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No Need to Wait: Congress Has the Power Under Section Five of the Fourteenth Amendment to Abolish the Death Penalty in the States

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NO NEED TO WAIT: CONGRESS HAS THE POWER UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT TO ABOLISH THE DEATH PENALTY IN THE STATES

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ABSTRACT

Reformers currently proposing the abolition of capital punishment by federal legislation have only targeted the federal death penalty. They are aiming too low. Concerns about the roughly 50 prisoners facing execution by the federal government should not cause advocates to ignore the approximately 2,400 on the combined Death Rows of the states. Congress has the authority to abolish the death penalty in the states, and good reason to exercise it.

This Article takes as a given the Supreme Court's view that the death penalty is not itself unconstitutional.

But under existing law Congress would have no difficulty in compiling a record that would support the use of its enforcement power under Section Five of the Fourteenth Amendment to enact a statute forbidding the imposition of capital punishment by those states that retain the practice. The statute would be congruent and proportional legislation to remedy and prevent an amply documented history of violations of rights that the Court has long recognized as fundamental concerns.

Those violations include the states': (1) denial of effective assistance of counsel to capital defendants, (2) racial discrimination in the selection of capital jurors and in charging and sentencing decisions, (3) failure to structure death penalty systems so as to reliably result in the execution of the most culpable of the potentially eligible defendants, (4) execution of the mentally impaired, (5) execution of prisoners

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My hope is that the research presented herein is current as of December 31, 2023.

contrary to the Constitution due to the fortuities of litigation timing, (6) execution of the innocent, and (7) use of torturous methods of execution.

If death penalty reformers focus their advocacy efforts on a federal statute they may achieve surprising success. Congressional representatives from abolitionist states may support their efforts, and so may some from retentionist states, buttressed by the growing number of political conservatives who support abolition. In any event, the campaign itself may strengthen the abolitionist cause.

INTRODUCTION

A. Overview

There are no new discoveries in this Article. Its legal underpinnings are well-established and the empirical data on which it rests has been extensively reported. Its envisaged contribution, rather, is to assemble materials that have been hiding in plain sight into the basis for prompt real-world action.

The Supreme Court has for some decades been of the view that a state does not violate the Eighth Amendment by maintaining an appropriately structured system of capital punishment.[1] I proceed on the premise that the Supreme Court is correct on that point.

But the power of Congress to enforce the provisions of the Fourteenth Amendment[2] is not limited to the "insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional . . . ."[3]

Congress can investigate for itself the existence of violations of the Bill of Rights and legislate to correct or prevent them.[4] The Court will evaluate the validity of such legislation by deciding whether it is congruent and proportional to the documented extent of the actual or potential constitutional violations.[5]

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[1] *See* Gregg v. Georgia, 428 U.S. 153, 169, 195 (1976) (plurality opinion). The Eighth Amendment has long ago been incorporated against the states under the due process clause of the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 665–67 (1962).

[2] *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). Section Two of the Fifteenth Amendment confers a like power on Congress. Cases arising under the two provisions apply the same tests, *see* Allen v. Milligan, 599 U.S. 1, 80 n.19 (2023) (Thomas, J., dissenting), and are routinely cited interchangeably. This Article adopts that practice. Further discussion of *Allen* appears *infra* text accompanying notes 44–45.

[3] Katzenbach v. Morgan, 384 U.S. 641, 649 (1966); *accord* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727 (2003) ("Congress may, in the exercise of its Section Five power, do more than simply proscribe conduct that we have held unconstitutional."); *see also id.* at 737–38. Further discussion of these cases appears *infra* note 34 and Part I.

[4] *See* City of Boerne v. Flores, 521 U.S. 507, 518 (1997).

[5] *See id.* at 519–20 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."). Further discussion of this case appears *infra* text accompanying notes 46–51.

I seek to demonstrate:

(1) Legally, Congress would have no difficulty in compiling a record justifying the use of its Section Five authority to enact a federal statute outlawing the states' imposition of capital punishment.[6] That statute would be a congruent and proportional response to a series of well-documented state death penalty practices that violate or threaten to violate core constitutional rights long recognized by the Supreme Court.

(2) Politically, death penalty abolitionists might benefit their cause by seeking the passage of such legislation.

B. Outline

Part I summarizes the Court's current approach to determining whether Section Five supports a federal statute. The closer a public policy problem is to one or more areas of fundamental constitutional concern and the stronger the record regarding the need for remedial or preventative action, the broader is Congress' legislative power. Critically, Section Five grants Congress the power to enact legislation designed to enforce the Fourteenth Amendment, not merely the power to enact legislation designed to enforce extant Supreme Court jurisprudence.

Part II limns the troubling constitutional problems that, taken together, would fully warrant Congress in concluding that abolition of the states' death penalties is a congruent and proportional response.[7]

Section A addresses individual issues:

(1) Denial of effective assistance of counsel. Recognizing that the absence of effective defense counsel has pervasive yet elusive effects on the integrity of capital trials, the Court squarely held in the early decades of the twentieth century that the states were required to provide capital defendants with the effective assistance of counsel.[8] But Congress could very reasonably conclude that the principle has yet to be realized in practice, and that its past efforts to remedy the problem have failed.[9]

(2) Racial discrimination in the selection of capital jurors and in charging and sentencing decisions. These injustices are of course at the core of Fourteenth

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[6] Congressional authority to abolish the federal death penalty—repealing statutes that it was under no obligation to enact in the first place—flows uncontroversially from its power to enact a federal criminal code and to govern the military, U.S. CONST. art. I, § 8, cls. 6, 10, 14, 18; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416–18 (1819). This Article will not consider that issue further.

[7] I use the word "limns" advisedly. With apologies to numerous dedicated researchers whose work has gone uncited, this Article makes no attempt at an exhaustive presentation of the empirical data in support of its various propositions. My only goal is to show that ample such data exists.

[8] *See* Powell v. Alabama, 287 U.S. 45, 71–72 (1932).

[9] *See infra* text accompanying notes 72–79 (discussing previous congressional efforts).

Amendment concerns.[10] Congressional power to remedy and prevent them is as unquestionable as their continuing existence.[11]

(3) Failure to structure death penalty systems so as to reliably result in the execution of the most culpable of the potentially eligible defendants. The Supreme Court laid down these bedrock Eighth Amendment requirements more than fifty years ago.[12] Empirical studies show that the situation is worse now than it was then.[13]

(4) Execution of the mentally impaired. A state violates the Eighth Amendment by executing a person with intellectual disability[14] or one who does not understand the punishment to be inflicted.[15] But Congress could well determine that both events happen on a regular basis and have every prospect of continuing to do so.[16] Moreover, Congress could justifiably conclude that even if the Court's rules were perfectly enforced, they do not fully capture the Eighth Amendment problem.[17]

(5) Execution of defendants contrary to the Constitution due to the fortuities of litigation timing. Sometimes the defendants were ahead of the Court in recognizing that their executions would be unlawful, and were still alive at the time it did, but were executed nonetheless.[18] Sometimes they asserted their claims after the Court had explicitly adopted their positions but were foreclosed from a remedy by recalcitrant lower courts[19] or by Ptolemaic Supreme Court jurisprudence originating in *Teague v. Lane*[20] and elaborated within a universe bounded by Congress's own prior efforts at reform.[21] And there is every reason to believe the data is incomplete.[22] Peering into this swirling cloud of injustices, Congress might well see a line of unconstitutionally executed prisoners stretching out to the crack of doom. Congress could appropriately respond: "I'll see no more."[23]

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[10] *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 84–98 (1986); *Ex parte* Virginia, 100 U.S. 339, 344–49 (1879).

[11] *See infra* text accompanying notes 85–105.

[12] *See* Gregg v. Georgia, 428 U.S. 153, 188–89 (1976) (plurality opinion) (describing the holding of Furman v. Georgia, 408 U.S. 238 (1972)).

[13] *See infra* text accompanying notes 111–21.

[14] *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[15] *See* Madison v. Alabama, 139 S. Ct. 718, 723 (2019); Panetti v. Quarterman, 551 U.S. 930, 959 (2007); Ford v. Wainwright, 477 U.S. 399, 409–10 (1986).

[16] *See infra* text accompanying notes 125–43.

[17] *See infra* text accompanying notes 143–50.

[18] *See* Joseph Margulies et al., *Dead Right: A Cautionary Capital Punishment Tale*, 53 COLUM. HUM. RTS. L. REV. 59, 90–91 (2021); *infra* note 214 (discussing Schriro v. Summerlin, 542 U.S. 348 (2004) and Florida's response to Hurst v. Florida, 577 U.S. 92 (2016)).

[19] *See infra* note 213.

[20] Teague v. Lane, 489 U.S. 288 (1989).

[21] *See infra* text accompanying notes 152–86.

[22] *See infra* text accompanying notes 208–16 (discussing cases dismissed without discussion of merits).

[23] WILLIAM SHAKESPEARE, MACBETH act 4, sc.1, l. 118.

(6) Execution of the innocent. The Court has taken an exiguous view of when—or even whether—this constitutes a violation of the Constitution.[24] Congress would be amply justified both in taking a broader one and in determining that the gravity and extent of the problem supports abolishing executions altogether.[25]

(7) Use of torturous methods of execution. This is a core Eighth Amendment violation.[26] Remedying it through litigation is impracticable due to a series of limitations that the Supreme Court has imposed on challengers.[27] But there is ample evidence—much compiled by the states themselves—that the problem persists.[28] Congress can fix it.

Section B observes that the foregoing issues, and other structural defects in contemporary American death penalty systems which have not been specifically listed, cannot realistically be considered separately. They reinforce each other.[29] This synergistic effect is additional support for the remedy of abolition.

The case for Congressional action is particularly strong because the problems described to this point have flourished in the environment created by Congress's own attempt at reform—the 1996 curtailment of federal judicial remedies in the Antiterrorism and Effective Death Penalty Act (AEDPA).[30] In operation, as scores of studies have shown,[31] this marginally constitutional legislation—which radically

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[24] *See infra* text accompanying notes 217–22.

[25] *See infra* text accompanying notes 223–36.

[26] *See In re* Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . . ."); Wilkerson v. Utah, 99 U.S. 130, 136 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment . . . ."). Subsequent cases are discussed *infra* notes 238, 242.

[27] *See infra* text accompanying notes 239–42.

[28] *See infra* text accompanying notes 245–50.

[29] *See infra* text accompanying notes 253–62.

[30] Pub. L. No. 104-132, 110 Stat. 1214 (1996); *see* David R. Dow & Eric M. Freedman, *The Effects of AEDPA on Justice*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH 261, 261 (Charles S. Lanier et al. eds., 2009) [hereinafter Dow & Freedman, *The Effects of AEDPA*].

[31] *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.1 n.2 (7th ed. 2019 & Supp. 2023) (collecting studies).

One very detailed investigation, covering the first few years during which AEDPA was in effect, found that the rate at which federal habeas corpus relief was granted in capital cases was cut by roughly 70%. The authors concluded that in the post-AEDPA years relief was granted in approximately 13% of cases, compared to the previous grant rate of approximately 40% reported in JEFFREY FAGAN ET. AL., GETTING TO DEATH: FAIRNESS AND EFFICIENCY IN THE PROCESSING AND CONCLUSION OF DEATH PENALTY CASES AFTER *FURMAN*, FINAL TECHNICAL REPORT 56 (2003), https://www.ojp.gov/pdffiles1/nij/grants/203935.pdf [https://perma.cc/CFA8-ZMSZ]. *See* NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM & EFFECTIVE DEATH PENALTY ACT OF 1996, at 61 (2007), https://www.ojp.gov/pdffiles1/nij/grants/219559.pdf [https://perma.cc/6JAS-XR7C].

altered the pre-existing relationship between the state and federal judicial systems by giving heavier weight to the former—has allowed more constitutional error to go uncorrected than was previously the case.[32] But that was not its stated purpose,[33] and to take its proponents at their word strengthens the argument of this Article. Congress has given the states every chance to repair the federal constitutional defects in their capital punishment systems. Their failure to do so is additional justification for Congressional abolition of those systems.[34]

Part III discusses the political risks and benefits to the abolitionist cause of seeking to achieve its goal through federal legislation. Although the area hardly lends itself to confident predictions, there are sound reasons to believe that the legislation could have more Congressional support than one might expect at first glance[35] and that in any event the potential gains from its introduction would outweigh the potential losses.[36]

The Conclusion reiterates that this Article does not rest on any controversial legal or empirical propositions. The legislation it supports is predicated on the idea that the Court's interpretations of the Constitution, both with respect to capital punishment and with respect to the extent of Congressional power under Section Five, have been correct. The data underpinning the suggested use of that power in the present case is solid. The future of the proposed statute does not depend on overcoming doctrinal obstacles, only on marshalling the political energy to get it enacted.

I. THE SECTION FIVE POWER

This Part is a primer on current Supreme Court doctrine respecting Congressional authority to enact legislation under Section Five.[37]

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[32] *See* Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORNELL L. REV. 1739, 1782 (2022) ("[F]ederal judges must often stand by, despite their Article III role, when . . . constitutional abuses come before them. They cannot readily develop the facts, interpret the law, or grant relief for patently violative state court convictions. This impact has been particularly felt in capital habeas cases, where constitutional violations may be particularly numerous and the declin[e] in access to relief has been particularly pronounced.").

[33] *See* Eric M. Freedman, *Federal Habeas Corpus in Capital Cases*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 577, 589–90 (James R. Acker et al. eds., 3d ed. 2014) [hereinafter AMERICA'S EXPERIMENT].

[34] *See* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 729–35, 737 (2003) (finding that record of failure of states to comply with prior congressional efforts to eliminate gender-based discrimination in employment policies was "weighty enough to justify the enactment of prophylactic § 5 legislation"). There is further discussion *infra* note 50.

[35] *See infra* text accompanying notes 266–72.

[36] *See infra* text accompanying notes 273–77.

[37] *See supra* note 2.

In *Lassiter v. Northampton County Board of Elections*, the Court rejected the claim of a potential voter who asserted that the state's requirement that she first pass a literacy test "violated the Fourteenth, Fifteenth, and Seventeenth Amendments of the Federal Constitution."[38] In § 4(e) of the Voting Rights Act of 1965 (VRA), Congress, claiming the right to act under Section Five, outlawed such tests under certain circumstances.[39] The claim was soon challenged by plaintiffs who straightforwardly argued that because "the Fourteenth Amendment does not forbid the states from imposing English-language literacy tests, Congress ha[d] no power to pass the statute."[40] Congress could hardly "enforce" a right that the Court had squarely held to be non-existent.

In the fountainhead case of *Katzenbach v. Morgan*, the Court rejected that position:

> A construction of [Section Five] that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional . . . . By including [Section Five] the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause . . . . The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch v. Maryland*, [17 U.S. (4 Wheat.) 316, 421 (1819)]:
>
> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."
>
> Correctly viewed, [Section Five] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.[41]

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[38] 360 U.S. 45, 46, 50–54 (1959).

[39] Pub. L. No. 89-110, 79 Stat. 439 (1965).

[40] Brief for Appellees at 2, Katzenbach v. Morgan, 384 U.S. 641 (1966) (Nos. 847, 877), 1966 WL 115486; *see also Katzenbach*, 384 U.S. at 648 (summarizing state's argument to same effect).

[41] *Katzenbach*, 384 U.S. at 648–51.

