.

<sup>96</sup> See *Gregg v. Georgia*, 428 U.S. 153, 183, 186 (1976).

<sup>97</sup> STEIKER & STEIKER, *supra* note 15, at 40.

<sup>98</sup> See Berry, *supra* note 26, at 451.

instate the death penalty.<sup>99</sup> He, along with Justice Stevens who was not on the Court at the time of *Furman*, joined with Justice Powell to author a joint opinion and announce the judgment of the Court.<sup>100</sup> The opinion emphasized that “in assessing a punishment selected by a democratically elected legislature against the constitutional measure,” the Court must “presume its validity” such that “a heavy burden rests on those who would attack the judgment of the representatives of the people.”<sup>101</sup>

Federalism concerns also figured prominently in the shifting tides between *Furman* and *Gregg*. The death penalty convictions before the Court concerned state criminal processes, such that the Court was not simply enforcing a constitutional restraint against a coordinate branch but asserting the federal government’s role with respect to state criminal justice systems.<sup>102</sup> The *Furman* dissenters raised these very same concerns.<sup>103</sup> Now they were echoed in majority decisions in the post-*Gregg* period.<sup>104</sup>

While the role of federalism, change in court membership, public backlash to the *Furman* decision, and the states’ quick legislative responses all factored into the *Gregg* turnaround, one cannot ignore how these forces all translated into a very different articulation of the Court’s role with respect capital punishment. As Professor Berry put it, the Court came to see its role in enforcing the Eighth Amendment as “one of restraint, in which states could remedy their constitutional defects and legislative actions, and for the most part be respected.”<sup>105</sup>

<sup>99</sup> LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 128–29 (1992) (noting that Justices Stewart and White shifted from their *Furman* postures in *Gregg* and hypothesizing about whether keeping them on the side of death penalty abolition would have swayed other Justices).

<sup>100</sup> *Gregg*, 428 U.S. at 158.

<sup>101</sup> *Id.* at 175 (“We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.”).

<sup>102</sup> Bilonis, *supra* note 19, at 1673 (“When the federal judiciary wields its power in state criminal cases too casually, it may cross the fine line that separates sound, well-grounded implementation of constitutional values from highly consuming, insufficiently productive, unduly subjective, or needlessly abrasive ‘judicial activism.’”).

<sup>103</sup> *Furman v. Georgia*, 408 U.S. 238, 465–69 (1972) (Rehnquist, J., dissenting); *Gregg*, 428 U.S. at 176 (plurality opinion) (citing Justice Rehnquist’s dissent in *Furman* and emphasizing respect for federalism and judicial restraint in the realm of state criminal judgments).

<sup>104</sup> *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 823–24 (1991) (overruling *Booth v. Maryland*’s total ban on victim-impact evidence reasoning that within the federal “constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States”).

<sup>105</sup> Berry, *supra* note 26, at 451.



Constitutional regulation of the death penalty soon reflected a dramatic shift toward judicial deference,<sup>106</sup> even when the Court was confronted with glaring evidence of the death penalty's arbitrariness as in *McCleskey v. Kemp*.<sup>107</sup> In 1987, the *McCleskey* Court rejected an equal protection and Eighth Amendment challenge to statistically documented racial disparities in Georgia's capital punishment scheme.<sup>108</sup> The Court cited the need for deference to the legislature's legitimate reasons for enacting criminal laws and penalties and its wide discretion in doing so.<sup>109</sup>

In spite of this judicial lean toward acceptance of capital punishment as a valid punishment in the years after *Gregg*, other features of the Court's capital jurisprudence showed an abiding unwillingness to defer wholesale to judgments rendered in the capital punishment system. In this second thread of jurisprudence a different version of judicial restraint emerged in regard to the death penalty: the notion that the finality and severity of capital punishment demands close and cautious judicial supervision before the justices put the weight of the Court behind the ultimate use of state power.<sup>110</sup> The push and pull between these two poles—deference to other bodies and the Court's "duty" to ensure fair and humane punishments—continued to define the Court's relationship with capital punishment over the next five decades.

## 2. *Death is Different Restraint*

Not long after the Court began down the post-*Gregg* road of cabining the death penalty's "arbitrary, discriminatory, and excessive applications" through meaningful constitutional regulation,<sup>111</sup> a theory of constitutional decision-

<sup>106</sup> Bilonis, *supra* note 19, at 1649 (contending that in enforcing the Eighth Amendment "the Court uses federal judicial power sparingly in order to accommodate considerations of governmental structure, institutional capacity, and institutional responsibility").

<sup>107</sup> *McCleskey v. Kemp*, 481 U.S. 279, 279 (1987); see also M. Shanara Gilbert, *Racism and Retrenchment in Capital Sentencing: Judicial and Congressional Haste Toward the Ultimate Injustice*, 18 N.Y.U. REV. L. & SOC. CHANGE 51, 62 n.66 (1990–91) (noting that the *McCleskey* dissenters noted that "emphasis on deference to the legislature, and judicial restraint" urged by the dissenters in *Furman* "has now become the majority view") (citing *McCleskey*, 481 U.S. at 320–67 *passim* (Brennan, J., dissenting, joined by Marshall, J., and joined in part by Blackmun & Stevens, JJ.)).

<sup>108</sup> *McCleskey*, 481 U.S. at 297 (noting that "discretion is essential to the criminal justice process," and refusing to make any inferences about motive based upon statistics, in the absence of "exceptionally clear proof" of bias or abuse of discretion).

<sup>109</sup> *Id.* at 298. The Court also concluded that *McCleskey's* sentence was not disproportionate under the Eighth Amendment because he was sentenced pursuant to a Georgia law that properly focused discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant." *Id.* at 308 (reasoning that *McCleskey's* death sentence was not "'wantonly and freakishly' imposed" such that it was not "disproportionate within any recognized meaning under the Eighth Amendment").

<sup>110</sup> See *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (quoting *Gregg v. Georgia*, 428 U.S. 153, 184 (1976)); see also Deborah W. Denno, "Death Is Different" and Other Twists of Fate, 83 J. CRIM. L. & CRIMINOLOGY 437, 447–48 (1992).

<sup>111</sup> STEIKER & STEIKER, *supra* note 15, at 39–40.

making further developed that paradoxically emphasized the necessity of a robust judicial role in the regulation of capital punishment.<sup>112</sup> This “death is different” jurisprudence implemented a different version of judicial restraint.

The premise that the Eighth Amendment applies “with special force” to the death penalty because it is “unique in its severity and irrevocability[,]”<sup>113</sup> spurred a version of judicial restraint marked by vigilance. The Court would act carefully and deliberately to ensure that capital punishment functions in accordance with constitutional limitations.<sup>114</sup>

Some might argue that “death is different” jurisprudence is at odds with notions of judicial restraint since the Court is playing a central check on enforcement of legislatively approved punishments. Thus “death is different” jurisprudence might be said to reflect another pendulum shift, a return to a robust judicial role similar to *Furman*, and in tension with *Gregg*.<sup>115</sup>

Yet this strand of death penalty decisions differs from *Gregg*’s vision of judicial restraint. The Court is less concerned about judicial containment vis-à-vis the other branches or showing deference to democratic choices. Rather, “death is different” rationales function as a form of quality control, similar to the Court’s previous hesitancy to interfere in matters before absolutely necessary or its tendency to defer to lower court and agency development of factual records and stay determinations.<sup>116</sup> As in these other examples of restraint, the Court is focused on careful vetting of all plausible issues, the need for accuracy and the goal of avoiding mistakes. “Death is different” decision-making reflects an awareness of the reality that the legal system makes mistakes. The finality of the punishment generates the need for close scrutiny before the Court places the

<sup>112</sup> David McCord, *Visions of Habeas*, 1994 BYU. L. REV. 735, 783–84, 783 n.135 (1994) (citing first *Harmelin v. Michigan*, 501 U.S. 957, 958–59 (1991); then *Lankford v. Idaho*, 500 U.S. 110, 125–26 (1991); then *Beck v. Alabama*, 447 U.S. 625, 637–38 (1980); then *Gardner v. Florida*, 430 U.S. 349, 357 (1977); and then *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) as examples of death is different jurisprudence).

<sup>113</sup> *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Enmund*, 458 U.S. at 797; *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring) (“The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself.”).

<sup>114</sup> *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (“[T]he severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.”); William W. Berry III, *More Different than Life, Less Different than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After Graham v. Florida*, 71 OHIO STATE L.J. 1109, 1125 (2010) (noting that “death is different” means that, as a practical matter, “capital cases often receive far more extensive and careful review than life-without-parole sentences”).

<sup>115</sup> *Gregg*, 428 U.S. at 188 (suggesting that *Furman* had acknowledged that “death was different”); see Denno, *supra* note 110, at 440 (noting that “death is different” principles were first established as precedent in *Furman* and describing them as the notion that “death as a punishment necessitate[s] additional safeguards to prevent the cruel or unusual application of the death penalty”).

<sup>116</sup> See discussion *supra* Section I.A.1.

imprimatur of the highest court behind a death sentence and—more plainly—allows the state to kill someone.<sup>117</sup>

Of course, the same values that sound in the register of restraint, caution, and deliberation, could—in a different light—be characterized as judicial overreaching. Indeed, critics of this strand of jurisprudence, including chief among them, Justice Scalia, charged that the Court’s vigilance meant interference with the implementation of sentences authorized by the people’s representatives.<sup>118</sup> To be sure, scrupulously ensuring fairness and accuracy under “death is different” rationales drew the Court into the long-term project of judicial regulation of the death penalty with arguably less restraint about occupying this decisive role in the scheme of capital punishment.<sup>119</sup>

### 3. “Evolving Standards:” Deference and Judgment

The Court’s tacking between the two poles of deference to other bodies and the Court’s “duty” to ensure fair and humane punishments is also evident in its “evolving standards of decency [jurisprudence].”<sup>120</sup> That principle derived from the Supreme Court’s recognition since *Weems* that “[t]he concept of proportionality is central to the Eighth Amendment.”<sup>121</sup> Indeed, the Supreme Court first recognized over a century ago that the Eighth Amendment’s ban on cruel and unusual punishments includes the requirement “that punishment for crime should be graduated and proportioned to [the] offense.”<sup>122</sup> That means that the

<sup>117</sup> See McCord, *supra* note 112, at 785 (“To death-is-different visionaries the combination of the ultimate nature of the sanction, the complicated nature of the governing law, and the suspicion that state authorities are particularly susceptible to political pressure in death penalty cases, makes a strong argument for assigning the federal courts a special watchdog function as to death penalty cases.”).

<sup>118</sup> Justice Scalia was chief among the critics raising this view. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 337–38, 352 (2002) (Scalia, J., dissenting). In *Atkins* he noted:

Today’s decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members. . . . Today’s opinion adds one more to the long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court’s assumed power to invent a death-is-different jurisprudence.

*Id.*; see also *Morgan v. Illinois*, 504 U.S. 719, 751–52 (1992) (Scalia, J., dissenting) (criticizing the “death is different” jurisprudence as a “fog of confusion” and as “annually improvised” by the Court).

<sup>119</sup> See generally STEIKER & STEIKER, *supra* note 15. But see Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 354 (1983) (questioning whether post-*Gregg* constitutional regulation of the death penalty amounts to “merely a matter of legal aesthetics”).

<sup>120</sup> *Graham v. Florida*, 560 U.S. 48, 60–61 (2010) (summarizing evolving standards of decency analysis).

<sup>121</sup> *Id.* at 59.

<sup>122</sup> *Weems v. United States*, 217 U.S. 349, 367 (1910).

Eighth Amendment bars not only cruel and unusual methods of punishment, but also punishment that is grossly disproportionate to the wrong committed.<sup>123</sup>

Enforcement of the Eighth Amendment's proportionality requirement divided into two approaches for assessing excessive punishments.<sup>124</sup> The first balances factors to assess whether in a given case a particular sentence is grossly disproportionate to the crime.<sup>125</sup> The second approach considers whether a sentence is constitutionally disproportionate with respect to a category of offenses or offenders.<sup>126</sup> Under the rationale of that second strand of Eighth Amendment jurisprudence, the Court has recognized categorical restrictions on the death penalty and certain life without parole sentences.<sup>127</sup>

For example, the Court has held that the death penalty is categorically excessive for nonhomicide offenses, including rape and felony murder where the defendant did not kill or intend to kill.<sup>128</sup> It has also recognized categorical rules prohibiting the death penalty as disproportionate based upon the characteristics of the people convicted, recognizing constitutional bars on the execution of children<sup>129</sup> and people with intellectual disability.<sup>130</sup>

While on the one hand, this categorical approach is undoubtedly a forceful exertion of the judicial role in enforcing the Eighth Amendment as to capital punishment, it nevertheless also incorporates respect for legislative judgments. Indeed, the standard adopted by the Court to enforce this categorical approach embodies the same tension between the Court's professed deference to legislatively chosen punishments and its power to restrain those choices because of its role as the arbiter of cruel and unusual punishment. That is, in assessing whether a sentence is disproportionate, the Court looks beyond historical views of prohibited punishments, recognizing that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>131</sup>

To determine whether a punishment violates evolving standards of decency "[t]he Court first considers 'objective indicia of society's standards, as ex-

<sup>123</sup> *Graham*, 560 U.S. at 59, 61.

<sup>124</sup> *Id.* at 59.