Applying this test to the facts at hand, the *Katzenbach* Court had no difficulty in upholding Section 4(e). Congress, it said, might have determined that the abrogation of English-language literacy tests as a precondition to voting was an appropriate step to enhance the political power of New York residents educated in Puerto Rico, thus limiting the risk of their being discriminated against when attempting to benefit from public services.[42]

The subsequent decision in *City of Rome v. United States*[43] fit smoothly into this framework. The city there argued that the VRA exceeded the enforcement powers of Congress because the Constitution prohibited only restrictions on voting enacted with racially discriminatory intent but the VRA outlawed those that had racially discriminatory effects. The Court's response was unambiguous:

> [W]e hold that the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.[44]

In June of 2023, the Court explicitly reaffirmed this constitutional holding in *Allen v. Milligan*:

> We also reject Alabama's argument that [Section 2 of the VRA] . . . is unconstitutional under the Fifteenth Amendment. According to Alabama, that Amendment permits Congress to legislate against only purposeful discrimination by States. But we held over 40 years ago "that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to [Section 2 of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect." *City of Rome v. United*

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[42] *See id.* at 652–53 ("It was for Congress . . . to assess and weigh . . . the adequacy or availability of alternative remedies . . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.").

[43] 446 U.S. 156 (1980).

[44] *Id.* at 177.

> *States*, 446 U.S. 156 (1980). The VRA's "ban on electoral changes that are discriminatory in effect," we emphasized, "is an appropriate method of promoting the purposes of the Fifteenth Amendment." *Id.* at 177.[45]

Although *Katzenbach* and *City of Rome* remain the law, the Court in 1997 enunciated a new framework for their application, one that it has adhered to ever since. In *City of Boerne v. Flores*,[46] the Court rejected the constitutionality of a statute that imposed more stringent First Amendment restrictions on the states than the Amendment itself did under the Court's jurisprudence. The Court wrote:

> Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."
>
> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.[47]

There have been numerous decisions in subsequent years applying this test. The Court has sometimes endorsed and sometimes rejected Congressional assertions that a particular statute was a congruent and proportional tool for the remediation or prevention of constitutional violations by the states.[48] The closer a public policy

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[45] Allen v. Milligan, 599 U.S. 1, 41 (2023).

[46] 521 U.S. 507 (1997).

[47] *Id.* at 519–20; *see* Allen v. Cooper, 589 U.S. 248, 260–61 (2020) (reiterating this test).

[48] Representative cases upholding statutory provisions under the *City of Boerne* formulation include *Tennessee v. Lane*, 541 U.S. 509 (2004) and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). Representative cases invalidating ones include *Shelby County v. Holder*, 570 U.S. 529 (2013); *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30 (2012); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).

problem is to one or more areas of fundamental constitutional concern[49] and the stronger the record regarding the need for the remedial or preventative action in question,[50] the broader is Congressional power under Section Five.[51]

II. FOURTEENTH AMENDMENT CONCERNS JUSTIFYING FEDERAL LEGISLATIVE ABOLITION OF STATES' DEATH PENALTIES

Readers who peruse the following sections might in each instance be able to imagine some limited Congressional response to the undoubted constitutional problem discussed. But, as Part I has described, that is not the test of whether my proposed response—legislation abolishing the states' death penalties—is within Congress's powers. This is not a situation where the question is whether a statute is consistent with the Bill of Rights and the answer depends on whether the act is sufficiently narrowly tailored. The question here is whether the statute is within Congress's granted power to enforce the Fourteenth Amendment. In answering that question, the issue is whether Congress, which must be given "wide latitude," has crossed "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law . . . ."[52] The test of the validity of a Section Five enforcement statute is not whether it utilizes least restrictive means but whether it utilizes congruent and proportional ones.

A. Individual Issues

1. Denial of Effective Assistance of Counsel

Attorney ineffectiveness frequently conceals itself. It also frequently conceals constitutional defects in capital prosecutions.[53] Hence, the duty of the states to provide

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[49] *See, e.g.*, *Lane*, 541 U.S. at 532–34.

[50] As noted *supra* note 34, one factor in determining this need is the degree to which prior less intrusive attempts by Congress to achieve its goals have been unsuccessful in getting the states to implement the reforms needed to address the Fourteenth Amendment concerns. *See infra* text accompanying notes 72–75 & note 74 (describing repeated Congressional incentives to states to improve capital counsel systems); *infra* note 223 (describing prior Congressional effort to address innocence issues in states' capital punishment systems).

[51] An explication of how the Court structures its inquiry appears in *Wessel v. Glendening*, 306 F.3d 203, 209–10 (4th Cir. 2002).

[52] *City of Boerne*, 521 U.S. at 519–20.

[53] *See infra* text accompanying notes 58–60 & note 59.

capital defendants with the effective assistance of counsel was one of the earliest due process obligations that the Court recognized.

In *Powell v. Alabama*,[54] one of the set of cases known to history as the Scottsboro Boys cases,[55] the Court wrote:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[56]

Critically, the Court rejected the hypothesis that trial counsel might have "thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts."[57] Attorney ineffectiveness is a uniquely pernicious violation of constitutional rights. It is unlikely to be discovered[58]

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[54] 287 U.S. 45 (1932). The due process holding appears *id.* at 71–72. In *Gideon v. Wainwright*, 372 U.S. 335, 341–45 (1963), the states' duty to provide effective assistance of defense counsel was extended to all felony defendants, non-capital as well as capital.

[55] For overviews, see STEVEN P. BROWN, ALABAMA JUSTICE: THE CASES AND FACES THAT CHANGED A NATION 78–105 (2020) and JAMES GOODMAN, STORIES OF SCOTTSBORO (1994).

[56] *Powell*, 286 U.S. at 68–69.

[57] *Id.* at 58.

[58] *See* Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 661–65 (2013) (canvassing reasons why ineffective capital representation is frequently invisible).

but conceals whatever legal and factual defects may exist in the government's case.[59] "To decide otherwise, would simply be to ignore actualities."[60]

Today's Court measures the effectiveness of defense counsel by the criteria articulated in *Strickland v. Washington*.[61] A defendant claiming ineffective assistance must show (1) unprofessional performance by counsel and (2) prejudice.[62]

As to the first:

> Judicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

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[59] Of course, one concern which was particularly salient to the *Powell* Court is that ineffective assistance of counsel might lead to conviction of the innocent, *see* 286 U.S. at 69 (noting that unless assisted by counsel the defendant "though he be not guilty, he faces the danger of conviction")—a concern that proved well-founded in that case, *see* John Edmond Mays & Richard S. Jaffe, *History Corrected—The Scottsboro Boys Are Officially Innocent*, THE CHAMPION, Mar. 2014, at 28–29, and that is well-founded today, *see Inadequate Legal Defense*, NAT'L REGISTRY OF EXONERATIONS (2019), https://www.law.umich.edu/special/exonerationPages/Inadequate-Defense.aspx [https://perma.cc/S3GG-38GR].

But undiscovered evidence that the defendant did not commit the crime is just one instance of the enveloping problem. For example, a variety of mental conditions may be the predicate for suppressing confessions or may preclude capital defendants' executions or may form the basis for powerful jury arguments in support of sparing their lives. But unless counsel recognize, investigate, and litigate these issues, the legal system will never even know of their existence. *See* Michael L. Perlin et al., *"A World of Steel-Eyed Death": An Empirical Evaluation of The Failure of the* Strickland *Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty*, 53 U. MICH. J.L. REFORM 261, 264–68, 272–74 (2019) [hereinafter Perlin et al., *"A World of Steel-Eyed Death"*].

Thus, an empirical study has found that, in an era when the number of capital sentences is declining nationwide, "the measure most strongly and robustly correlated with a decline in actual death sentences" is whether a state provides defendants with effective defense representation. *See* Ankur Desai & Brandon L. Garrett, *The State of the Death Penalty*, 94 NOTRE DAME L. REV. 1255, 1296 (2019).

[60] *Powell*, 287 U.S. at 58.

[61] 466 U.S. 668 (1984). The case involved the performance of counsel at the sentencing phase of a capital case, which, the Court wrote, was "sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial." *Id.* at 686–87. For an account of the case emphasizing that it arose during mitigation rather than guilt proceedings, see Alexis Hoag-Fordjour, *White is Right*: *The Racial Construction of Ineffective Assistance of Counsel*, 98 N.Y.U. L. REV. 770, 818–29 (2023).

[62] *Strickland*, 466 U.S. at 687.

> presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."[63]

As to the second:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . . [A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.[64]

In practice, it is "almost impossible" for a defendant to meet these standards.[65]

Underneath the manhole cover of the reported cases lies a sewer of uncorrected ineffective representation at state capital trials. It may well be that the aggregate performance of the capital defense bar has been improving over the last few decades.[66] That is what one would expect in any field that has been the subject of ongoing empirical research into best practices.[67] But the well-documented problem is that the

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[63] *Id.* at 689.

[64] *Id.* at 694–96.

[65] Andrea D. Lyon, *The Capital Defense Attorney*, *in* AMERICA'S EXPERIMENT, *supra* note 33, at 375, 387; *see* Perlin et al., *"A World of Steel-Eyed Death," supra* note 59, at 270–72.

[66] *See* Carol S. Steiker & Jordan M. Steiker, *The Court and Capital Punishment on Different Paths: Abolition in Waiting*, 29 WASH. & LEE J.C.R. & SOC. JUST. 1, 17–19 (2023).

[67] *See* Stetler & Wendel, *supra* note 58, at 638–40.

Strickland test fails to weed out those lawyers whose performances did not meet the professional standards in place at the time of the representation.[68]

Systems of post-conviction review whose purpose is to correct fundamental flaws in trials are in place on both the state and federal levels.[69] Neither has succeeded in systematically insuring the effective assistance of defense counsel at state capital trials.

a. State Post-Conviction Systems

An obvious way to strengthen state post-conviction review systems would have been to require that capital petitioners in those systems had the effective assistance

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[68] *See, e.g.*, Meredith J. Duncan, "*Lucky" Adnan Syed: Comprehensive Changes to Improve Criminal Defense Lawyering and Better Protect Defendants' Sixth Amendment Rights*, 82 BROOK. L. REV. 1651, 1652–53 (2017) ("In the more than thirty years since the definitive ineffective assistance of counsel case *Strickland v. Washington*, prisoners have famously had difficulty proving that their trial counsel provided constitutionally inadequate representation. The success rate of ineffective assistance of counsel claims is well documented as abysmally low. Worse still, the failure rate of ineffective assistance claims does not accurately reflect the frequency with which defendants receive unacceptable legal representation at trial."); Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS U. PUB. L. REV. 351, 361–95 (2009); Kenneth Williams, *Does* Strickland *Prejudice Defendants on Death Row?*, 43 U. RICH. L. REV. 1459, 1461 (2009); American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 928–29, 930 n.37 (2003) [hereinafter *ABA Guidelines*] (Commentary to Guideline 1.1) (disclosure: I serve as Reporter to this project, *id.* at 915); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2102–10 (2000); Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 18 (1996); Special Comm. on Capital Representation & Comm. on C.R., Ass'n of the Bar of the City of N.Y., *The Crisis in Capital Representation*, 51 REC. OF ASS'N OF THE BAR OF CITY OF N.Y. 169, 185–87 (1996); Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 428–34 (1996); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923 (1994); Marianne Lavelle & Marcia Coyle, *Effective Assistance: Just a Nominal Right?; Fatal Defense*, 12 NAT'L L.J. 55 (1990).

In fact, within two years of the decision, *Strickland* was criticized by two of three judges on a Fifth Circuit panel as being insufficient to assure justice in capital cases. *See* Riles v. McCotter, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin & Johnson, JJ., concurring).

[69] *See* Freedman, *Federal Habeas Corpus in Capital Cases*, *supra* note 33, at 577–78. *See generally ABA Guidelines*, *supra* note 68, at 932–36.

Importantly, where a state-postconviction system exists, a would-be federal habeas corpus petitioner must in most circumstances utilize it. *See* 28 U.S.C. § 2254(b)(1); *infra* text accompanying note 184.

of counsel, thereby giving them a fair shot at holding the states to the Sixth Amendment duty of providing effective assistance at trial.

The Supreme Court has not been willing to impose that requirement as a matter of constitutional law[70] notwithstanding continuing efforts to get it to do so.[71]

Congress has sought since 1996 to accomplish the same result by statute. It began by offering the states significant litigation advantages in federal capital post-conviction litigation if they could demonstrate that they provided effective counsel in state capital post-conviction proceedings.[72]

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[70] *See* Coleman v. Thompson, 501 U.S. 722, 752–54 (1991); Murray v. Giarratano, 492 U.S. 1, 3–4, 10 (1989). The farthest the Court has been willing to go is as follows. If a state does not provide effective post-conviction counsel to raise a substantial claim of ineffective assistance of trial counsel which could not practically have been raised on direct appeal, the federal habeas court will reach the merits of that claim rather than holding it to have been forfeited. *See* Trevino v. Thaler, 569 U.S. 413, 428–29 (2013); Martinez v. Ryan, 566 U.S. 1, 9, 17 (2012). For a more complete discussion, see Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After* Martinez *and* Pinholster, 41 HOFSTRA L. REV. 591, 592–96 (2013) [hereinafter Freedman, *Enforcing the ABA Guidelines*].

The prospects of federal habeas corpus petitioners successfully utilizing *Martinez*, however, were subsequently dimmed by the Court's restrictive reading of it in *Shinn v. Ramirez*, 596 U.S. 366, 382, 384–88 (2022). The Court ruled that the ineffectiveness of state post-conviction counsel may be shown only by the state court record (which may well have been compiled by that selfsame attorney) rather than by a presentation to the federal court of the evidence that state post-conviction counsel should have found. *Id.* at 382. For an example of the application of this rule resulting in the dismissal of a federal habeas petition, see *Juniper v. Davis*, 74 F.4th 196, 209–14 (4th Cir. 2023).

[71] *See, e.g.*, Eric M. Freedman, Giarratano *Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1095–1101 (2006).

[72] Collectively known as "Chapter 154," the relevant statutory provisions appear at 28 U.S.C. §§ 2261–66. A state qualifies by having "established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death." § 2265(a)(1)(A). There is an exhaustive discussion of the various special procedures applicable to Chapter 154 cases in HERTZ & LIEBMAN, *supra* note 31, § 3.3[c].

Tellingly, no state ever qualified.[73] So Congress in 2004 offered states financial incentives to improve their capital defense systems and in 2006 sought to make it easier for them to qualify under Chapter 154 by transferring the authority for certifying compliance from the courts to the Attorney General.[74] Still, no state has qualified.[75]

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[73] *See* Spears v. Stewart, 283 F.3d 992, 1019 (9th Cir. 2001) (holding state's failure to comply with Arizona's facially sufficient Chapter 154 mechanism prevented it from benefiting from the opt-in provisions in instant case); Kreutzer v. Bowersox, 231 F.3d 460, 462–63 (8th Cir. 2000) (stating Missouri does not qualify under Chapter 154); Tucker v. Catoe, 221 F.3d 600, 604–05 (4th Cir. 2000) (holding South Carolina's "mere promulgation of a 'mechanism' [was] not sufficient to permit [it] to invoke [Chapter 154's] provisions[;] . . . those mechanisms and standards must in fact be complied with"); Ashmus v. Woodford, 202 F.3d 1160, 1170 (9th Cir. 2000) (holding California does not qualify under Chapter 154); Baker v. Corcoran, 220 F.3d 276, 285–87 (4th Cir. 2000) (holding Maryland does not qualify under Chapter 154), *cert. denied*, 531 U.S. 1193 (2001); Green v. Johnson, 116 F.3d 1115, 1120 (5th Cir. 1997) (holding Texas does not qualify under Chapter 154); Brown v. Puckett, No. 3:01CV197-D, 2003 WL 21018627, at *2–3 (N.D. Miss. Mar. 12, 2003) (holding Mississippi does not qualify under Chapter 154); Kasi v. Angelone, 200 F. Supp. 2d 585, 592–93 n.2 (E.D. Va. 2002) (stating that "Virginia does not meet the [opt-in provisions]"); Smith v. Anderson, 104 F. Supp. 2d 773, 786 (S.D. Ohio 2000) (holding Ohio does not qualify under Chapter 154); Ward v. French, 989 F. Supp. 752, 757 (E.D.N.C. 1997) (holding North Carolina does not qualify under Chapter 154), *aff'd*, 165 F.3d 22 (4th Cir. 1998); Williams v. Cain, 942 F. Supp. 1088, 1092 (W.D. La. 1996) (holding Louisiana does not qualify under Chapter 154); Austin v. Bell, 927 F. Supp. 1058, 1062 (M.D. Tenn. 1996) (holding Tennessee law providing for the appointment of counsel to habeas petitioners did not satisfy prerequisites of § 2261(b)); Ryan v. Hopkins, No. 4:CV95-3391, 1996 WL 539220, at *4 (D. Neb. July 31, 1996) (holding "Nebraska's framework for appointing counsel in postconviction capital cases [was not] in compliance with subsections (b) and (c) of section 2261.").

[74] *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 507, 120 Stat. 192, 250–51 (2006).

The Justice for All Act of 2004, Public Law No. 108-405, § 421 enacted a program of "grants to States for the purpose of improving the quality of legal representation provided to indigent defendants in State capital cases." *Id.* § 421(a). The House report on the legislation observed:

> [T]here are steps that can be taken to prevent wrongful convictions . . . . The single most important of these is to ensure that every indigent defendant has a competent attorney, particularly in capital cases. Many of the most egregious cases of wrongful convictions have involved attorneys who failed to inquire into the facts, failed to present or challenge evidence at trial, or worse—were drunk or asleep during key portions of the proceedings. . . . However, such a system must be funded. The Committee believes the Federal Government should offer affirmative assistance and encouragement to the States to adopt effective systems for the appointment and performance of counsel, rather than imposing new unfunded Federal mandates.

H.R. REP. NO. 108-711, at 5 (2004).

[75] *See* Garrett & Phillips, *supra* note 32, at 1745–46 (commenting that states' record under Chapter 154 shows their lack of interest in taking the opportunity afforded them by Congress to achieve substantive justice in capital cases).

One state did manage to briefly achieve certification but only under circumstances undermining the efficacy of the statute. Attorney General Barr certified the Arizona system in 2020.[76] He wrote that a state need only have a mechanism for the provision of effective capital post-conviction counsel on the books—regardless of whether it worked in practice.[77] If so, he continued, the certification would be retroactive to date the state statute was passed.[78] These interpretations would of course fundamentally undercut the ameliorative design of Chapter 154. The Biden Administration withdrew the certification and is currently reviewing those interpretations.[79] But some future Attorney General or court might adopt them, thereby further increasing the injustices in the federal system of capital post-conviction review without reducing those in the state systems.

b. Federal Habeas Corpus

Even if a capital defendant has sufficiently competent counsel on state post-conviction to preserve a claim of ineffective assistance of trial counsel and even if the litigant receives effective assistance of counsel on federal habeas corpus so that the

[76] *See* Certification of Arizona Capital Counsel Mechanism, 85 Fed. Reg. 20705 (Apr. 14, 2020).

[77] *Id.* at 20708, 20711–12 ("[T]he contention that the Attorney General should certify a State's mechanism only if he is satisfied with the actual performance of postconviction counsel . . . misconceives the Attorney General's role . . . . The statute . . . provide[s] that the Attorney General is to inquire into . . . whether a State has standards determining eligibility for appointment.").

[78] *Id.* at 20718–19 ("I determine that the date Arizona established the mechanism I now certify is May 19, 1998.").

[79] *See* Arizona Chapter 154 Certification Review, 87 Fed. Reg. 52416–17 (Aug. 25, 2022), https://www.federalregister.gov/documents/2022/08/25/2022-18252/arizona-chapter-154-certification-review-notice-regarding-arizonas-June-2022-response [https://perma.cc/QVJ9-H7VK].

federal courts are persuaded to reach the merits of the claim,[80] the likelihood of success on the merits is low because of the remedial limitations contained in AEDPA.[81]

In short, Congress could quite reasonably determine that *Powell*'s promise of effective assistance of counsel in capital cases remains unfulfilled.[82] Because the self-concealing nature of ineffective assistance makes it difficult to eradicate effectively, to the detriment of other constitutional rights,[83] and because previous, less far-reaching measures have failed,[84] Congress could also quite reasonably determine that abolition of the death penalty is an appropriate response.

2. Racial Discrimination in the Selection of Capital Jurors and in Charging, Sentencing, and Executions

From the time of the enactment of the Civil War Amendments, the Court has used very strong language in emphasizing the power of Congress to eradicate all vestiges of racial discrimination in the states' administration of their criminal justice systems.

In *Ex parte Virginia*,[85] a federal statute provided that any jury selection officer who excluded or failed to summon any otherwise qualified citizen "on account of race, color, or previous condition of servitude" would be guilty of a federal crime.[86]

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[80] Federal habeas corpus petitioners sometimes fail to receive such assistance, *see, e.g.*, Gamboa v. Davis, 782 F. App'x 297, 298–99, 301 (5th Cir. 2019), notwithstanding the efforts of Congress in 18 U.S.C. § 3559. *See* Martel v. Clair, 565 U.S. 648, 659 (2012) (describing § 3559, a special statutory provision governing the appointment of counsel in federal habeas corpus proceedings challenging state capital proceedings, whose enactment was based on a "determination that quality legal representation is necessary" in all capital cases to foster "fundamental fairness in the imposition of the death penalty" (quoting McFarland v. Scott, 512 U.S. 848, 855, 859 (1994)).

[81] In evaluating a claim of ineffective assistance of trial counsel, the federal habeas court begins with the highly deferential *Strickland* standard described *supra* text accompanying notes 61–65, and if the state court rejected the claim on the merits, then determines whether that result was unreasonable within the meaning of either prong of 28 U.S.C. § 2254(d). *See, e.g.*, Dunn v. Reeves, 141 S. Ct. 2405, 2410–11 (2021) (rejecting ineffective assistance claim under this "doubly deferential" standard). In making those determinations the federal habeas court is limited to the record that existed in state court. *See* Cullen v. Pinholster, 563 U.S. 170, 187–88 (2011). There is further discussion in Freedman, *Enforcing the ABA Guidelines*, *supra* note 70, at 597–99.

[82] *See* Robin M. Maher, *"The Guiding Hand of Counsel" and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 1091 (2003) (arguing that too little progress towards the provision of effective capital representation has been made in the years since *Powell*).

[83] *See supra* text accompanying notes 58–60 & note 59.

[84] *See supra* text accompanying notes 72–75 & note 74.

[85] *Ex parte* Virginia, 100 U.S. 339, 344 (1879).

[86] The statute, which remains in force as 18 U.S.C. § 243, was originally the Act of March 1, 1875, 18 Stat. 335, § 4.

A Virginia judge who had been indicted for violating the act challenged Congressional power under the Thirteenth and Fourteenth Amendments to enact it. The Court forcefully rejected the challenge:

> One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color. They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress. . . .[87]
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> [T]his protection and this guarantee, as the fifth section of the [Fourteenth] amendment expressly ordains, may be enforced by Congress by means of appropriate legislation. All of the amendments derive much of their force from this latter provision. . . . It is the power of Congress which has been enlarged[.] Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power. . . .
>
> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. . . .
>
> [T]he constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all

[87] The elided passage cites *Strauder v. West Virginia*, 100 U.S. 303, 308–10 (1879). In addition to its well-known holding invalidating a state statute restricting jury duty to white people, that decision also upheld under Section Five a federal statute permitting a state criminal defendant to remove the prosecution to federal court on the allegation of being denied in the state proceedings "any right secured to him by any law providing for the equal civil rights of citizens of the United States," *id.* at 311. The statute remains in force today as 28 U.S.C. § 1443(1).

> persons the enjoyment of such rights, power was given to Congress to *enforce* its provisions by appropriate legislation.[88]

Reflecting this bedrock intention, the relatively few past academic articles and legislative proposals for congressional abolition of the death penalty under Section Five have been centrally based on concerns about racial discrimination.[89] Those concerns may be as inseparable from the very institution of capital punishment[90] as they are pervasive in the entire American criminal justice system,[91] but I confine myself here to two specific issues that fit comfortably into existing Supreme Court doctrine.

a. The Use of Peremptory Jury Challenges to Exclude Racial Minority Groups

This practice—which distorts the accuracy of the jury in capital cases both as a fact-finder and as a reflection of community consensus regarding a case-appropriate

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[88] *Ex parte Virginia*, 100 U.S. at 344–47 (original emphasis).

[89] *See* Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 19 (1970) (arguing that Congress would have the power to abolish states' death penalties nationwide if it "were to conclude—as I think statistics would force it to conclude—that capital punishment had been administered for a long time in a manner discriminatory against blacks and other minority groups . . . [and] to judge, from this long experience, that this discriminatory administration was likely to continue or to recur.").

In light of the subsequent decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997) (discussed *supra* text accompanying note 46), I leave aside the suggestion, *see* Charles L. Black Jr., *The Crisis in Capital Punishment*, 31 MD. L. REV. 289, 306–07 (1971) [hereinafter Black, *The Crisis in Capital Punishment*], that Congress would be warranted under Section Five in declaring the death penalty to be cruel and unusual punishment notwithstanding any contrary holding by the Supreme Court.

I also put aside several bills proposed during the pendency of *Furman v. Georgia*, 408 U.S. 238 (1972), to suspend state death penalties in order to give Congress breathing room to consider how to react to the eventual decision.

For a representative collection of bills taking these various approaches, see *Capital Punishment: Hearings on H.R. 8414, 8483, 9486, 3243, 193, 11797, and 12217 Before Subcomm. No. 3, H. Comm. on the Judiciary*, 92d Cong. 4–10 (1972); 117 CONG. REC. 17336–48 (1971).

There is a discussion of subsequent congressional activity *infra* text accompanying notes 103–04.

[90] *See* DEATH PENALTY INFORMATION CENTER, ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY 27 (2020) [hereinafter ENDURING INJUSTICE], https://dpic-cdn.org/production/documents/reports/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf [https://perma.cc/QP3Z-LZWP].

[91] *See, e.g.*, NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES (Samuel R. Gross ed., 2022), https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf [https://perma.cc/8APW-AA5R].

sentence—has been held unconstitutional time and again.[92] The modern law on this subject is an elaboration of the framework laid down in *Batson v. Kentucky*.[93] But ample evidence shows that *Batson*, as enforced by courts on the ground, has failed to achieve its stated purpose.[94] Indeed, states are increasingly coming to that conclusion and are experimenting with a variety of approaches to the problem.[95] The recognized failure of existing institutions to implement an undoubted constitutional right[96] supports the need for its enforcement and protection through uniform federal legislation.

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[92] *See, e.g.*, Flowers v. Mississippi, 588 U.S. 284 (2019); Foster v. Chatman, 578 U.S. 488 (2016); Snyder v. Louisiana, 552 U.S. 472 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005); Powers v. Ohio, 499 U.S. 400 (1991); Batson v. Kentucky, 476 U.S. 79 (1986); *see also* Clark v. Mississippi, 143 S. Ct. 2403 (2023) (Sotomayor, Kagan & Jackson, JJ., dissenting from denial of certiorari) (criticizing Mississippi for defying *Flowers*). The Court locates this prohibition in the Equal Protection Clause. *See Flowers*, 588 U.S. at 293–303 (reviewing Court's jurisprudence); *Miller-El*, 545 U.S. at 237–39 (same). For another approach, see Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 5–9 (1990).

[93] 476 U.S. at 97–98. The *Batson* framework is summarized in *Flowers*, 588 U.S. at 297–300. For a comprehensive discussion, updated regularly, see Elisabeth Semel, Batson *and the Discriminatory Use of Peremptory Challenges in the 21st Century*, *in* NJP LITIGATION CONSULTING, JURYWORK: SYSTEMATIC TECHNIQUES § 4 (Elissa Krauss & Diane Wiley eds., 2023).

[94] *See* STEPHEN B. BRIGHT & JAMES KWAK, THE FEAR OF TOO MUCH JUSTICE: FEAR, POVERTY, AND THE PERSISTENCE OF INEQUALITY IN THE CRIMINAL COURTS 86–90 (2023). A substantial number of supportive studies are collected in Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 787 n.3 (2020). The point of Professor Frampton's article is that a "myopic focus on peremptory strikes . . . has led to the neglect of an adjacent problem: equivalent racial disparities pervade the exercise of challenges for cause," *id.* at 788, but nothing in my proposal requires the adoption of any broader view of the constitutional problem than is taken by cases cited *supra* note 92. There is further discussion *infra* text accompanying note 261.

[95] These developments are summarized in Semel, *supra* note 93, § 4.1 (Author's Note 2022) ("The most recent, significant development in the law governing the exercise of peremptory challenges is the move by several state courts and legislatures away from the three-step Batson inquiry to an approach that rejects its key features.").

[96] *See* Thomas Ward Frampton & Brandon Charles Osowski, *The End of* Batson*? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1, 17–34 (2024) (overviewing state-level reform efforts and situating them in efforts to make the promise of *Batson* meaningful); Nancy S. Marder, *Race, Peremptory Challenges, and State Courts: A Blueprint for Change*, 98 CHI.-KENT L. REV. 65, 79 (2023) ("After more than thirty-five years of *Batson*, [the states] have had ample opportunity to observe the ineffectiveness of the *Batson* test, and they have decided to take action.").

b. Racially Biased Patterns of Capital Charging, Death-Sentencing and Executions

These phenomena have been documented in dozens and dozens of studies conducted since the Supreme Court sought in *Gregg v. Georgia*[97] to remove arbitrary factors from the states' systems of capital punishment.[98]

In *McCleskey v. Kemp*,[99] a 5–4 Court rejected a constitutional attack on the Georgia capital sentencing system predicated on a meticulous multivariate study by Professor David C. Baldus. That study, whose accuracy the Court accepted, showed that the probabilities of receiving a death sentence were heavily influenced by the race of the defendant and the victim, with the harshest outcomes taking place in cases where the killer was Black and the defendant was white.[100] But McCleskey's claim of unconstitutional racial discrimination failed, the Court held, because he was unable to "prove that the decisionmakers in *his* case acted with discriminatory purpose."[101] That, however, did not mean that the injustices he assailed needed to go unremedied. "McCleskey's arguments," the Court wrote, "are best presented to the legislative bodies," which had the flexibility, representative legitimacy, and responsibility to respond appropriately.[102]

Not long afterwards, the House began work on a Racial Justice Act in order to preclude the imposition of the death penalty in state systems with racially suspicious characteristics. The various proposals, based on a review of the empirical data, "respond[ed] to the *McCleskey* Court's invitation through the exercise of Congress'

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[97] Gregg v. Georgia, 428 U.S. 153 (1976).

[98] There is a voluminous list of these studies in the scholarly and comprehensive brief authored by Anthony G. Amsterdam and Randy Hertz on behalf of an amicus curiae group of New York law professors (including me) in *People v. Harris*, 98 N.Y.2d 452 (2002), which has been reprinted in 27 N.Y.U. REV. L. & SOC. CHANGE 399 (2002) [hereinafter *Amicus Brief*]. *See id.* at 442–48. The federal Government Accounting Office conducted a similar review, with similar results, in 1990. *See id.* at 445–46. For a perspective on many of these studies, see John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 167–68 (2004).