<sup>125</sup> See Alison Siegler & Barry Sullivan, "'Death Is Different' No Longer": *Graham v. Florida and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327, 331–32 (2010).

<sup>126</sup> *Graham*, 560 U.S. at 60.

<sup>127</sup> *Id.* at 59. This approach considers whether a punishment is categorically excessive when applied to a class of offenders based upon "the nature of the offense" or "the characteristics of the offender." *Id.* at 60.

<sup>128</sup> See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008) (barring death penalty for rape of a child); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (barring death penalty for rape of an adult); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (barring death penalty for person convicted of felony murder where the person did not kill or intend to kill).

<sup>129</sup> *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

<sup>130</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>131</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

pressed in legislative enactments and state practice,’ to determine whether there is a national consensus” rejecting the punishment as excessive.<sup>132</sup> Enacted laws, recent legislation, including the trend of legislation, the frequency with which an authorized penalty is used, and broader social and professional consensus, are relevant to the Court’s assessment of objective indicia of society’s standards.<sup>133</sup>

To be sure, this analysis is not an act of deference to the body responsible for a punishment under review. Nevertheless, by taking account of evolving standards of decency by reference in large part to legislative enactments and the trend of state practice, the Court does not simply ordain that it alone has the authority to mark the boundaries of acceptable punishment.

At the same time, the evolving standards of decency doctrine preserves space for the Court to make those very determinations. Within the analysis of evolving standards, the Court also considers “in the exercise of [the Court’s] own independent judgment whether the punishment in question violates the Constitution.”<sup>134</sup> That entails an assessment of whether the punishment is categorically disproportionate in light of the culpability of the class of offenders as compared with “the severity of the punishment in question.”<sup>135</sup> The Court also evaluates whether the challenged sentencing practice serves legitimate penological justifications.<sup>136</sup> In short, the Court’s judgment unquestionably matters.

Some have argued that this analysis drastically expands the power of the Court and is unworkable as it invites judicial wading into what should be non-traversable legislative waters.<sup>137</sup> Others have defended the doctrine on the grounds that a “judiciary empowered to police the boundaries between the limited power of government and the natural rights of individuals follows ‘from the nature and reason’ of the constitutional design.”<sup>138</sup>

The split focus of the inquiry arguably encapsulates the Court’s larger ambivalence about its role in constitutional regulation of the death penalty.<sup>139</sup> On the one hand, the Court placed limits on capital punishment under the Eighth Amendment that depended upon the Court’s own views of proportionality and

<sup>132</sup> *Graham*, 560 U.S. at 61 (quoting *Roper*, 543 U.S. at 572).

<sup>133</sup> *See id.* at 62–67; *Atkins*, 536 U.S. at 313, 316–17. The practices of other countries are also relevant. *See Graham*, 560 U.S. at 80–82.

<sup>134</sup> *Graham*, 560 U.S. at 61.

<sup>135</sup> *Id.* at 67.

<sup>136</sup> *Id.*

<sup>137</sup> *See generally* John F. Stinneford, *The Illusory Eighth Amendment*, 63 AM. U. L. REV. 437, 473 (2013) (criticizing the test as an unworkable prophylactic rule similar to *Miranda*).

<sup>138</sup> *See, e.g.*, Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO STATE J. CRIM. L. 403, 405–06, 417 (2011) (arguing that “the ‘evolving standards of decency’ formulation highlights important liberal-democratic values and is thus worth preserving.”).

<sup>139</sup> *Id.* at 417 (“Having framed Eighth Amendment analysis as a choice between objective considerations that flow from democratic processes and the subjective preferences of the unelected, unaccountable judiciary, the Court has left itself no meaningful choice at all.”).

evolving standards of decency.<sup>140</sup> But it endeavored to strike a balance and arguably assert a restraint upon that judgment by simultaneously respecting the standards reflected by democratic decision-makers.<sup>141</sup>

Ultimately, this line of decision-making opened a new path for constitutional restrictions on the death penalty, whereby the Court outlaws under the Eighth Amendment the death penalty as a constitutional punishment for certain people, like young people and people with intellectual disability, and categories of offenders like those who did not kill or intend to kill. The force and logic of the Court's reasoning eventually led to expansion of the categorical approach to life without parole sentences for youthful offenders, thereby making clear, as Justice Thomas put it, that "'[d]eath is different' no longer."<sup>142</sup>

Given its trajectory and consequences, characterizing this jurisprudence as reflective of judicial restraint may seem a stretch under traditional formulations of that principle. Still, if "death is different" decision-making reflects restraint from reflexive deference to criminal judgments in favor of cautious and deliberate enforcement of the Eighth Amendment, the "evolving standards of decency" doctrine is one in the same.

#### 4. *Judicial Second-Thoughts*

Another illustration of the Court's ambivalence is the repeated occurrence of Supreme Court Justices professing fidelity to the notion of judicial restraint throughout their careers via respect for capital punishment and capital sentences—only to later conclude that the death penalty likely cannot be sustained as a constitutional form of punishment.<sup>143</sup> As noted, Justice Blackmun famously reversed course after long upholding the constitutionality of capital punishment and declared his unwillingness to continue "tinker[ing] with the machinery of death."<sup>144</sup> Professor Berry has explained Justice Blackmun's turnaround as fundamentally reflecting a change in his views of judicial restraint.<sup>145</sup> He was no

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<sup>140</sup> *Id.* at 404.

<sup>141</sup> Berry, *supra* note 26, at 473–74 (noting that while this approach appeared to rest "on the notion of restraint to the states . . . [it] carve[d] out analytical room to choose not to defer in the future"). Some scholars, however, have argued that the test actually reflected a tilt toward judicial power in this area. See Susan Raeker-Jordan, *Kennedy, Kennedy, and the Eighth Amendment: "Still in Search of a Unifying Principle"?*, 73 U. PITT. L. REV. 107, 152 (2011) (arguing that Justice Kennedy's "chosen language" in his opinion in *Kennedy v. Louisiana*, which categorically barred the death penalty for rape of a child, "reveals his posture toward these cases, which is that the Court resolves the Eighth Amendment proportionality question, not legislatures").

<sup>142</sup> *Graham*, 560 U.S. at 103 (Thomas, J., dissenting).

<sup>143</sup> See generally Berry, *supra* note 26.

<sup>144</sup> *Callins v. Collins*, 510 U.S. 1141, 1145–46 (1994) (Blackmun, J., dissenting from denial of certiorari) (explaining his earlier positions upholding the death penalty as based upon the erroneous belief that it could be imposed fairly and effectively reviewed by the courts through federal habeas corpus review).