Subsequent literature surveys are to be found in ENDURING INJUSTICE, *supra* note 90, at 28–50; Catherine M. Grosso et al., *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, *in* AMERICA'S EXPERIMENT, *supra* note 33, at 525; and Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty With Statistics:* Furman*,* McCleskey*, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1246–51 (2013).

A more recent study is discussed *infra* note 105.

[99] McCleskey v. Kemp, 481 U.S. 279 (1987).

[100] *See id.* at 286–91 & n.7.

[101] *Id.* at 292 (original emphasis).

[102] *Id.* at 319.

enforcement power under Section 5 of the Fourteenth Amendment."[103] No legislation ultimately passed, but the point for present purposes is that both Court and Congress recognized more than three decades ago that Congress had the power to address the underlying problem.[104]

The subsequent years have demonstrated the appropriateness of abolition of the states' death penalty systems as a congruent and proportional response to the persisting, multifarious, and intractable racial inequity of those systems[105]—a problem at the very center of Fourteenth Amendment concern.

3. States' Failure to Structure Their Death Penalty Systems so as to Reliably Result in the Execution of the Most Culpable of the Potentially Eligible Defendants

In *Furman v. Georgia*,[106] the Court considered a system in which a large number of murders in the state were eligible for death sentences; prosecutors pursued capital punishment in a subset of the cases in which it was available; and juries imposed it in a yet smaller subset. The upshot was that approximately 15–20% of the initially eligible defendants wound up being sentenced to death,[107] and there was no culpability-related way to explain why people landed in one group rather than the other.[108] The Court invalidated the system under the Eighth Amendment. In *Gregg v. Georgia*, the Court reviewed the state's replacement statute, which contained a variety of reforms,

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[103] H.R. REP. NO. 101-681, pt. 1, at 37–38, 156–63 (1990). For previous and subsequent bills, see Racial Justice Act of 1988, H.R. 4442, 100th Cong. (1988) and Racial Justice Act, H.R. 4017, 103d Cong. (1994).

[104] Just as in the voting rights context, even if one narrowly conceives that problem as intentional discrimination, a legislative attack on discriminatory effects is squarely within the Section Five power. *See supra* text accompanying notes 43–45.

[105] The great bulk of the data canvassed *supra* note 98 is from the period since Congressional consideration of a Racial Justice Act.

In a notable recent study, Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585 (2020), the authors updated Professor Baldus's study that was the centerpiece of *McCleskey*, *see supra* text accompanying notes 99–100. They followed the later progress of the cases in his database and demonstrated that "[e]ven among those already sentenced to death, persons who were convicted of killing a white victim were more than twice as likely to be executed." *Id.* at 606; *see also* Adam Liptak, *Executions Less Likely When Victims Are Black*, N.Y. TIMES, Aug. 4, 2020, at A16.

[106] Furman v. Georgia, 408 U.S. 238 (1972).

[107] *See* Sam Kamin & Justin Marceau, *Waking the* Furman *Giant*, 48 U.C. DAVIS L. REV. 981, 989 (2015).

[108] *See* Gregg v. Georgia, 428 U.S. 153, 188–89 (1976).

and concluded that they sufficiently addressed these issues. The Court accordingly held that the new statute met the Eighth Amendment concerns of *Furman*.[109]

The decision in *Gregg* was based on a facial review of the successor statute, not on any empirical evidence.[110] A careful examination of Georgia's actual performance under that statute about a decade after it went into operation showed that its safeguards were not in fact reducing arbitrariness as the Supreme Court had anticipated.[111]

In the years since, empirical studies around the country have repeatedly confirmed that in operation the states' capital punishment systems have failed to meet *Furman*'s mandate.[112] It may well be, as some researchers conclude,[113] that persisting racism is a powerful explanation for these results. But it may also be the case that statutes that fail to narrow the class of death-eligible homicides—contrary to the states' constitutional duty[114]—combined with the resulting practical need for prosecutors to severely reduce the number of cases they will actually pursue capitally, necessarily result in arbitrariness as different prosecutors exercise their discretion.[115] In any event, a substantial body of literature shows that whether or not the government

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[109] *Id.* at 207.

[110] *See* Kamin & Marceau, *supra* note 107, at 1008.

[111] *See* Ursula Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U. L.Q. 573, 591 (1985); *see also* Jack Greenberg, Commentary, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1675 (1986) (reviewing post-*Gregg* landscape: "We have a system of capital punishment that results in infrequent, random, and erratic executions, one that is structured to inflict death neither on those who have committed the worst offenses nor on defendants of the worst character.").

[112] A number of these studies are listed in a table in Kamin & Marceau, *supra* note 107, at 1015 tbl. 1. Others include Jeffrey Fagan et al., *Getting to Death: Race and the Paths of Capital Cases After* Furman, 107 CORNELL L. REV. 1565 (2021) (studying Georgia) and John H. Blume & Lindsey S. Vann, *Forty Years of Death: The Past, Present, and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years)*, 11 DUKE J. CONST. L. & PUB. POL'Y 183 (2016).

[113] *See, e.g.*, Fagan et al., *supra* note 112, at 1615–16; Blume & Vann, *supra* note 112, at 201–02 & fig. 2; Shatz & Dalton, *supra* note 98, at 1230–31.

[114] *See* Kamin & Marceau, *supra* note 107, at 993–95 (reviewing cases).

[115] *See* CHARLES L. BLACK JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 105 (2d ed. 1981). For example, as the description in Shatz & Dalton, *supra* note 98, at 1256–59, shows, even if race were not a factor, "The breadth of capital murder in California gives extraordinary discretion to prosecutors and juries to select defendants for death, and that discretion is not otherwise limited." *See also* Tuilaepa v. California, 512 U.S. 967, 986–93 (1994) (Blackmun, J., dissenting) (describing the capaciousness of the amorphous aggravating and mitigating circumstances contained in the California statute). The situation is similar in South Carolina. *See* Blume & Vann, *supra* note 112, at 208–11. Under current law there, "a vast majority of all murders," on the order of 75%, "are death eligible." *Id.* at 210.

seeks the death penalty for a particular murder is largely driven by the county of prosecution rather than by a policy decision of the state respecting culpability.[116]

Whatever the reasons may be, the message of the studies is clear: whether or not a murderer who might receive a death sentence actually does is no more than aleatory. Results under the existing state death penalty systems have no less a capricious connection to culpability than they did at the time of *Furman*.[117]

For Eighth Amendment purposes, it doesn't matter why states have not done what *Furman* required them to do. Perhaps the Court was misguided *ab initio*[118] or unduly optimistic[119] in believing that the states could do it. The key point is that Congress has at hand ample data on which to base the conclusion that they haven't done it[120] and that

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[116] For a discussion of this subject, see *infra* note 121. For a typical current example of the phenomenon, see Lauren Gill, *Western Pennsylvania Prosecutor Makes His County an Epicenter for the Death Penalty*, BOLTS MAG. (Oct. 6, 2023), https://boltsmag.org/washington-county-pennsylvania-death-penalty/?utm_source=TMP-Newsletter&utm_campaign=0934bf0756-EMAIL_CAMPAIGN_2023_10_10_11_06&utm_medium=email&utm_term=0_5e02cdad9d-0934bf0756-%5BLIST_EMAIL_ID%5D [https://perma.cc/ZSZ5-VGQS], which reports that one county comprising about 2% of Pennsylvania's population accounts for about a quarter of the state's pending capital cases.

[117] *See* CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 2–4 (2016). The same point is made in a volume studying a dozen individual capital cases, MARC BOOKMAN, A DESCENDING SPIRAL: EXPOSING THE DEATH PENALTY IN 12 ESSAYS (2021), which I reviewed in Eric M. Freedman, *A Descending Spiral: Exposing the Death Penalty in 12 Essays*, CRIM. L. & CRIM. JUST. BOOKS (Aug. 2021), https://clcjbooks.rutgers.edu/books/a-descending-spiral-exposing-the-death-penalty-in-12-essays/ [https://perma.cc/M8SJ-E8K2].

[118] *See Amicus Brief*, *supra* note 98, at 436–75.

[119] *See* STEIKER & STEIKER, *supra* note 117, at 5. Several Justices who initially believed that it would be possible for the Court to impose a rational structure on the states' death penalty systems changed their views in light of experience. *See* Glossip v. Gross, 576 U.S. 863, 908–09 (2015) (Breyer & Ginsburg, JJ., dissenting); Baze v. Rees, 553 U.S. 35, 84–86 (2008) (Stevens, J., concurring in judgment); Callins v. Collins, 510 U.S. 1141, 1143–45 (1994) (Blackmun, J., dissenting from denial of certiorari); David Von Drehle, *Retired Justice Changes Stand on Death Penalty*, WASH. POST (June 10, 1994), https://www.washingtonpost.com/archive/politics/1994/06/10/retired-justice-changes-stand-on-death-penalty/9ccde42b-9de5-46bc-a32a-613ae29d55f3/ [https://perma.cc/EE3E-UJ8C] (describing postretirement views of Justice Powell that he had been mistaken in rejecting the challenge in *McCleskey v. Kemp*, 481 U.S. 279 (1987) (discussed *supra* text accompanying notes 99–102) and that the system contemplated by the Court was unworkable in practice).

[120] *See* FRANK R. BAUMGARTNER ET AL., DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY 351 (2018) (reviewing empirical data in depth and concluding, "A reasoned assessment based on the facts suggests not only that the modern system flunks the *Furman* test but that it surpasses the historical death penalty in the depth and breadth of the flaws apparent in its application."); Anna VanCleave, *The Illusion of Heightened Standards in Capital Cases*, 2023 U. ILL. L. REV. 1289, 1293, 1295–96 (2023).

there is no realistic prospect that they will do it.[121] Having reached that conclusion, Congress is fully empowered to enforce the Eighth Amendment by abolishing the death penalty in those states where it continues to exist.

4. Execution of the Mentally Impaired

The Supreme Court has firmly held that the Eighth Amendment precludes the states from executing two classes of people.

a. People with Intellectual Disability[122]

Explaining the special considerations applicable to this group, the Court has written:

> Because of their disabilities in areas of reasoning, judgment, and control of their impulses . . . they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. . . . The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978), is enhanced, not only

[121] As indicated *supra* text accompanying note 116, the death penalty persists in retentionist states only in a small and dwindling number of counties, *see* Annette Choi & Dakin Andone, *Executions in the US Are in Decline—But Some Jurisdictions Lead the Rest*, CNN (Oct. 6, 2023, 6:00 AM), https://www.cnn.com/2023/10/06/us/us-executions-death-penalty-dg/index.html [https://perma.cc/B38Y-J3SP], and its usage is less and less connected to culpability. *See Glossip*, 576 U.S. at 918–20 (Breyer & Ginsburg, JJ., dissenting) (reviewing studies); Brandon L. Garrett et al., *The American Death Penalty Decline*, 107 J. CRIM. L. & CRIMINOLOGY 561, 616 (2017). Professor Garrett maintains an updated website of county-level data, *Data on Death Sentencing*, END OF ITS ROPE, https://endofitsrope.com/ [https://perma.cc/Z3UH-T69S] (last visited Apr. 30, 2024), which illuminates the trends over time. Observing that those counties continue to have enough statewide influence to prevent repeal of their states' death penalties, Congress could quite defensibly predict that they will also continue to have enough statewide influence to prevent their states from complying with the *Furman* mandate of a rational death penalty system.

[122] *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002); *see also* Moore v. Texas (*Moore II*), 139 S. Ct. 666, 672 (2019) (holding that Texas had violated *Moore I*, *infra*, on remand); Moore v. Texas (*Moore I*), 137 S. Ct. 1039, 1052–53 (2017) (holding Texas criteria for intellectual disability inconsistent with *Atkins*); Hall v. Florida, 572 U.S. 701, 724 (2014) (holding that Florida's criteria for mental retardation, which the case renamed intellectual disability, *id.* at 704, failed to meet *Atkins*).

> by the possibility of false confessions,[123] but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. . . . Mentally retarded defendants in the aggregate face a special risk of wrongful execution.[124]

The real-world problem is that, as persuasive evidence shows, the states—and particularly the states where executions continue to take place regularly[125]—are failing to implement *Atkins*.[126] There is every reason for Congress to intervene.

On the simplest level, Congress should take action because the federal judicial system is structurally unable to enforce the Eighth Amendment holding of *Atkins*. The Supreme Court suffers from institutional limitations and the lower federal courts, even if acting in good faith, are constrained by AEDPA. Thus, a careful study has found that before the Supreme Court granted review in *Moore I* and invalidated

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[123] Among the cases referenced in a footnote omitted at this point, *Atkins*, 536 U.S. at 320 n.25, is that of my client Earl Washington, a Virginia capital prisoner who was exonerated by DNA testing and freed. *See* MARGARET EDDS, AN EXPENDABLE MAN, THE NEAR-EXECUTION OF EARL WASHINGTON JR. (2006 ed.); Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089 (2001); Frank Green, *20th Anniversary of Earl Washington's Freedom Nears as Abolition of Va. Death Penalty Is Considered*, RICH. TIMES-DISPATCH (Jan. 27, 2021), https://richmond.com/news/state-and-regional/20th-anniversary-of-earl-washingtons-freedom-nears-as-abolition-of-va-death-penalty-is-considered/article_6fc28f53-22f6-5f05-9cf4-667f783ebf46.html [https://perma.cc/3AR5-RBBZ].

For perspectives on the role of the case in bringing about Virginia's abolition of the death penalty, see DALE M. BRUMFIELD, CLOSING THE SLAUGHTERHOUSE: THE INSIDE STORY OF DEATH PENALTY ABOLITION IN VIRGINIA 159–68 (2022) and Corinna Barrett Lain & Douglas A. Ramseur, *Disrupting Death: How Specialized Capital Defenders Ground Virginia's Machinery of Death to a Halt*, 56 U. RICH. L. REV. 183, 240–42 (2021).

For an overview of the intellectual disability problem, see Sheri Lynn Johnson et al., *Convictions of Innocent People with Intellectual Disability*, 82 ALB. L. REV. 1031, 1031–34 (2018).

[124] *Atkins*, 536 U.S. at 306–07, 320–21 (footnote omitted).

[125] *See* Michael L. Perlin et al., *"Man Is Opposed to Fair Play": An Empirical Analysis of How the Fifth Circuit Has Failed to Take Seriously* Atkins v. Virginia, 11 WAKE FOREST J.L. & POL'Y 451, 455–58 (2021); *see also* Perlin et al., *"A World of Steel-Eyed Death*," *supra* note 59, at 297.

[126] *See Reversals Under Atkins*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/intellectual-disability/reversals-under-atkins [https://perma.cc/864T-LPXM] (last visited Apr. 30, 2024) (listing twenty-nine defendants, including two on federal death row, who were executed in the period from 2006–2022 but likely had intellectual disabilities).

Texas's framework for intellectual disability,[127] at least thirteen Texas defendants with intellectual disability were wrongfully executed.[128]

Perhaps even more disturbingly—and certainly supportive of the Congressional remedy of death penalty abolition as a prophylactic measure—is the Supreme Court's warning that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution."[129] In other words, the failure to accurately assess their conditions not only results in a denial of their *Atkins* rights but, quite possibly, the concealment of other flaws in the cases against them.

b. People Who Lack a Rational Understanding of Their Forthcoming Executions

Carrying forward the deeply rooted common law prohibition on executing the insane, the Eighth Amendment forbids the states from executing those whose mental conditions keep them from having a rational understanding of the circumstances of their impending punishment.[130] Capital defendants who assert that they are in this class are constitutionally entitled to fact-finding procedures sufficiently robust to support a reliable judicial determination of the issue.[131]

Again, comprehensive empirical studies—not to mention vivid accounts of individual cases[132]—support the conclusion that the states are utterly failing to comply.[133] Indeed, in their latest work, the leading scholars in the field conclude "that our hopes that the *Panetti* case would actually change practice, and that it would become less likely that profoundly mentally ill death row inmates would be executed was a 'fantasy.'"[134]

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[127] *See supra* note 122.