<sup>145</sup> Berry, *supra* note 26, at 450–51.

longer willing to privilege deference to legislatively enacted punishments above Eighth Amendment principles once he could no longer count on the legislative process to ensure fair, nonarbitrary, and humane punishments.<sup>146</sup>

Justice Blackmun was not alone. He was one of three jurists whose views about constitutional regulation of the death penalty followed this arc—with Justice Powell and Justice Stevens voicing similar views upon their retirement from the bench.<sup>147</sup> Professor Berry’s account of these jurists’ change of view persuasively demonstrates that their eventual repudiation of their votes to uphold the death penalty did not reflect “normative shifts on the morality of capital punishment, but instead . . . shifts in the Justices’ views concerning judicial restraint towards the states with respect to the death penalty.”<sup>148</sup>

Each shared a similar philosophy in the end. They concluded that enforcing the Eighth Amendment prevented them from blindly deferring to the legislature with respect to a penalty that, based upon years of experience, they no longer believed could be fairly and justly imposed.

This is not the only outcome once jurists dispense with judicial restraint. As outlined above, judicial restraint in general, and particularly with respect to the death penalty, is not one dimensional and does not graft onto a uniform judicial philosophy.<sup>149</sup> In particular, because it does not always mean a muted judicial role,<sup>150</sup> a retreat from judicial restraint could also lead to greater judicial sanctioning of executions.

Indeed, an unrestrained Supreme Court might no longer proceed under a “death is different” philosophy and be willing to patiently pursue the long, tedious course of ensuring death sentences that comply with the constitution.<sup>151</sup> Or a Court that is unrestrained may no longer follow the precedent of the evolving standards of decency doctrine as a way to balance judicial enforcement of proportionality with emerging trends in legislative approaches.<sup>152</sup> In short, the death of judicial restraint does not mean judicial activism in the guise of death penalty abolition. As explained next, the death of judicial restraint can mean a

<sup>146</sup> *Id.* at 451.

<sup>147</sup> *Id.* at 450–51.

<sup>148</sup> *Id.* at 444 (“[T]hese decisions to abandon deference to the states reflect, on the part of Justices Powell, Blackmun, and Stevens, a diminishing view of the Court’s duty to exercise judicial restraint with respect to state legislatures and their use of the death penalty.”).

<sup>149</sup> *See supra* Section I.A.

<sup>150</sup> *See supra* Sections I.B.2–3.

<sup>151</sup> *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (broadly dismissing late-stage execution challenges as “tools to interpose unjustified delay.”).

<sup>152</sup> *Bucklew* again provides a ready example. *Id.* at 1122. There, the Court employed an originalist methodology to evaluate whether *Bucklew*’s execution would be cruel and unusual, measuring the degree of pain permitted by the Eighth Amendment at the time of its adoption. *See id.* Within this analysis, the Court never discussed whether historical execution practices can or should be squared with the Court’s well-settled “evolving standards of decency” doctrine. *See id.* “While the Court did not overtly call into question the doctrine, its failure to discuss ‘evolving standards of decency’ and its originalist analysis of the Eighth Amendment” was striking. *See Condon, supra* note 2, at 17.

Court more willing than ever before to play an aggressive, decisive role in America's system of state killing.

### 5. *The Decline of Restraint*

In recent Terms, when the Court has addressed judicial restraint in its merits opinions in death cases, it has shown extraordinary deference to the states with respect to executions, impatience at the slow pace of death penalty litigation, and unrestrained hostility to condemned prisoners' late-stage execution challenges.<sup>153</sup> In this period, the narrative of judicial restraint has been influential in the Court's own account of its role with respect to capital punishment, especially with respect to claims challenging whether specific execution methods violate the constitutional ban on cruel and unusual punishment. Nevertheless, contrary to the Court's language of judicial restraint, the Court has shown a willingness to adjudicate Eighth Amendment challenges in ways that are anything but restrained, both with respect to its hostility to condemned persons and its willingness to erect barriers to condemned prisoners invoking Eighth Amendment protections.<sup>154</sup>

For example, in 2015 in *Glossip v. Gross*, the Court rejected a condemned person's challenge to Oklahoma's lethal injection protocol, emphasizing its opinion as one rooted in deference to the legislature.<sup>155</sup> At the same time, however, the Court adopted a bold and unusual rule for assessing the risk of severe pain experienced by condemned people. Specifically, the Court held that a state method of execution may be constitutional even if it creates a substantial risk of severe pain, so long as an alternative less painful measure is not readily identified by the condemned person at the time of a challenge.<sup>156</sup> This decision placed the burden on condemned people to themselves identify a less painful method of execution in order to succeed in an Eighth Amendment challenge to a specific execution method.<sup>157</sup> The Court explained that "prisoners 'cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative[;]' [i]nstead, prisoners must identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" <sup>158</sup>

The Court defended this rule partly on the basis of syllogistic rationales grounded in judicial restraint. It reasoned that "because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [con-

<sup>153</sup> See Condon, *supra* note 2, at 15.

<sup>154</sup> See J. Skelly Wright, *The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges*, 14 HASTINGS CONST. L.Q. 487, 489–90 (1987).

<sup>155</sup> *Glossip v. Gross*, 576 U.S. 863, 881 (2015).

<sup>156</sup> *Id.* at 877.

<sup>157</sup> *Id.* at 877–78.

<sup>158</sup> *Id.* at 877 (quoting *Baze v. Rees*, 553 U.S. 35, 51–52 (2008)).



stitutional] means of carrying it out.’”<sup>159</sup> Justice Sotomayor in dissent challenged this simplistic view as contrary to basic notions of constitutional powers and restraint. She noted that where a state possesses authority does mean it may employ “any and all means” to exercise it.<sup>160</sup> Though framed in the language of judicial restraint, this was a bold new path in Eighth Amendment jurisprudence that turned the Court’s acceptance of the death penalty as a constitutional punishment as dispositive of Eighth Amendment challenges to executions presumably no matter the pain caused.<sup>161</sup> This virtual disclaiming of a judicial role to police the execution methods chosen by the legislature under meaningful Eighth Amendment standards was a radical new vision of the Court’s role as facilitator of executions.

In another prominent challenge to an execution method in 2019, the Court again invoked judicial restraint to support its decision, even while it engaged in significant overreaching to opine on and discredit a whole class of death penalty challenges. Specifically, in *Bucklew v. Precythe*, the Court upheld as constitutional a state’s lethal injection protocol, in a challenge by a condemned man in Missouri with an unusual medical condition alleged to make death by lethal injection extremely painful.<sup>162</sup> Specifically, Bucklew argued that he would experience torturous pain if subjected to Missouri’s execution method because his condition would prevent the state’s sedative, pentobarbital, from circulating properly throughout his body.<sup>163</sup> In a 5-4 decision written by Justice Gorsuch, the Court rejected Bucklew’s claim that subjecting him to this execution method would amount to cruel and unusual punishment in his unique circumstances.<sup>164</sup>

Once again, the theme of judicial restraint was influential in the decision as the Court declined to second-guess the lower court judgments.<sup>165</sup> But at least in two ways the Court showed a significant lack of restraint by opining on issues not before it and disparaging entire classes of claims as meritless litigation tactics.