[128] *See* Margulies et al., *supra* note 18, at 72.

[129] *Atkins*, 536 U.S. at 321.

[130] *See* Madison v. Alabama, 139 S. Ct. 718, 723 (2019); Panetti v. Quarterman, 551 U.S. 930, 959 (2007); Ford v. Wainwright, 477 U.S. 399, 409–10 (1986).

[131] *See Panetti*, 551 U.S. at 949–54.

[132] *See, e.g.*, Nathan J. Robinson, *The Death of Ricky Ray Rector*, JACOBIN (Nov. 5, 2016), https://jacobin.com/2016/11/bill-clinton-rickey-rector-death-penalty-execution-crime-racism [https://perma.cc/Y8PD-U4KB].

[133] *See* Michael L. Perlin et al., *"The Timeless Explosion of Fantasy's Dream": How State Courts Have Ignored the Supreme Court's Decision in* Panetti v. Quarterman, 49 AM. J.L. & MED. 205 (2023) [hereinafter Perlin et al., *"The Timeless Explosion of Fantasy's Dream"*]; Michael L. Perlin et al., "The World of Illusion Is at My Door": Why *Panetti v. Quarterman* Is a Legal Mirage, 5–9 (Aug. 1, 2022) (unpublished manuscript), https://ssrn.com/abstract=4172316 [https://perma.cc/Z72X-DZ9U]; Michael L. Perlin & Talia Roitberg Harmon, *"Insanity Is Smashing up Against My Soul": The Fifth Circuit and Competency to Be Executed Cases After* Panetti v. Quarterman, 60 U. LOUISVILLE L. REV. 557, 557–58, 561 (2022).

[134] Perlin et al., *"The Timeless Explosion of Fantasy's Dream," supra* note 133, at 208.

Thus, in both the *Atkins* and *Ford* areas, Congress could certainly find that the states' record of compliance with their undoubted Eighth Amendment obligations has been dismal for decades. One need not necessarily attribute this record to hostility on the part of the states to the underlying rights. Perhaps repeated errors have been made in good faith and reflect the inherent difficulties of the inquiries[135] or perhaps they arise from a confluence of other system-wide factors that impair accurate determinations.[136] But in this area of the law no malign governmental intent is needed to make out a constitutional violation. And the consequence of every single failure is a wrongful execution.

A legislative prohibition on executions would be a congruent and proportional remedial and prophylactic response to this situation even if there were no more to the story. But there is.

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[135] "[S]ince *Atkins*, the bench and bar have learned that it is no small challenge to distinguish between a person who is intellectually disabled and one whose cognitive deficits place them on just the other side of the line." Margulies et al., *supra* note 18, at 68 (citing Sheri Lynn Johnson et al., *Protecting People with Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 HOFSTRA L. REV. 1107 (2018)). Indeed, the cited issue of the Hofstra Law Review contains a clinically focused article of 114 pages and 445 footnotes designed to assist legal actors in making accurate intellectual disability determinations. *See* James W. Ellis et al., *Evaluating Intellectual Disability: Clinical Assessments in* Atkins *Cases*, 46 HOFSTRA L. REV. 1305, 1310 (2018).

With respect to *Ford*, the very object of the inquiry is nebulous. The parties may well agree that an inmate is profoundly delusional and disagree only on the precise contours of the delusions. Whether the inmate lives or dies will depend on a judicial decision as to whether the delusions are such "as to prevent [the] person from sustaining a rational understanding of why the State wants to execute him." *See* Madison v. Alabama, 139 S. Ct. 718, 729 (2019) (articulating this standard, observing that "delusions come in many shapes and sizes," and remanding for courts below to make "the precise judgment *Panetti* requires"). As of this writing, the judicial system is still struggling to make that judgment in Panetti's own case. *See* Panetti v. Lumpkin, No. A-04-CA-042-RP, 2023 WL 6348877, at *4–9, *12 (W.D. Tex. Sept. 27, 2023) (concluding after detailed consideration of psychiatric testimony that Panetti lacks rational understanding of the reasons for his execution).

In addition, as discussed *infra* text accompanying notes 139–43, making accurate determinations is significantly complicated by fact that many Death Row inmates are seriously mentally ill.

[136] *See, e.g.*, Perlin et al., *"A World of Steel-Eyed Death," supra* note 59, at 266–68 (noting widespread ineffectiveness of counsel in cases involving mentally impaired capital defendants). Moreover, *Ford* claims must be raised on the eve of execution, *see* Stewart v. Martinez-Villareal, 523 U.S. 637, 643 (1998); Powers v. State, 371 So. 3d 629, 653 (Miss. 2023) (collecting authority), a moment when both judicial impatience and AEDPA's constraints on judicial inquiry are likely to be at their maximum. *See, e.g.*, Johnson v. Vandergriff, 143 S. Ct. 2551, 2552 (2023).

As ample evidence attests, a significant number of inmates on Death Row are seriously mentally ill.[137] Because the Supreme Court has not decided that the Eighth Amendment requires that the members of this group receive a categorical exemption from execution, they do not benefit from *Atkins.* Yet their diminished culpability—and the risk of other undetected flaws in the cases against them—is by every measure comparable to the group that *Atkins* does protect. For this reason, the American Bar Association, the American Psychological Association, the American Psychiatric Association, and the National Alliance on Mental Illness recommended in 2006 that those mental illnesses which produce the same level of impairment as intellectual disability should be accorded the same legal treatment.[138]

But Congress need not embrace any substantive expansion of the reach of the Eighth Amendment to take account of the severe mental illness problem in exercising its Section Five powers to abolish the death penalty. The existence of the problem undeniably complicates the determination of which capital defendants meet the criteria of *Atkins*[139] and *Ford*.[140] Moreover, as the number of new arrivals on Death Row diminishes,[141] the average age of the existing population will increase, as will

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[137] *See* Christopher Slobogin, *Intellectual Disability, Mental Illness and the Death Penalty*, *in* AMERICA'S EXPERIMENT, *supra* note 33, at 335, 343–48; Marco Poggio, *They Are Mentally Ill; Some States Want Them Off Death Row*, LAW 360 (Nov. 17, 2023, 9:37 PM), https://www.law360.com/articles/1739233/they-are-mentally-ill-some-states-want-them-off-death-row [https://perma.cc/B9TX-ZXEV] (summarizing studies).

[138] *See* AMERICAN BAR ASSOCIATION, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY (Dec. 2016), https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/severe-mental-illness-death-penalty-white-paper [https://perma.cc/TT7L-X7LQ].

For an example of how a severe mental illness which does not qualify the defendant for an exclusion from the death penalty may interact with dubious forensic science to produce an unreliable confession and resulting unsound capital conviction, see Luke Nozicka, *Missouri Woman in Prison for Murder Since 1980 Gets Chance to Prove Innocence Next Year*, KAN. CITY STAR (July 10, 2023, 2:21 PM), https://www.kansascity.com/news/local/crime/article277040488.html [https://perma.cc/KA9V-GNRD] (describing case of Sandra Hemme, who was a heavily medicated patient in a psychiatric ward when questioned by detectives and who pleaded guilty to capital murder; State agrees to evidentiary hearing on innocence).

[139] *See* Ellis et al., *supra* note 135, at 1341–46.

[140] *See id.*

[141] *See Key Findings*, DEATH PENALTY INFO. CTR. (2021), https://deathpenaltyinfo.org/facts-and-research/death-penalty-census/key-findings [https://perma.cc/K64N-NE3L] (documenting that "death row has decreased in size every year since peaking at more than 3,700 in 2001"). The statistics for that period subsequently released by the federal government are in accord. *See* DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2021—STATISTICAL TABLES (2023), https://bjs.ojp.gov/library/publications/capital-punishment-2021-statistical-tables [https://perma.cc/HR6B-WWW7] (reporting that 2021 marked the "21st consecutive year" of declines in the "number of prisoners under sentence of death").

the incidence of dementia,[142] thereby multiplying for the future the difficulties of identifying defendants who should benefit from *Ford*—difficulties that have already made the implementation of that case "a fantasy."[143]

If Congress were to look beyond the precise holding of *Atkins*, it would find additional support for prophylactic Section Five legislation. Assuming that the states were perfectly precise in drawing the line between those inmates who have intellectual disability and those who do not, Congress would be well warranted in questioning whether that line is congruent with the core Eighth Amendment concern for culpability. For example, capital defendants who suffer a traumatic brain injury after the age of eighteen, and who would plainly be found intellectually disabled if the event had occurred earlier, do not qualify as intellectually disabled. The diagnostic criteria for the condition require it to manifest itself before age eighteen,[144] so executing those defendants is not an *Atkins* violation.[145]

For similar reasons, a capital defendant whose IQ is accurately measured at 76 is outside of *Atkins*.[146] Although that line reflects clinical practice, it was not drawn for Eighth Amendment purposes:

> An IQ between 71 and 84 is categorized as borderline intellectual functioning. Only nine percent of the general population has an IQ of 80 or below . . . . The difference between an offender with an IQ score that renders him categorically ineligible for the death penalty and an offender with borderline intellectual functioning is often negligible. Relative to the typical adult, borderline mental deficiency—like intellectual disability—diminishes defendants' capacities to understand and process information, communicate, abstract from mistakes and learn from experience, engage in logical reasoning, control impulses, and understand

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[142] *See* AM. BAR ASS'N, COMM'N ON LAW & AGING, PEOPLE LIVING WITH DEMENTIA IN THE CRIMINAL LEGAL SYSTEM 84 (May 2022), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2022-dementia-crim-just-rpt.pdf [https://perma.cc/MXS2-4JCE]; *see also* Emily Widra, *The Aging Prison Population: Causes, Costs, and Consequences*, PRISON POL'Y INITIATIVE (Aug. 2, 2023), https://www.prisonpolicy.org/blog/2023/08/02/aging/?utm_source=TMP-Newsletter&utm_campaign=dff370d72e-EMAIL_CAMPAIGN_2023_08_03_11_18&utm_medium=email&utm_term=0_5e02cdad9d-dff370d72e-%5BLIST_EMAIL_ID%5D [https://perma.cc/N7T4-7EAB]; Katie Engelhart, *Inside a Dementia Unit in a Federal Prison*, N.Y. TIMES, Aug. 13, 2023, at SR6.

[143] *See supra* text accompanying note 134.

[144] *See* Ellis et al., *supra* note 135, at 1336–37.

[145] An example of that situation is the case of Ricky Rector. *See* Robinson, *supra* note 132; Margulies et al., *supra* note 18, at 67 n.27 (discussing case). *See generally* Robert J. Smith et al., *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1232 (2014) (discussing traumatic brain injury).

[146] *See* Ellis et al., *supra* note 135, at 1328.

> the reactions of others. Thus, the line between offenders exempted under *Atkins* and offenders with borderline intellectual deficiency is an arbitrary one—both classes of offenders possess diminished culpability relative to the typical adult.[147]

IQ tests, like the concept of intellectual disability itself, were developed and are continuously refined for purposes entirely independent of measuring Eighth Amendment culpability, viz., providing appropriate educational services to children and suitable community supports for adults.[148]

Congress has the power under Section Five to respond to these realities. There is an ample record on which to base the conclusion that a significant group of capital defendants whose conditions raise the concerns regarding both culpability and reduced capacity for self-protection that the Court enunciated in *Atkins* is at risk of execution.[149] Congress may act to protect that group, whose individual members are difficult to determine, by outlawing executions.[150]

5. Executions Contrary to the Constitution Due to the Fortuities of Litigation Timing

A common law system is inherently one that evolves. The inevitable result is that some outcomes acceptable in the past may not be in the future. Indeed, the irrevocability of the death penalty is one argument for its abolition under the Eighth Amendment.[151] But that is not the argument made in this section just as it is not the argument made anywhere in this Article. Accepting the constitutionality under the Eighth Amendment of the death penalty in the abstract, the discussion below focuses on the death penalty system that exists in fact. In that system, state capital defendants are executed in violation of the Constitution because their ability to invoke the power

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[147] Smith et al., *supra* note 145, at 1231.

[148] *See* Ellis et al., *supra* note 135, at 1325–26.

[149] *See ABA Guidelines*, *supra* note 68, at 1007 (Commentary to Guideline 10.5) (noting the high "prevalence of mental illness and impaired reasoning . . . in the capital defendant population"). The legal justification for judicial deference to Congressional determinations that Court-created categories fail to fully capture the underlying constitutional problem is laid out at William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 934–39 (2013).

[150] *See* Nev. Dep't Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003) (noting that "mutually reinforcing stereotypes create[ ] a self-fulfilling cycle of discrimination . . . [which], Congress reasoned, lead[s] to subtle discrimination that may be difficult to detect on a case-by-case basis.").

[151] *See* Black, *The Crisis in Capital Punishment*, *supra* note 89, at 295–300; *cf.* Margulies et al., *supra* note 18, at 111 (including among reasons for abolition of the death penalty, "the fact that the common law works the same way [in capital cases as it does in non-capital and civil cases] exposes death row incarcerated persons to uniquely severe risks that other criminal defendants or civil plaintiffs do not face.").

of the federal courts to enforce already-existing constitutional rights is systematically blocked by a broad field of legalistic barbed wire composed of multiple intertwined court-made and statutorily created obstacles.

This Section presents a brief and minimally technical[152] overview of that obstacle field.[153] I divide the affected defendants into three broad groups.

a. Group 1: Retroactivity, Procedural Default, Exhaustion

One cohort of capital defendants has claims that are indisputably meritorious today. The defendants claim, accurately, that some constitutional flaw (call it X) undermined their trials. They further claim, accurately, that the Supreme Court has squarely held X to be unconstitutional. They are executed. There are two common reasons for this outcome.

i. Retroactivity Limitations on Federal Habeas Corpus Remedies

In 1997 Joseph O'Dell complained to the Supreme Court that at his capital trial in Virginia in 1986, the prosecutor had argued to the sentencing jury that his prior criminal record made him unfit to "live among us," yet the trial court had denied him the right to respond that if he were not sentenced to death he would be sentenced to life without parole and never released from prison.[154] O'Dell argued that this denial was a plain violation of a rule the Supreme Court had announced in 1994: where the prosecutor relies on future dangerousness in support of a death sentence the prisoner must be allowed to bring his parole ineligibility to the jury's attention.[155] On the assumption that O'Dell's argument was correct, the Supreme Court, in a 5–4 opinion, denied him relief and he was executed within weeks.[156]

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[152] Answering a reader's question, Linda Greenhouse of the *New York Times* on July 6, 2001, accurately described the law of federal habeas corpus as "so complex as to be almost theological." *See* Linda Greenhouse, *Procedure, Sources and Amendments*, N.Y. TIMES (July 6, 2001), https://www.nytimes.com/2001/07/06/national/procedure-sources-and-amendments.html [https://perma.cc/5J2A-Z7VJ]. The authoritative treatise in the field is HERTZ & LIEBMAN, *supra* note 31.

[153] Another overview appears in Freedman, *Federal Habeas Corpus in Capital Cases*, *supra* note 33, at 585–89. Neither presentation purports to do any more than highlight a few of the most salient barriers confronting state capital defendants seeking federal habeas corpus relief. As of December 2022, the relevant sections of HERTZ & LIEBMAN, *supra* note 31, cover some 2,300 densely footnoted pages.

[154] *See* O'Dell v. Netherland, 521 U.S. 151, 168 (1997) (Stevens, J., dissenting).