<sup>159</sup> *Id.* at 869 (quoting *Baze*, 553 U.S. at 47) (reasoning that because the death penalty is constitutional, the execution method in question had to be constitutional because the challenger did not identify a less painful alternative).

<sup>160</sup> *Id.* at 974 (Sotomayor, J., dissenting).

<sup>161</sup> *Id.* at 882 (asserting that “challenges to lethal injection protocols test the boundaries of the authority and competency of federal courts”). Although the *Glossip* court acknowledged that it must invalidate unconstitutional lethal injection execution methods, the Court cautioned that “federal courts should not ‘embroil [themselves] in ongoing scientific controversies beyond their expertise.’” *Id.* (quoting *Baze*, 553 U.S. at 51).

<sup>162</sup> *Bucklew v. Precythe*, 139 S. Ct. 1112, 1120, 1133 (2019).

<sup>163</sup> *Id.* at 1120. Bucklew’s expert described the likelihood of a particularly painful and inhumane death: hemorrhaging would “impede [his] airway by filling his mouth and airway with blood, causing him to choke and cough on his own blood.” *Id.* at 1138 (Breyer, J., dissenting).

<sup>164</sup> *Id.* at 1116, 1119.

<sup>165</sup> *Id.* at 1116, 1118.

First, the Court stated that “[u]nder our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve[.]” and “the judiciary bears no license to end a debate reserved for the people and their representatives.”<sup>166</sup> But a broader “debate reserved for the people” in regard to the death penalty’s future was not at issue in Bucklew’s case; he did not bring an Eighth Amendment challenge to the constitutionality of capital punishment. Rather, he asked the Court to assess the likelihood of pain and suffering he would experience from lethal injection in light of his unique condition. By defending its actions based upon a question not before it and invoking a need for deference to the political process not implicated by the case, the Court used the illusion of moderation to blur its exercise of significant judicial power.

Another form of overreaching came in the form of the Court’s broad and unnecessary dismissal of late-stage execution “challenges as tools to interpose unjustified delay.”<sup>167</sup> The final section of the Court’s opinion chastised not just Bucklew but presumably other condemned prisoners for raising late-stage challenges to execution methods, even though the narrative that condemned persons strategically delay litigation rests on thin, unproven assumptions.<sup>168</sup>

Moreover, the Court’s discussion was totally unnecessary to deciding the case. Whether Bucklew delayed bringing his claim—and as the dissent pointed out, there were valid reasons to think he did not<sup>169</sup>—had no bearing upon whether proceeding with his execution would cause him severe pain in violation of the Eighth Amendment.

As Justice Sotomayor stated, there was no “legal question before [the Court] concerning delay” such that the “majority’s commentary on once and future stay applications [was] not only inessential but also wholly irrelevant to its resolution of any issue before [the Court].”<sup>170</sup> The Court transgressed critical norms of judicial restraint—prejudging future cases and litigants and opining on issues not essential to resolving the dispute.

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<sup>166</sup> *Id.* at 1123, 1134.

<sup>167</sup> *Id.* at 1134. This is not the first time the Court has raised concerns about death row litigants gaming the system or inviting delay. Justice Powell, in particular, expressed this concern after he left the bench. See Lewis F. Powell Jr., *Capital Punishment*, 102 HARV. L. REV. 1035, 1041–42 (1989) (“[T]he deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks.” (quoting his plurality opinion in *Kuhlmann v. Wilson*, 477 U.S. 436, 452–53 (1986))); see also *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) (“There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process.”).

<sup>168</sup> Kovarsky, *supra* note 3, at 1321 (arguing that the assumption that condemned prisoners strategically delay litigation “both ignores the major causes of eleventh-hour litigation and assumes a non-existent incentive structure”).

<sup>169</sup> See *Bucklew*, 139 S. Ct. at 1146 (Sotomayor, J., dissenting).

<sup>170</sup> *Id.*

Arguably the path of true restraint might have been to allow Bucklew's claim to be subjected to testing at trial.<sup>171</sup> That surely would have been a more muted Supreme Court role rather than denying his claim on summary judgment and in the process directing lower courts to be less exacting and more suspicious of defendants' motives when addressing future execution stay requests.<sup>172</sup> Given the unusualness of Bucklew's condition, as well as the substantial public record of botched executions with improvised execution drugs and the general secrecy surrounding the source and nature of state execution methods, allowing further inquiry into whether Bucklew's execution would likely cause extreme pain was the more restrained course than allowing it to proceed at summary judgment with constitutional sanction.

In the end, *Bucklew* is reflective of a trend in the Supreme Court's capital jurisprudence, particularly that of the current, conservative majority, in which the Court invokes judicial restraint but does not actually abide by it. The Court presents itself as a passive, disinterested participant in a process defined by other institutions and actors. That narrative of the Court as careful, constrained, and once removed has been eroded in numerous decisions addressed by the Supreme Court's merits decisions, just a few of which have been addressed here.

Acknowledging this erosion of judicial restraint with respect to capital cases on the merits docket is important before evaluating the shadow docket's additional impact. These merit decisions come with briefs, oral argument, amici, and reasoned decisions that permit commentators to identify and critique the various uses of judicial restraint and urge new approaches to these developments. All of that promotes accountability.

As explained next, the capital shadow docket tracks similar developments in the Court's turn away from judicial restraint by dispensing with norms of caution and deference to lower courts. But in contrast to the cases outlined here, the shadow docket's emergence has meant such developments have occurred in ways that are hard to apprehend. The fact that eroding norms of restraint are occurring through mechanisms that offer little visibility only intensifies the Court's unchecked power and adds to the problem. But even more so, the method itself communicates that the Court feels empowered to do more of its business without the transparency and backstops of normal procedures. In that way, the Court's changes to how it adjudicates cases on the capital orders docket itself delivers a message of emboldened judicial power.

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<sup>171</sup> As Justice Breyer pointed out in dissent, the Court was, after all, examining Bucklew's claim of severe pain at the point of summary judgment. *Id.* at 1126 (majority opinion); *id.* at 1138–39 (Breyer, J., dissenting) (“The experts dispute whether Bucklew's execution will prove as unusually painful as he claims, but resolution of that dispute is a matter for trial.”).

<sup>172</sup> *See id.* at 1134.

## II. MAXIMALISM IN THE SHADOWS

While the Supreme Court has always handled emergency requests for stays in capital cases on its orders docket, in the 2018 Term something changed in the Court's approach to condemned persons' requests for emergency relief.<sup>173</sup> In two cases that Term, the Court denied or vacated stays in summary fashion,<sup>174</sup> and, as Steve Vladeck has noted, thereby shifted the standards that govern stay requests but without explicating the nature or basis for the shift.<sup>175</sup>

For example, in *Dunn v. Ray*, the Court vacated a stay of execution issued by the Eleventh Circuit, thereby permitting an execution of a condemned man in Alabama to move forward in the face of substantial constitutional questions.<sup>176</sup> At issue was whether Alabama's denial of Domineque Ray's request for a Muslim spiritual adviser during his execution and only allowing access to the prison's Christian chaplain, violated the Establishment Clause.<sup>177</sup> But those reading the Court's summary order denying the stay would not even know that a substantial constitutional issue was presented. The single sentence that addressed the Court's reasons stated: "Because Ray waited until January 28, 2019 to seek relief, we grant the State's application to vacate the stay entered by the United States Court of Appeals for the Eleventh Circuit."<sup>178</sup>

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, dissented and provided more information about Ray's "powerful claim that his religious rights [would] be violated at the moment the State puts him to death" and the nature of the alleged delay that the Court treated as more important than all other values.<sup>179</sup> Justice Kagan questioned the basis for the majority's certainty that Ray had engaged in any unreasonable delay, in spite of the Eleventh Circuit's conclusion to the contrary.<sup>180</sup> She cited evidence that Ray asserted his challenge as soon as he learned that Alabama had denied his request for an Imam.<sup>181</sup>

By elevating above all other considerations concern about Ray's supposed delay, the Court not only retreated from its ordinary reluctance "to interfere with the substantial discretion Courts of Appeals have to issue stays when

<sup>173</sup> Vladeck, *supra* note 5, at 157.

<sup>174</sup> *See, e.g.*, *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019); *Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019).

<sup>175</sup> Vladeck, *supra* note 5, at 157.

<sup>176</sup> *Ray*, 139 S. Ct. at 661.

<sup>177</sup> *Id.* (Kagan, J., dissenting).

<sup>178</sup> *Id.* (per curiam) (quoting *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.")).

<sup>179</sup> *Id.* at 662 (Kagan, J., dissenting) (calling the majority's decision profoundly wrong and "against the Establishment Clause's core principle of denominational neutrality").

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

needed[.]”<sup>182</sup> it showed its hand about the substantive values driving the conservative majority’s death penalty decision-making.<sup>183</sup> That is religious neutrality, strict constitutional compliance, and a cabined judicial role were less important to the Court than implementation of a death sentence.<sup>184</sup>

The *Ray* order sparked considerable controversy<sup>185</sup> and the Court later responded in a series of decisions on the shadow and merits docket that arguably endeavored to show greater regard for religious liberty in the execution chamber.<sup>186</sup> But the Court has only showed greater solicitude in that narrow category of execution challenges. The hostility to late-stage execution challenges and the presumption that prisoners who file execution stays seek to “interpose unjustified delay” persists.<sup>187</sup> In the 2022 decision in *Ramirez v. Collier*, for example, the Court concluded that Ramirez presented facts to show his request satisfied the Religious Land Use and Institutionalized Persons Act’s (RLUIPA) threshold for a sincerely held religious belief.<sup>188</sup> But it emphasized that concerns about delays in execution still occupy a prominent space in the Court’s death penalty jurisprudence.<sup>189</sup>

This hyperfocus on delay and presumption that death penalty lawyers and their clients engage in improper litigation tactics was further developed in an-

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> The Court later acknowledged in several cases on both its orders and merits docket that policies limiting religious advisors or restricting religious practice in the execution chamber implicate the First Amendment and may violate the Religious Land Use and Institutionalized Persons Act (RLUIPA). See *Gutierrez v. Saenz*, 141 S. Ct. 127, 128 (2020) (granting stay pending petition for certiorari and directing the district court to expeditiously determine “based on whatever evidence the parties provide, whether serious security problems would result if a prisoner facing execution is permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution”); *Dunn v. Smith*, 141 S. Ct. 725, 725 (2021) (denying request to vacate injunction by the Eleventh Circuit as to whether RLUIPA required Alabama to permit a religious adviser into the execution chamber); *Ramirez v. Collier*, 142 S. Ct. 1264, 1284 (2022) (holding under RLUIPA, which provides broader protection than the First Amendment, that a state may not prevent a religious advisor from praying or touching a condemned person during an execution).

<sup>185</sup> See, e.g., Editorial Board, *Is Religious Freedom for Christians Only?*, N.Y. TIMES (Feb. 9, 2019) <https://www.nytimes.com/2019/02/09/opinion/supreme-court-alabama-execution.html> [<https://perma.cc/69ZG-AEGS>] (criticizing the Court’s decision).

<sup>186</sup> See *supra* cases and text accompanying note 184.

<sup>187</sup> *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019).

<sup>188</sup> *Ramirez*, 142 S. Ct. at 1277.

<sup>189</sup> *Id.* at 1283. Chief Justice Roberts, writing for the majority, stated:

If States adopt clear rules in advance, it should be the rare case that requires last-minute resort to the federal courts. If such cases do arise and a court determines that relief is appropriate under RLUIPA, the proper remedy is an injunction ordering the accommodation, not a stay of the execution. This approach balances the State’s interest in carrying out capital sentences without delay and the prisoner’s interest in religious exercise.

*Id.*; see also *id.* at 1289 (Thomas, J., dissenting) (criticizing the majority for inviting more litigation delay tactics from people on death row).

other 2018 Term case on the shadow docket, *Dunn v. Price*.<sup>190</sup> There, the Court similarly overturned a stay entered by the Eleventh Circuit, which would have allowed for the lower courts to consider whether Price had properly elected a more humane method of execution under the standards required by the *Glossip* decision.<sup>191</sup> The Court did so in spite of Justice Breyer's impassioned dissent, which made clear that the Court had rebuffed his middle-of-the-night request that the Justices wait to discuss the case at the Court's next conference.<sup>192</sup>

Notwithstanding this context and the lower court's stay, the Court again chose the more aggressive action available and upended the status quo, refusing to look at the case more closely. Moreover, had Justice Breyer not written his late-night dissent, the public would not have understood the debate occurring on the Court about how the Court's *Glossip* requirement was being implemented. The willingness to proceed as it did in secrecy and the rejection of the possibility for further discussion adds to the picture of an emboldened Supreme Court undeterred by the norms of cautiousness and public accountability.

The pushback from court watchers and dissenting Justices to these and other controversial shadow docket decisions from the 2018 Term arguably had an impact at least on capital cases raising claims of religious liberty.<sup>193</sup> But as Lee Kovarsky has shown, the Court was undeterred whatsoever about using the shadow docket to resolve and summarily deny late-stage challenges to federal executions at the end of President Trump's term after a seventeen-year moratorium even where the cases presented substantial issues.<sup>194</sup>

Moreover, as Kovarsky explains, in these decisions the Court did more than just deny emergency relief, "[i]t dissolved lower-court stays at an unprecedented rate, and did so *without* contemporaneous merits dispositions."<sup>195</sup> End-stage litigation to state executions is nearly always resolved by federal courts

<sup>190</sup> *Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019).