[155] *See Simmons* v. South Carolina, 512 U.S. 154, 156 (1994).

[156] *See* Spencer S. Hsu, *Virginia Executes O'Dell Despite Worldwide Pleas*, WASH. POST (July 24, 1997, 8:00 PM), https://www.washingtonpost.com/archive/local/1997/07/24/virginia-executes-odell-despite-worldwide-pleas/37ad0f5e-0dfa-4815-acc1-cec1429a7703/ [https://perma.cc/Z9P3-HD2Y].

This outcome was the result of tangled jurisprudence originating in *Teague v. Lane*[157] that was subsequently further complicated by AEDPA.[158] In its simplest form, the current version of this doctrine is that federal habeas corpus petitioners may not benefit from any "new" rule of criminal procedure announced after their convictions became "final" unless the rule is "substantive."[159] As a vast literature has documented, the problems here are conceptual, structural and practical. Conceptually, the doctrine is at war with the idea that the Court interprets the Constitution rather than writes it.[160] Structurally, *Teague* creates inappropriate incentives for both the states and defendants,[161] threatens norms of fundamental fairness, and eviscerates the lower courts' role in shaping federal constitutional law in the criminal area—thereby reducing to almost nothing any particular petitioner's chance of obtaining relief from the judicial system and denying the Court valuable intellectual input.[162] Practically, each

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[157] Teague v. Lane, 489 U.S. 288 (1989).

[158] *See* 2 HERTZ & LIEBMAN, *supra* note 31, § 25.1. There is no doubt of congressional power to change both AEDPA, which is a statute, and *Teague*, which, the Court has said, "is plainly grounded in [the Court's authority under 28 U.S.C. § 2243 to adjust] the scope of federal habeas relief in accordance with equitable and prudential considerations." Danforth v. Minnesota, 552 U.S. 264, 278 (2008).

[159] *See* 2 HERTZ & LIEBMAN, *supra* note 31, § 25.1; text accompanying notes 5–8; *see also infra* note 163. At the time *O'Dell* was decided, there was a second exception, which the Court subsequently repudiated, *see* Edwards v. Vannoy, 593 U.S. 255, 270–72 (2021), for "watershed" new rules of criminal procedure that implicated the fundamental accuracy of the decisional process. The holding in *O'Dell* was that the rule of *Simmons* was both "new" and did not fall within this exception.

[160] *See* 2 HERTZ & LIEBMAN, *supra* note 31, § 25.1; text accompanying notes 10–25 (overviewing continuing differences among Justices and confusion in lower federal courts "over the import and application of fundamental components of the doctrine," and observing that other jurisprudential developments suggest "that the Court may or ought to be prepared to reconsider the premises underlying the *Teague* doctrine as a whole").

[161] *See* The Committee on Civil Rights, *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASS'N BAR CITY N.Y. 848, 852 (1989) (calling for repudiation of *Teague*, under which "whether one lives or dies depends on the fortuity of the speed at which one's case progresses through the legal system," with the rewards going to those prisoners who manage to keep their cases tied up longest in the state courts). By way of disclosure, I was the principal author of this report. *See id.* at 860.

[162] *See* 2 HERTZ & LIEBMAN, *supra* note 31, § 25.4, text accompanying notes 45–51; STEIKER & STEIKER, *supra* note 117, at 295 (describing AEDPA as "decimating [the federal judiciary's] ability to hear and redress claims of federal constitutional violations" in criminal cases, rendering the remedy worthless); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1223–44 (2015); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1816–20 (1991) (criticizing *Teague* "for sharply restricting habeas courts from either developing or enforcing the constitutional law of criminal procedure").

of the three quoted terms in the second sentence of this paragraph is the subject of voluminous and often-conflicting interpretations.[163] Prisoners in different regions of the country live or die as judges viewing *Teague* quarrel over whether their dueling perceptions result from sound "metaphysics" or instead "ignore[] reality . . . here on Earth, [where] the laws of physics still apply" and where the Supreme Court cannot "alter the space time continuum."[164]

ii. Procedural Default and Exhaustion Limitations on Federal Habeas Corpus Remedies

In February of 1975, Rebecca Machetti was sentenced to death in Georgia for a murder that she carried out with her husband, John Eldon Smith. In a separate trial in the same county a few weeks earlier, he had been convicted of the same crime and also sentenced to death. On federal habeas corpus, she successfully invoked recent Supreme Court authority to challenge the selection of her jury for its under-representation of women.[165] At a new trial, the jury sentenced her to life imprisonment; she served 36 years, was released on parole in 2010, and died of COVID-19 in 2020.[166]

But Smith's lawyers, ignorant of the Supreme Court's gender-discrimination decisions, failed to make the jury composition challenge in his initial state post-conviction petition, as Machetti's had done. When his new lawyers asserted the claim on federal habeas corpus it was denied because of the prior failure to assert it in state court.[167] On December 15, 1983, John Eldon Smith died in Georgia's electric chair, the first person to be executed under its post-*Gregg* statute.[168]

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[163] *See* 2 HERTZ & LIEBMAN, *supra* note 31, § 25.5 (discussing new rules in a section occupying 50 pages and 174 footnotes); *id.* § 25.6 (discussing finality); *id.* § 25.7; text accompanying notes 1–25 (discussing exceptions for substantive rules); *see also* Eric M. Freedman, *The Substance of* Montgomery *Retroactivity: The Definition of States' Supremacy Clause Obligation to Enforce Newly Recognized Federal Rights in Their Post-Conviction Proceedings and Why it Matters*, 18 OHIO ST. J. CRIM. L. 633, 647–48 (2021) (discussing *Teague*'s "substantive" exception).

[164] *Cf.* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 314 n.36 (2000) (describing *Teague* as a case that "recategorizes Time itself"). *Compare* Lester v. United States, 921 F.3d 1306, 1317 (11th Cir. 2019) (statement of William Pryor, J., respecting denial of rehearing en banc), *with id.* at 1331 (statement of Rosenbaum, J., joined by Martin and Jill Pryor, JJ., respecting same).

[165] *See* Machetti v. Linahan, 679 F.2d 236, 239 (11th Cir. 1982).

[166] *See* Joe Kovac Jr., *Rebecca Machetti, Sentenced to Death for 1974 Macon Murder Plot, Dies of COVID-19*, MACON TELEGRAPH (Sept. 16, 2020, 10:23 AM), https://www.macon.com/news/local/crime/article245721705.html [https://perma.cc/G7V9-59Q4].

[167] *See* Smith v. Kemp, 715 F.2d 1459, 1471 (11th Cir. 1983).

[168] *See Execution List 1976–1986*, DEATH PENALTY INFO. CTR. (2023), https://deathpenaltyinfo.org/executions/1976-1986 [https://perma.cc/5LGC-NYNF].

Three years later, in 1986, the Supreme Court decided the case of Michael Smith.[169] Prior to his 1977 capital trial in Virginia, he had been interviewed by a court-appointed psychiatrist who—without warning him of his right to remain silent or have counsel present—had elicited damaging admissions and testified to them at trial.[170] This precise practice had been condemned by a unanimous Court in 1981 in *Estelle v. Smith*.[171] Delicately referring to *Estelle* with a "cf.,"[172] the Supreme Court rejected Smith's federal habeas corpus challenge on a 5–4 vote. The Court explained that although his trial lawyer had objected to the testimony, counsel on direct appeal had not pursued the issue because existing precedent in the Virginia Supreme Court was adverse and he had wanted to focus on his strongest claims.[173] Because the appellate lawyer had not raised the issue of the psychiatrist's testimony, the Virginia Supreme Court had not considered it. But Smith had no valid complaint against the lawyer. For counsel to confine himself to the claims he perceived as strongest was not deficient performance under *Strickland* but rather constituted sound strategy.[174] Thus, "the defendant was represented by competent counsel, had a full and fair opportunity to press his claim in the state system, and yet failed to do so in violation of a legitimate rule of procedure."[175] This was an inexcusable omission by Michael Smith. So, notwithstanding the violation of a constitutional rule that had been in place for five years, Virginia executed him the next month.[176]

In 1991, four years after his 1987 loss concerning racial discrimination described above,[177] Warren McCleskey was back before the Supreme Court.[178] The basis of McCleskey's conviction had been his participation in an armed robbery during which a policeman was killed. Although he maintained that he was not the

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[169] Smith v. Murray, 477 U.S. 527 (1986).

[170] *Id.* at 529–30.

[171] Estelle v. Smith, 451 U.S. 454 (1981).

[172] *See Smith v. Murray*, 477 U.S. at 530.

[173] The constitutional arguments against the admission of the psychiatrist's testimony had, however, been brought to the attention of the Virginia Supreme Court in an amicus brief filed by the Post-Conviction Assistance Project of the University of Virginia Law School. *See id.* at 537.

[174] *See id.* at 535–36.

[175] *Id.* at 539.

[176] *See Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/database/executions?year=1986&state=Virginia&federal=No (last visited Apr. 30, 2024) (Michael Marnell Smith).

[177] *See supra* text accompanying notes 99–102.

[178] *See* McCleskey v. Zant, 499 U.S. 467 (1991). The account from this point in the text through the following paragraph is drawn from ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 51–52 (2003) [hereinafter FREEDMAN, THE GREAT WRIT OF LIBERTY] and Freedman, *Federal Habeas Corpus in Capital Cases*, *supra* note 33, at 585–87.

triggerman, the evidence against him at trial included a purported jailhouse confession to one Offie Evans, an inmate housed near him, in which McCleskey was said to have admitted shooting the officer. In his initial post-conviction petition in the Georgia courts, McCleskey asserted that Evans had been deliberately sent into his cell by the government to elicit a confession. If this in fact occurred, it indisputably violated McCleskey's Sixth Amendment right to counsel. But the state denied the allegation. The prosecuting attorney stated at a deposition that he was unaware of any prior arrangement with Evans, and a set of documents represented as containing the complete prosecutor's file contained no supporting evidence. Counsel, who had tried but failed to gain any further substantiation, thereupon omitted the claim from the federal habeas corpus petition he filed following denial of relief by the state courts.

Following his 1987 loss in the Supreme Court, McCleskey again sought federal habeas corpus relief on his claim concerning Evans—this time armed with a 21-page report from Evans to the government on his conversations with McCleskey, a document that had not been included when the prosecution turned over to the defense what purported to be the government's "complete" file. McCleskey had obtained the document from the Atlanta police in the weeks following the Court's decision only as a result of a new interpretation of the Georgia Open Records Act by the Georgia Supreme Court. After conducting an evidentiary hearing, including the testimony of a jailer whose identity was discovered through the document, the District Court granted habeas relief. It concluded that (1) the failure to present the claim earlier was justifiable and (2) because Evans had indeed been deliberately planted by the government, McCleskey was entitled to prevail on the merits. Without reaching the merits, the Eleventh Circuit reversed, holding that the petition should have been dismissed as an "abuse of the writ" because the claim should have been presented in McCleskey's first federal habeas petition.[179] McCleskey challenged this ruling in the Supreme Court.

Taking an approach that no party had briefed, the Court decided that it would simply scrap existing doctrines that had applied more forgiving standards to omissions in previous federal habeas corpus petitions than to similar failures during state proceedings.[180] Both contexts would now be governed by the restrictive standards applicable to the second group.[181] Under those standards, McCleskey's habeas corpus petition was dismissed without a ruling on his Sixth Amendment claim. Notwithstanding the State's deceptive response to discovery requests, and a lawyer's obligation to assert only those claims for which a reasonable basis exists, McCleskey's

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[179] *See* McCleskey v. Zant, 890 F.2d 342, 344, 346–47 (11th Cir. 1989).

[180] *See McCleskey v. Zant*, 499 U.S. at 479–503; Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 340 (2010).

[181] *See* Freedman, *Federal Habeas Corpus in Capital Cases*, *supra* note 33, at 577, 586–87; *infra* text accompanying notes 190–97 (describing restrictive standards).

attorney was at fault for not continuing to assert his claims about Evans.[182] Georgia executed Warren McCleskey on September 25, 1991.[183]

The three cases described in this subsection illustrate how access to federal habeas corpus relief may be precluded by linked doctrines under which (a) petitioners are ordinarily required to have asserted their claims initially in state court (exhaustion)[184] and (b) federal courts will ordinarily refuse to consider claims that state courts applying their own law have refused to hear for being untimely or invoking the wrong legal remedy (procedural default).[185]

A detailed exposition is far beyond the scope of this Article. The doctrines "are intricately labyrinthine, and so confusing that courts today devote ten times as much labor, intelligence, and prose to deciding whether they can hear a convicted person's

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[182] *See McCleskey v. Zant*, 499 U.S. at 497–98.

[183] *See Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/database/executions?year=1991&state=Georgia&federal=No [https://perma.cc/R6E5-UU6B] (last visited Apr. 30, 2024) (Warren McCleskey).

[184] The current federal habeas corpus statute, 28 U.S.C. § 2254, provides:

> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
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> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

The purpose of this requirement is to allocate cases efficiently between the state and federal courts, allowing the former the first opportunity to pass upon alleged violations of Constitutional rights. It is not jurisdictional: it "never wholly forecloses, but only postpones, federal relief." 2 HERTZ & LIEBMAN, *supra* note 31, § 23.1. Therefore, as the Court understands, to have real bite the exhaustion requirement needs to be applied in combination with the procedural default doctrine described in the remainder of this sentence of text. *See* Shinn v. Ramirez, 596 U.S. 366, 377–78 (2022); *see also* Gray v. Netherland, 518 U.S. 152, 161–62 (1996).

[185] For example, in *Dugger v. Adams*, 489 U.S. 401 (1989) (5–4 decision), an instruction given at the prisoner's 1978 capital trial in Florida plainly violated the federal constitutional rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). But he had not challenged it under state law in his first round of appeals and for that reason the state courts refused to consider its validity in his second round. *See Dugger*, 489 U.S. at 405. That procedural default, which the Court noted may well have resulted from a subpar performance by defense counsel, *see id.* at 408–09, barred a federal habeas corpus court from reviewing the federal constitutional issue. Florida executed Aubrey Adams on May 4, 1989. *See Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/database/executions?year=1989&state=Florida&federal=No [https://perma.cc/N3V3-EWUC] (last visited Apr. 30, 2024) (Aubrey Adams).

constitutional claims at all as they devote to considering the merits of such claims."[186] I confine myself to three straightforward observations.

First, except in the relatively rare and highly problematical cases where a capital defendant is proceeding pro se, the missteps barring the federal habeas corpus court from adjudicating the merits of capital prisoners' federal constitutional claims are made by lawyers, not prisoners. But it is the prisoners who suffer the consequences.

Second, over the last forty-five years, the Court's continuing expansion of the doctrinal labyrinth foreclosing federal courts' merits review of constitutional claims has trapped more and more Death Row inmates. They fall to the Minotaur unheard.

The initial concern in this area was to prevent what is often known as "sandbagging": a prisoner might intentionally withhold a constitutional claim for tactical reasons.[187] For example, the prisoner might refrain at trial from asserting a constitutional objection to the admission of a confession, hoping to convince the jury that the account was exculpatory, and then assert the objection after conviction. The Court accordingly ruled that a federal habeas corpus court could withhold relief where the prosecution could demonstrate that the petitioner personally had deliberately and intelligently chosen to bypass available state remedies.[188] Of course, this scenario was rare; such decisions are overwhelmingly made by lawyers and, in any event, a rational petitioner would be very unlikely to choose the sandbagging strategy.[189]

In 1977, the Court overturned that framework,[190] announcing that henceforth a petitioner who had been denied relief on a federal constitutional claim in state court for violation of a state procedural rule would not be heard on the claim in federal habeas corpus without first demonstrating both "cause" for violating the state rule and "prejudice" if the federal court did not forgive the default.[191] The Court subsequently

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[186] Anthony G. Amsterdam, *Remarks at the Investiture of Eric M. Freedman as the Maurice A. Deane Distinguished Professor of Constitutional Law, November 22, 2004*, 33 HOFSTRA L. REV. 403, 409 (2004) [hereinafter Amsterdam, *Remarks*]. For an authoritative map of the current doctrinal labyrinth, complete with a number of side-turnings that I do not cover in text, *e.g.*, House v. Bell, 547 U.S. 518, 536–37 (2006) (discussed *infra* in the final paragraph of note 222), see 2 HERTZ & LIEBMAN, *supra* note 31, ch. 23 (exhaustion) and ch. 26 (procedural default).

[187] *See* 2 HERTZ & LIEBMAN, *supra* note 31, § 26.3[b]; text accompanying note 19 (referring to "a strategic, tactical, or 'sandbagging' choice by the petitioner or his counsel").

[188] *See* Henry v. Mississippi, 379 U.S. 443, 450–53 (1965); Fay v. Noia, 372 U.S. 391, 438–39 (1963); *see also* The Committee on Civil Rights, *supra* note 161, at 861 n.16 (explaining why this standard should continue to govern capital cases notwithstanding later doctrinal developments).

[189] *See* Lee Kovarsky, *Delay in the Shadow of Death*, 95 N.Y.U. L. REV. 1319, 1341–56 (2020) (analyzing prisoners' incentives and concluding that "the better return comes from immediate litigation because the decline in procedural viability swamps other effects").

[190] *See* Wainwright v. Sykes, 433 U.S. 72, 87–88 (1977).

[191] *Id.* at 91 (noting that "precise content [would] be given those terms by later cases").

defined "cause" as "some objective factor external to the defense [that] impeded counsel's effort to comply with the State's procedural rule."[192] One such factor might be the ineffectiveness of trial counsel—but only if the federal habeas corpus petitioner could demonstrate ineffectiveness in accord with the risible standards of *Strickland*.[193]

The upshot is this. If some procedural blunder by a capital defense lawyer at trial or on a direct appeal as of right[194] results in a state court refusing to hear the merits of the prisoner's federal constitutional claim, a federal habeas corpus court normally will only hear those merits if the blunder amounts to *Strickland*-defined ineffective assistance of counsel. If some procedural blunder by a capital defense lawyer during state post-conviction proceedings results in a state court refusing to hear the merits of the prisoner's federal constitutional claim, a federal court will not hear those merits at all. Because there is no constitutional right to effective assistance of counsel in state post-conviction proceedings,[195] the system works only one way: the lawyer may forfeit the prisoner's right to be heard in federal court but the prisoner may not attack the lawyer as ineffective for having done so.[196]

Explaining this rule in *Coleman v. Thompson*, a case holding that the federal courts would not hear the merits of a capital prisoner's federal constitutional claims because his state post-conviction lawyers had filed state appellate papers three days late, the Court wrote that the outcome represented the appropriate "allocation of costs . . . [a]s between the State and the petitioner."[197]

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[192] Murray v. Carrier, 477 U.S. 478, 479 (1986).

[193] *Id.* at 492, 496. Because *Strickland* itself requires a showing of prejudice, most habeas petitioners never overcome *Wainwright*'s "cause" barrier. But in the event they somehow do so, its "prejudice" barrier will almost always block the path to being heard on the merits. *See* Amsterdam, *Remarks*, *supra* note 186, at 410–11.

[194] *See* Ross v. Moffitt, 417 U.S. 600 (1974) (holding that states' duty to provide counsel to indigent defendants following trial extends only to appeals as of right, not subsequent applications for discretionary review); *cf.* O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999) (holding in a non-capital case that a failure to pursue discretionary review to the Illinois Supreme Court resulted in a procedural default on federal habeas corpus).

[195] *See supra* text accompanying note 70.

[196] *See* Coleman v. Thompson, 501 U.S. 722, 752 (1991). A completely typical example is *Thurmond v. Thaler*, No. 08-70008, 2011 U.S. App. LEXIS 1608 (5th Cir. 2011). Texas executed Keith S. Thurmond on March 7, 2012. *See Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/database/person/1284/keith-thurmond [https://perma.cc/YHU8-QQD4] (last visited Apr. 30, 2024) (Keith Thurmond).

[197] *Coleman*, 501 U.S. at 754. Virginia executed Roger Coleman on May 20, 1992. *See Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/database/person/175/roger-coleman [https://perma.cc/49PU-RVLC] (last visited Apr. 30, 2024) (Roger Coleman). The current Court embraces *Coleman*'s reasoning. *See* Shinn v. Ramirez, 596 U.S. 366, 379–84 (2022). For a comprehensive criticism of the *Coleman* framework, see *Hutchinson v. Florida*, 677 F.3d 1097, 1103–11 (11th Cir. 2012) (Barkett, J., concurring).

Third, the rationale driving the ongoing expansion of the doctrinal labyrinth is that the Court is implementing a sound conception of federalism. Indeed, the opening sentence of *Coleman* is: "This is a case about federalism."[198] Each time the modern Court announces some new restriction on habeas corpus it reiterates with greater intensity that: "Because federal habeas review overrides the States' core power to enforce criminal law, it 'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.' That intrusion 'imposes special costs on our federal system.'"[199]

But Congress, which certainly has the power over the content of preclusion doctrines,[200] could decide to implement a different vision of federalism, one that, as many scholars have pointed out, corresponds to the founders' vision of how to protect individual rights from tyranny.[201] Congress is free to reject the reification of the "States" as entities independent of We the People and to the adopt views of James Madison. He explained that "in the compound republic of America, the power surrendered by the people is divided between two distinct governments [which] . . . will control each other," thereby providing "security . . . to the rights of the people."[202] Madison observed that if

> the people should in [the] future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of better administration as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it most to be due.[203]

Of course, the precise reason that after the Civil War Congress gained the power to ensure that the states abided by the dictates of due process was that the people determined that this allocation of authority to the federal government would provide

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[198] 501 U.S. at 726.

[199] *Shinn*, 596 U.S. at 376 (internal citations to series of cases since 1980s omitted). *See generally* Bell v. Thompson, 545 U.S. 794, 812–13 (2005) (finding abuse of discretion in failure of Court of Appeals to accord sufficient weight to state's reliance interest in upholding arguably unconstitutional death sentence).

[200] *See supra* note 158.

[201] *See* FREEDMAN, THE GREAT WRIT OF LIBERTY, *supra* note 178, at 160 n.25 (collecting citations).

[202] THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

[203] THE FEDERALIST NO. 46, *supra* note 202, at 295 (James Madison).

greater security for individual rights than had previously existed.[204] In implementing that conclusion, "the 1867 Habeas Corpus Act enabled the federal courts to assert their primacy in deciding questions affecting individual liberty."[205]

Now as then, Section Five gives Congress the primary responsibility for deciding what model of federalism will best secure enforcement of the rights guaranteed by the Fourteenth Amendment.[206] Congress need not accept one under which the appropriate "allocation of costs"[207] as between a state which may be ordered to conduct a retrial and a citizen who will be executed on a wholly fictitious theory of agency is to bar the latter from asserting his federal constitutional rights in federal court. Congress could decide instead to bar the state from the execution.

b. Group 2: Statutes of Limitations

For another group of state capital defendants, whether their constitutional claims had merit is as unlikely to ever be known as their executed bodies are unlikely to ever be exhumed. The federal courts never considered the merits because their habeas corpus petitions were filed too late and they did not benefit from the Supreme Court's

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[204] *See* Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 828 (1965) [hereinafter Amsterdam, *Criminal Prosecutions*] ("[T]he Civil War radically altered the view which the national legislature had previously taken, that generally the state legislatures, courts, and executive officials were the sufficient protectors of the rights of the American people. The assumption was abandoned that the state courts were the normal place for enforcement of federal law save in rare and narrow instances where they affirmatively demonstrated themselves unfit or unfair. Now the federal courts were seen as the needed organs, the ordinary and natural agencies, for the administration of federal rights.").

[205] William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J.S. HIST. 530, 532 (1970); *see* 1 HERTZ & LIEBMAN, *supra* note 31, § 2.4[d][iii]; *see also supra* text accompanying notes 87–88; William M. M. Kamin, *The Great Writ of Popular Sovereignty*, 77 STAN. L. REV. (forthcoming 2025) (manuscript at 68), https://ssrn.com/abstract=4714694 (observing that "the explicit aim of the Act was to expand federal-court power to wield habeas corpus as a tool for vindicating the sovereignty of We the Unitary People of the United States in the face of Southern resistance—that is, for crushing the efforts of recalcitrant Southern state prosecutors and state courts to use their delegated police powers as an end-run around the sovereign commands of the Thirteenth Amendment."). Today's 28 U.S.C. § 2254(a) is the direct descendant of the 1867 act, Act of February 5, 1867, ch. 28, 14 Stat. 385.

[206] *See* Amsterdam, *Criminal Prosecutions*, *supra* note 204, at 830.

[207] Coleman v. Thompson, 501 U.S. 722, 754 (1991).

decisions recognizing rare circumstances under which AEDPA's statutes of limitations[208] are subject to equitable tolling.[209]

A study by the Marshall Project in 2014 identified eighty capital cases in which defendants had missed the statute of limitations—sometimes by as little as a single

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[208] There are a number of these, which are explicated along with scores of case citations in 1 HERTZ & LIEBMAN, *supra* note 31, § 5.2 [b]. Because the most commonly litigated time limitations are keyed to events in state post-conviction litigation, complying with them depends on the vagaries of state law, *see, e.g.*, Lookingbill v. Cockrell, 293 F.3d 256, 260–62 (5th Cir. 2002) (deciding 2–1 after extended discussion of Texas law that federal petition was four days late), and the alertness of state post-conviction counsel. The result at times is to entrap prisoners in situations of fiendish legal complexity. *See, e.g.*, Mathis v. Thaler, 616 F.3d 461, 468–75 (5th Cir. 2010) (dismissing claims of Milton Wuzael Mathis, who was executed by Texas on June 21, 2011. *See Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/database/executions?q=Mathis&year=2011&state=Texas&federal=No [https://perma.cc/7AB6-VYJM] (last visited Apr. 30, 2024) (Milton Wuzael Mathis)); Kovarsky, *supra* note 180, at 354–55. But simple mishaps will suffice. *See, e.g.*, Thurmond v. Quarterman, No. H-06-2833, 2008 WL 11444148 (S.D. Tex. Feb. 12, 2008) (dismissing petition where lawyer tried to file after hours on last available day but found clerk's time stamp machine not working, so mailed document, which was received next day). Keith S. Thurmond was executed by Texas on March 7, 2012. *Execution Database*, *supra* note 196; Seth Freed Wessler, *Eugene Clemons May Be Ineligible for the Death Penalty, A Rigid Clinton-Era Law Could Force Him to Be Executed Anyway*, PROPUBLICA (May 28, 2021, 11:00 AM), https://www.propublica.org/article/eugene-clemons-death-penalty [https://perma.cc/EXN4-TURL] (describing case of Eugene Clemons of Alabama, whose federal habeas petition, which had been timely given to a court clerk but then fallen behind a filing cabinet, was dismissed without merits consideration).

[209] The fountainhead Supreme Court case recognizing equitable tolling under AEDPA is *Holland v. Florida*, 560 U.S. 631, 634 (2010). For an extensive discussion of the case law, see 1 HERTZ & LIEBMAN, *supra* note 31, § 5.2[b][iii].

One legal rule of critical practical importance is that the mere fact that a filing was untimely because of an attorney's negligence or ignorance of the law will not assist the petitioner. *E.g.*, Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000) (denying equitable tolling to Paul Kreutzer, who was executed by Missouri on April 10, 2002. *See Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/database/executions?q=Paul+Kreutzer [https://perma.cc/NA4B-ZP3Z] (last visited Apr. 30, 2024) (Paul W. Kreutzer)).

Moreover, establishing an entitlement to equitable tolling requires not only that the timely filing have been prevented by some extraordinary circumstance but also that the prisoner himself have made diligent efforts to file. *See* Lawrence v. Florida, 549 U.S. 327, 336–37 (2007). For a typical capital case denying equitable tolling, see *Wainwright v. Secretary, Florida Department Corrections*, No. 20-13639, 2023 WL 4582786, at *2–4 (11th Cir. July 18, 2023); see also *Miller v. Secretary, Florida Department Corrections*, No. 22-10657, 2021 WL 539596, at *10–11, 21 (M.D. Fla. Nov. 18, 2021), *certificate of appealability denied* 2022 WL 1692946, at *1 (11th Cir. May 10, 2022) (denying equitable tolling to a mentally ill prisoner).

day—resulting by then in sixteen executions.[210] More recently, a computer search done for purposes of this Article found sixty capital cases between 1996 and March 20, 2023, in which the statute of limitations resulted in all or substantially all of the claims in a petition being dismissed without merits review—including twenty-eight in which the prisoner was subsequently executed.[211]

Of course, these prisoners, like the ones who died at the barriers of procedural default or exhaustion, were executed for the faults of their lawyers, not their own.[212]

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[210] *See* Ken Armstrong, *Death by Deadline, Part One: How Bad Lawyering and an Unforgiving Law Cost Condemned Men Their Last Appeal*, THE MARSHALL PROJECT (Nov. 15, 2014, 4:30 PM), https://www.themarshallproject.org/2014/11/15/death-by-deadline-part-one [https://perma.cc/23TJ-RN8U]; *see also In re* Lewis, 484 F.3d 793 (5th Cir. 2007) (dismissing as untimely petition of Texas prisoner seeking to raise intellectual disability claim who on last permissible day mailed document, which was not received until next day).

The Marshall Project report focused on Texas. The widespread nature of the problem in Florida was the subject of an extended discussion by both the majority and dissenting opinions in *Lugo v. Secretary*, *Florida Department of Corrections*, 750 F.3d 1198, 1212–13 (11th Cir. 2014).

For an example of a case from North Carolina in which a capital inmate's claims—which included that a venire member had deliberately lied to get onto the jury and subsequently expressed virulently racist views to the other jurors—went unheard because the federal petition was filed a single day late, see *Rouse v. Lee*, 339 F.3d 238, 257, 265 (4th Cir. 2003) (Motz, J., dissenting) (7–3 en banc ruling); *see also id.* at 253 (citing cases where petitions were dismissed for being four and five days late).

[211] These cases are listed at: *The Human Cost of Missed Deadlines*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/death-penalty-representation/the-human-cost-of-missed-deadlines [https://perma.cc/HCN5-PTE7]. My special thanks to Paul Sessa of the Hofstra Law School class of 2024 for performing the extensive case law review underlying this table. As indicated in the text, we included only those cases in which the prisoner was denied merits review of substantially all of his constitutional claims. The opinions cited in the table were chosen to support that proposition, even though they may have been written in the context of some other aspect of the case.

The Death Penalty Information Center plans to keep the table updated henceforth. People with suggestions for additions or changes should contact the Director of the Center.

Because I did not have access to the dataset underlying the Marshall Project report, I have not been able to reconcile the numerical differences between the two studies. Very likely, neither count is precisely correct. But both show the widespread nature of the problem.

[212] *See* Ken Armstrong, *Death by Deadline, Part Two: When Lawyers Stumble, Only Their Clients Fall*, THE MARSHALL PROJECT (Nov. 16, 2014, 5:00 PM), https://www.themarshallproject.org/2014/11/16/death-by-deadline-part-two [https://perma.cc/E7CR-59V2]. *But cf. supra* note 209 (noting that prisoners are often held to have been insufficiently diligent in attempting to correct the blunders of their lawyers).