<sup>191</sup> *Id.*; *Glossip v. Gross*, 576 U.S. 863, 877–78 (2015).

<sup>192</sup> *Price*, 139 S. Ct. at 1312–13 (Breyer, J., dissenting). Justice Breyer's dissent revealed that shadow docket decision-making, as is its nature, was happening late into the night and without the benefit of discussion and full deliberation. He explained:

Shortly before 9 p.m. this evening, the State filed an application to the Justice of this Court who is the Circuit Justice for the Eleventh Circuit. It was later referred to the Conference. I requested that the Court take no action until tomorrow, when the matter could be discussed at Conference. I recognized that my request would delay resolution of the application and that the State would have to obtain a new execution warrant, thus delaying the execution by 30 days. But in my judgment, that delay was warranted, at least on the facts as we have them now.

*Id.* at 1314.

<sup>193</sup> See Stern, *supra* note 13 (questioning whether public backlash to shadow docket decision-making prompted the Court "at long last" to "block[] an execution and set the case for oral arguments").

<sup>194</sup> Kovarsky, *supra* note 8, at 659–67.

<sup>195</sup> *Id.* at 660.

“on the merits on the abbreviated schedule.”<sup>196</sup> But the Trump executions differed in that the Court cleared the path for executions without requiring resolution on the merits of the claims presented.<sup>197</sup>

For example, in *Barr v. Lee*, the Supreme Court invalidated lower court stays in four cases challenging the Department of Justice’s (DOJ) lethal injection drug protocol, where prisoners claimed the drug pentobarbital created an intolerable risk of severe pain.<sup>198</sup> The Court did so notwithstanding an evidentiary dispute about the cruelty of the federal government’s execution method.<sup>199</sup> Indeed, in its per curiam decision, the Court acknowledged expert evidence presented by the condemned men showing that pentobarbital can cause “respiratory distress that temporarily produces the sensation of drowning or asphyxiation.”<sup>200</sup> But the Court deemed that evidence insufficient to warrant further proceedings based on dueling evidence from the government.<sup>201</sup> The DOJ claimed that such distress “occurs only *after* the prisoner has died or been rendered fully insensate.”<sup>202</sup>

The per curiam opinion made no illusions that the Court was resolving—or allowing the lower courts to resolve—that dispute. It simply pointed to the fact that the challengers’ claim was contested by the government. And with that it suggested the execution could go forward.

Of course, the mere existence of a dispute about the cruelty of an execution method does not resolve its legality. The lower courts wanted time to address and evaluate the issue, but the Supreme Court cut off that process before it began, effectively accepting the government’s claim without testing. This enormously consequential shadow docket decision arguably reflected a substantive judgment that the government’s execution methods in this context are more impervious than ever before to Eighth Amendment challenge.

The Court, however, did not suggest such a substantive change, and instead presented its decision as something far more procedural and less consequential. It grounded its decision in the standards for emergency relief, noting “[t]he plaintiffs in this case have not made the showing required to justify last-minute intervention by a Federal Court.”<sup>203</sup>

Moreover, the explanation came with the now familiar invocation of judicial restraint. In vacating the lower court stay, the Court cited *Bucklew*, for the proposition that “[l]ast-minute stays’ like that issued this morning ‘should be

<sup>196</sup> *Id.* (“To the extent appellate courts denied emergency relief to end-stage prisoner litigants, the relief was almost always denied at the same time that the appellate courts decided the merits.”).

<sup>197</sup> *Id.*

<sup>198</sup> *Barr v. Lee*, 140 S. Ct. 2590, 2591–92 (2020).

<sup>199</sup> *Id.* at 2591.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

the extreme exception, not the norm.’”<sup>204</sup> As in *Bucklew*, the Court cited respect for the political judgments of “the people and their representatives” on the question of capital punishment and the Court’s “responsibility” to fairly and expeditiously resolve challenges to executions.<sup>205</sup> But this time the Court paradoxically cited those norms of judicial restraint as justification for dissolving a stay, rather than resolving the merits of a dispute under the Eighth Amendment.<sup>206</sup> The per curiam decision therefore laid bare that finality, expediency, and implementation of death sentences are the values driving the Court’s approach to the capital shadow docket, not careful and restrained decision-making.

Notwithstanding the blowback to the Court’s use of shadow docket decision-making in death cases, the Court does not appear to be chastened.<sup>207</sup> It has continued to disrupt lower court stays in death cases on the shadow docket. In fact, according to the Death Penalty Information Center, the Court has “not stayed any execution since the death of Justice Ruth Bader Ginsburg, except to determine whether a religious advisor may accompany a condemned prisoner in the execution chamber while he is being put to death.”<sup>208</sup>

For example, twice in 2022, the Court vacated lower court stays barring executions of condemned prisoners who claimed Alabama was not following their requests to be executed by nitrogen hypoxia following that method’s approval by the Alabama Department of Corrections.<sup>209</sup> In September of 2022, the Court issued another late-night order eliminating a lower court injunction barring Alabama from executing Alan Miller “by any method other than nitrogen hypoxia” after a district court judge appointed by President Trump concluded that Miller had presented “consistent, credible, and uncontroverted direct evi-

<sup>204</sup> *Id.* (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019)).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* (“It is our responsibility ‘to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously,’ so that ‘the question of capital punishment’ can remain with ‘the people and their representatives, not the courts, to resolve.’” (quoting *Bucklew*, 139 S. Ct. at 1134)).

<sup>207</sup> See James Romoser, *Will Jackson be the Supreme Court’s Next Great Opponent of Capital Punishment?*, SCOTUSBLOG (Dec. 5, 2022, 8:30 AM), <https://www.scotusblog.com/2022/12/will-jackson-be-the-supreme-courts-next-great-opponent-of-capital-punishment/> [<https://perma.cc/C3RX-ZJAS>] (citing the Court’s continued use of the shadow docket in death cases and noting that in November 2022 “the court green-lighted six executions in five states”).

<sup>208</sup> *Federal Court Orders Alabama to Preserve Evidence of Botched Attempted Execution of Alan Miller*, DEATH PENALTY INFO. CTR. (Sept. 26, 2022), <https://deathpenaltyinfo.org/news/federal-court-orders-alabama-to-preserve-evidence-of-botched-attempted-execution-of-alan-miller> [<https://perma.cc/Z8Z6-SBUZ>] [hereinafter DPIC].

<sup>209</sup> Ellena Erskine, *Court Green-Lights Alabama Execution in 5-4 Ruling that Reverses Two Lower Courts*, SCOTUSBLOG (Jan. 27, 2022, 11:29 PM), <https://www.scotusblog.com/2022/01/court-green-lights-alabama-execution-in-5-4-ruling-that-reverses-two-lower-courts/> [<https://perma.cc/UD53-M8SM>]. In both cases, Justice Amy Coney Barrett joined the Court’s three liberal members to dissent from the Court’s vacating of the lower court stays.



dence” of his election to be executed by that method.<sup>210</sup> Alabama claimed that it did not have a record of Miller’s election and, unprepared to move forward with executions by nitrogen hypoxia, sought to execute him by lethal injection.<sup>211</sup> The Court’s 5-4 order vacating the stay without any explanation allowed the execution to proceed, but it eventually was halted after executioners could not find an intravenous line before the death warrant expired.<sup>212</sup>

These developments reflect more than new approaches to requests for emergency relief that happen to arise in the capital context.<sup>213</sup> They reveal eroding norms of judicial restraint with respect to the death penalty.

### III. THE DEATH OF JUDICIAL RESTRAINT

If the long-existing approach to capital stay requests on the Supreme Court’s orders docket is a version of judicial minimalism—that is, a preference for proceeding cautiously, deference to decisionmakers with the better opportunity to develop the record, and only deciding cases on the narrowest possible grounds<sup>214</sup>—then the Court’s willingness to dispense with those standards in matters bearing upon life or death should be recognized as a form of judicial maximalism.<sup>215</sup> This approach also contrasts with “death is different” jurisprudence, which recognizes that certain decisions warrant caution and militate against disruption of the status quo as a means of cabining the awesome power of state execution, of which judges are inescapably a part. The capital shadow docket’s turn away from these approaches signals a two-fold decline of judicial restraint.

First, it rejects the substantive norm of proceeding carefully before allowing executions to proceed. Second, given that these norms have long existed in the capital jurisprudence, dispensing with them also rejects a philosophy of adherence to precedent as a constraint. As Justice Powell described “restraint in decisionmaking and respect for decisions once made are the keys to preservation of an independent judiciary and public respect for the judiciary’s role as a guardian of rights.”<sup>216</sup> Though Powell was referring specifically to *stare decisis*, elements of that philosophy apply to the Court’s hesitance to overturn lower court stays, particularly when the interests at stake are weighty. Thus, to reach

<sup>210</sup> DPIC, *supra* note 208.

<sup>211</sup> Nicholas Bogel-Burroughs, *Supreme Court Says Alabama Can Kill Prisoner with Method He Fears*, N.Y. TIMES (Sept. 23, 2022), <https://www.nytimes.com/2022/09/23/us/alan-miller-alabama-execution.html> [https://perma.cc/5VCX-PVME].

<sup>212</sup> *Id.*

<sup>213</sup> See Vladeck, *supra* note 5, at 155.

<sup>214</sup> Posner, *supra* note 27, at 520–21 (defining “judicial self-restraint” to include the process of “appellate judges defer[ring] to trial judges and administrative agencies” based upon conceptions of “‘modesty,’ or ‘institutional competence,’ or ‘process jurisprudence’”).

<sup>215</sup> See Steilen, *supra* note 40, at 391 (describing minimalist approaches as reflecting modest, narrow, fact-specific decisions that avoid opining on or resolving larger and more foundational questions).

<sup>216</sup> Powell, *supra* note 45, at 289–90.

out and dispose of cases on the shadow docket, even preliminarily before the lower courts can fully assess the issue,<sup>217</sup> disregards this vision of the Court in favor of a far more active and aggressive Supreme Court role in implementation of the death penalty.

Moreover, the challenges to the federal executions addressed above all determined whether the method of execution constituted cruel and unusual punishment under the Eighth Amendment or whether an execution was carried out in a way that would violate the First Amendment.<sup>218</sup> None of these cases attacked the constitutionality of the death penalty itself. Thus, respect for the political judgments of “the people and their representatives” on the question of capital punishment, which the Court has cited in merits decisions skeptical of late-stage execution challenges, does not support what the Court is doing on its shadow docket. That rationale is not only misplaced, it adds a further element of overreaching by drawing a larger, not directly applicable question into the more limited issues before the Court.<sup>219</sup> The Court cannot claim the mantle of judicial restraint to appear a disinterested protector of the political process, even as it engages in an act of bald judicial overreaching.

To grapple with the implications of the Court’s capital shadow docket, one must first appreciate the significance of these changes. The shift is not only about the revised standards for stay requests. It reflects profound skepticism of the post-*Gregg* project. Indeed, the Court could defer to the political process and judgments of the people’s representatives as to the existence of capital punishment and still approach enforcement of the Eighth Amendment with modesty, deliberation, and restraint. The Court’s apparent belief that the poles on the pendulum are ultimately incompatible is perhaps the most significant take away from the shadow docket’s death of judicial restraint.

What it indicates for the future, however, is less certain. At a minimum it will surely mean that in the few remaining states where the death penalty operates, the Court will largely endorse and facilitate executions with little worry about the legality of the sentences and execution methods coming before the Court. But the death of judicial restraint presaged by the capital shadow docket could potentially also mean the beginning of the end to delusions about the death penalty. No longer will the brutality and arbitrariness of capital punishment be cloaked and legitimized by judicial regulation. Whether the elimination of the Court’s normalizing force in the regulation of capital punishment in favor of middle-of-the-night rubber stamps hastens doubts about the death penalty’s fairness, accuracy, and compatibility with a system that purports to value human dignity remains to be seen. It should.

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<sup>217</sup> Vladeck, *supra* note 5, at 158.

<sup>218</sup> See *supra* Section I.B.5 & Part II.

<sup>219</sup> See *Barr v. Lee*, 40 S. Ct. 2590 (2020).

## CONCLUSION

The role of the courts in America's system of capital punishment reflects a seminal contradiction. Within its constitutional regulation of the death penalty and specifically when exercising the near-final say on whether condemned prisoners' executions may imminently proceed, the Court occupies a proximate and decisive space in the process of state killing. But the Court would prefer for us to think of its role differently—as a passive, mere agnostic participant in a process defined by judicial restraint. The capital shadow docket has arguably done much to erode the Court's narrative with still-to-be-determined implications.

The Court's willingness to clear the path for executions in the course of shadow docket expediency arguably could preserve capital punishment for the long-term, slowly weakening constitutional backstops. There is, however, another possibility. The capital shadow docket, to the extent it continues to operate the way it has in recent years could increasingly disrobe capital punishment of its shell of judicially regulated legitimacy. What remains after the death of judicial restraint are broader and ever pressing questions about the death penalty's fairness, accuracy, and compatibility with a system that purports to value human dignity.

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