A typical case illustrating both points is *Smith v. Commissioner, Alabama Department of Corrections*, 703 F.3d 1266, 1267–70 (11th Cir. 2012). Alabama executed Ronald Smith on December 8, 2016. *See Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/database/person/1442/ronald-smith [https://perma.cc/TV6U-KR4J] (last visited Apr. 30, 2024) (Ronald Smith).

An example of how a particular petitioner may suffer from more than one type of lawyer blunder is *Lopez v. Filson*, No. 2:01-cv-00406-RCJ-NJK, 2018 WL 4643085, at *15–16 (D. Nev. Sept. 27, 2018), *modified on reconsideration*, Lopez v. Gittere, No. 2:01-cv-00406-RCJ-NJK, 2021 WL 1177865, at *6 (D. Nev. Mar. 29, 2021) (dismissing numerous claims on statute of limitations grounds and numerous others on basis of procedural default).

c. Group 3: Right Too Soon

Yet another group of state capital defendants consists of those who assert some constitutional claim at Time 1. It is meritorious, as the Supreme Court will eventually rule at Time 2. Sometimes the lower courts were simply wrong under existing law to have rejected the claim.[213] Sometimes the Supreme Court had not yet agreed that it was indeed meritorious.[214] Either way, the fact that these defendants were executed while others with identical claims survived was due merely to the timing of

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[213] Although there are minor variations in the identification and categorization of cases, one could fairly estimate that 110 prisoners have been executed under these circumstances. *See* Margulies et al., *supra* note 18, at 68–97, 120–25; Eric M. Freedman, *No Execution if Four Justices Object*, 43 HOFSTRA L. REV. 639, 641 n.7 (2015) [hereinafter Freedman, *No Execution*].

[214] *See* Margulies et al., *supra* note 18, at 65–68, 116–18 (counting 64 executions of people who would have been exempt under the Supreme Court's eventual rulings in *Roper v. Simmons*, 543 U.S. 551 (2005) (precluding execution of those under 18 years of age) and *Atkins v. Virginia*, 536 U.S. 304 (2002) (precluding execution of persons with intellectual disability)). Those rulings were "substantive" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989). *See supra* text accompanying note 159. Hence, whatever other practical obstacles these prisoners would have faced in asserting their claims on federal habeas corpus if they had survived to do so, see *supra* text accompanying notes 125–29, retroactivity would not have been one.

In contrast, litigants who challenged the constricted role of the capital sentencing jury in Arizona prior to the time the Court accepted their position in *Ring v. Arizona*, 536 U.S. 584, 589 (2002), and were still alive to reiterate it on federal habeas corpus were precluded under *Teague*. *See* Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004); Margulies et al., *supra* note 18, at 90–91.

Beginning in at least 2002, litigants in Florida attacked the statute there on the same basis as the one in Arizona, but the Florida Supreme Court rejected the challenge. *See* Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002); King v. Moore, 831 So. 2d 143, 145 (Fla. 2002). The United States Supreme Court did not announce its agreement with the challengers until 2016. *See* Hurst v. Florida, 577 U.S. 92, 94 (2016). At that point, the Florida Supreme Court, exercising its prerogatives under *Danforth v. Minnesota*, 552 U.S. 264, 291 (2008), to craft retroactivity doctrines applicable to state post-conviction proceedings, adopted a limited retroactivity rule that benefitted roughly 151 inmates whose trials had taken place under the unconstitutional structure but denied relief to another 121 of whom the same was true. *See* Asay v. State, 210 So. 3d 1, 22 (Fla. 2016); Mosley v. State, 209 So. 3d 1248, 1283 (Fla. 2016); Hannah L. Gorman & Margot Ravenscroft, *Hurricane Florida: The Hot and Cold Fronts of America's Most Active Death Row*, 51 COLUM. HUM. RTS. L. REV. 935, 936 (2020). It then imposed strict criteria designed to cut back the number of potential beneficiaries who actually would achieve resentencings. *See* State v. Poole, 297 So. 3d 487, 491 (Fla. 2020). As of this writing Florida executions are continuing at a regular pace and there has been no successful federal constitutional challenge to its retroactivity regime.

the Court's discretionary decision to review the issue[215]—exacerbated by its opaque and inconsistent practices regarding stays of execution.[216]

Surveying the phenomena canvassed in this section, Congress could easily compile an ample record on which to conclude that: (a) intertwined defects in legal institutions are causing many state capital defendants to be executed in violation of their constitutional rights, and (b) the extent of the problem warrants abolition of the death penalty as a remedial and prophylactic measure.

6. Execution of the Innocent

In *Herrera v. Collins*,[217] the Court rejected the argument of a state prisoner who said his imminent execution would be unconstitutional because he was innocent of

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[215] Because of *Teague*, the lower federal courts hearing habeas petitions may not grant relief on a claim for the expansion of existing doctrine prior to a ruling by the Court, no matter how meritorious those courts might believe the claim to be. *See supra* text accompanying note 162 & note 162. By way of perspective, four circuits decided that the states were required to recognize same-sex marriages before the Supreme Court adopted that new rule in *Obergefell v. Hodges*, 576 U.S. 644 (2015). *See* Lyle Denniston, *Sixth Circuit: Now, a Split on Same-Sex Marriage*, SCOTUSBLOG (Nov. 6, 2014, 4:50 PM), https://www.scotusblog.com/2014/11/sixth-circuit-the-split-on-same-sex-marriage/ [https://perma.cc/9YX4-SQS4].

[216] For detailed consideration of these, see STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 93–127 (2023) and Freedman, *No Execution*, *supra* note 213. *See also* Jenny-Brooke Condon, *The Capital Shadow Docket and the Death of Judicial Restraint*, 23 NEV. L.J. 809, 810–13, 836–42 (2023) ("[T]he Supreme Court is playing a decisive role in the administration of capital punishment but with less restraint, transparency, and accountability than ever before."); Adam Liptak, *Execution Case Highlights the Power of One Vote*, N.Y. TIMES, Jan. 6, 2015, at A13; Adam Liptak, *4 Votes Get a Man to Court. 4 Votes Let Him Die First*, N.Y. TIMES, Oct. 8, 2007, at A13 (discussing the Court's 5–4 stay denial of August 23, 2007, in *Williams v. Allen*, 551 U.S. 1183 (2007), a case which raised lethal injection challenges that the Court agreed on September 25, 2007, to review in *Baze v. Rees*, 551 U.S. 1192, 1192–93 (2007)).

[217] Herrera v. Collins, 506 U.S. 390, 393 (1993).

the crime of which he was convicted.[218] The most the Court was willing to do was to:

> [A]ssume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.[219]

The Court's subsequent opinions have, using cloudy language, taken that assumption as a statement of the legal standard applicable to capital defendants claiming innocence.[220] But because there has never been a case in which the Court has found the standard to be met, the assumption has never been turned into a holding[221]—leaving

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[218] Texas executed Leonel Herrera on May 12, 1993. *See Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/database/executions?q=Leonel+Herrera [https://perma.cc/6XSU-BTNJ] (last visited Apr. 30, 2024) (Leonel Herrera).

[219] *Herrera*, 506 U.S. at 417. The Court continued:

> But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold.

Id.

[220] *See* Dist. Att'y's Off. Third Jud. Dist. v. Osborne, 557 U.S. 52, 71–72 (2009); House v. Bell, 547 U.S. 518, 554 (1993); *see also* Jones v. Hendrix, 599 U.S. 465, 527–29 (2023) (Jackson, J., dissenting).

After extended legal proceedings established his innocence, House was released in 2008 after twenty-two years on Death Row and in 2009 the state dropped all charges. *See Paul G. House*, NAT'L REGISTRY OF EXONERATIONS (May 2, 2022), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3307 [https://perma.cc/VRV7-RMN9]; Joseph L. Hoffmann, House v. Bell *and the Death of Innocence*, *in* DEATH PENALTY STORIES 449, 449 (John H. Blume & Jordan M. Steiker eds., 2009).

[221] "*Herrera* innocence claims are legal unicorns: assumed for argument's sake to be viable by some courts . . . but never seen as the ultimately successful predicate for the grant of habeas corpus relief." Larsen v. Cal. Victim Comp. Bd., 278 Cal. Rptr. 3d 566, 583 (2d Dist. 2021).

some Justices to question whether a state capital defendant's "bare" or "naked" claim of innocence is cognizable by the federal courts at all.[222]

Congress need not wait for the Court to make up its mind. The execution by states of prisoners for crimes they have not committed is an evil that no one defends. Whatever the Court may eventually decide about the remedial abilities of the federal courts will be a decision only about the remedial abilities of the federal courts. Congress, which is well aware of the problem,[223] has the power to respond to the evil by passing legislation outlawing the states' infliction of the death penalty.

Perhaps any system of capital punishment will inevitably make mistakes[224] but that would not be the premise of the legislation. Rather, Congress would be invoking its Section Five powers in response to convincing evidence that our actual system

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[222] *See In re* Davis, 557 U.S. 952, 957 (2009) (Scalia, J., dissenting). There, the Court granted leave to file an original petition for a writ of habeas corpus and transferred the case to the District Court "[to] receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence." *Id.* at 952. Justice Scalia, joined by Justice Thomas, dissented, explaining that because the Court had never actually decided that a constitutional claim based on actual innocence existed (and one probably didn't), AEDPA would preclude the grant of relief regardless of what findings were made on remand. *Id.* at 955.

There was no further doctrinal illumination because the subsequent proceedings eventuated adversely to Davis, the Supreme Court denied further review, and he was executed by Georgia on September 21, 2011. *See* Kim Severson, *Davis Is Executed in Georgia*, N.Y. TIMES, Sept. 21, 2011, at A1.

In a "bare" or "naked" claim of innocence, the federal habeas corpus petitioner asserts as a standalone claim that the fact of innocence renders a threatened state execution unconstitutional. In a "gateway" claim of innocence, the federal habeas corpus petitioner argues that the fact of innocence should constitute "cause" to excuse an otherwise preclusive procedural default. *See* Jimenez v. Stanford, No. 21-2582-pr, 2024 WL 1059097 (2d Cir. Mar. 12, 2024); Trease v. Sec'y, Fla. Dep't Corr., No. 8:11-cv-233-T-23TBM, 2014 WL 4791996, at *2–3 (M.D. Fla. Sept. 24, 2014). The difference is illustrated by *House*, 547 U.S. at 555. Although the Court there rejected House's bare innocence claim, it sustained his gateway innocence claim, which is why he survived to prevail in the subsequent proceedings described *supra* note 220.

[223] The Justice for All Act of 2004, Public Law No. 108-405, §§ 412–13 provided grants to states that upgraded their DNA testing methodologies and permitted the assertion of post-conviction claims of innocence. An earlier version had simply mandated that the states permit potentially exculpatory post-conviction DNA testing in capital cases. *See* Larry Yackle, *Congressional Power to Require DNA Testing*, 29 HOFSTRA L. REV. 1173, 1173–75 (2001) (arguing that Congress had Section Five power to enact that version as a safeguard against execution of innocent defendants).

[224] *See* BLACK, *supra* note 115, at 105–06 (arguing that the death penalty is therefore unconstitutional).

of capital punishment does not have reliable procedures in place to detect, correct, and prevent the persisting danger that states will wrongly kill their citizens.[225]

The fact that the legal system acknowledges 196 wrongful convictions in capital cases[226] as of the end of 2023[227] raises unsettling concerns about the ones that may

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[225] A recent study funded by the Justice Department reached exactly that conclusion. *See The Impact of False or Misleading Forensic Evidence on Wrongful Convictions*, NAT'L INST. JUST. (Nov. 28, 2023), https://nij.ojp.gov/topics/articles/impact-false-or-misleading-forensic-evidence-wrongful-convictions [https://perma.cc/4XRU-Z7PX] (summarizing extensive research report published by Dr. John Morgan of the University of California at Irvine in March 2023 that criticized failure of justice system to have in place self-evaluation procedures after wrongful convictions to prevent recurrences similar to those in place following transportation disasters).

It is noteworthy that the comprehensive and valuable official report, NAT'L ACAD. OF SCIS., COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), specifically excluded from consideration, *see id.* at 127 n.2, a number of key areas in which best practices could be implemented to improve accuracy, such as eyewitness identification procedures, interrogation techniques, and use of jailhouse informants. *See* JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 255–57 (2000).

Moreover, my discussion in the text assumes that the prosecuting authorities proceed in good faith and in accordance with their well-established constitutional duties to disclose exculpatory evidence and eschew the use of false evidence, *see, e.g.*, Kyles v. Whitley, 514 U.S. 419, 439–40 (1995); Giglio v. United States, 405 U.S. 150, 154 (1972); Miller v. Pate, 386 U.S. 1, 6–7 (1967); Brady v. Maryland, 373 U.S. 83, 90–91 (1963); Napue v. Illinois, 360 U.S. 264, 269 (1959); Mooney v. Holohan, 294 U.S. 103, 106–07 (1935). That assumption is often unwarranted. *See Prosecutorial Accountability*, DEATH PENALTY INFO. CTR. (June 2022), https://deathpenaltyinfo.org/policy-issues/prosecutorial-accountability [https://perma.cc/Y7GQ-WRZM] (identifying "more than 600 prosecutorial misconduct reversals and exonerations in capital cases," meaning "that more than 6.3% of all death sentences imposed since 1972 have been reversed for prosecutorial misconduct or resulted in a misconduct exoneration," without considering cases where misconduct was found but ruled harmless or immaterial); *cf.* Keith v. Hill, 78 F.4th 307, 318 (6th Cir. 2023) (finding multiple *Brady* violations but denying relief because petitioner had not met AEDPA standard of demonstrating by clear and convincing evidence that if the suppressed evidence had been disclosed no reasonable juror would have convicted him).

[226] *See Innocence Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/database/innocence?sort=exonerationYear/asc&page=4 [https://perma.cc/KBV5-3BCK]. *See generally* Phillip Morris, *Sentenced to Death, But Innocent: These Are The Stories of Justice Gone Wrong*, NAT'L GEOGRAPHIC (Feb. 18, 2021), https://www.nationalgeographic.com/history/article/sentenced-to-death-but-innocent-these-are-stories-of-justice-gone-wrong [https://perma.cc/3B8G-9QWR] (recounting some illustrative cases).

[227] I venture to predict that the number will be higher by the time these words reach print.

have taken place without acknowledgment and resulted in executions.[228] How many executed defendants never obtained post-conviction relief, although they should have?[229]

The real social value of tax audits is not to collect taxes from the individuals being audited but to illuminate how well the revenue collection system is doing overall. So too, each exoneration of a capital defendant, although a less-bad outcome for the individual than the alternative, is a sobering reminder of the cases not caught. Just as with tax audits, we can only estimate the size of the systemic problem by looking at the sample we have. The view is disquieting.[230] One comprehensive study, largely based on appeals completed before AEDPA took effect, found that when capital cases were retried after prisoners' victories in post-conviction proceedings 7% of the defendants were found to be not guilty of the crime.[231] Because AEDPA was

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[228] *See* DANIEL S. MEDWED, BARRED: WHY THE INNOCENT CAN'T GET OUT OF PRISON 12 (2022):

> [K]eep the iceberg analogy in mind. The groups that litigate postconviction innocence claims in the United States lack resources to accept every case that demands justice and instead engage in triage by pursuing only the strongest. Those cases, compelling as they may be, must steer through the formidable procedural obstacles to exoneration. Documented exonerations therefore reflect just the relatively small number of innocent prisoners we know about. What about all the others . . . who died[?]

A very sophisticated statistical study based on inmates who left Death Row alive but unexonerated, for example, as a result of plea deals, estimated the percentage of innocent ones still there. Published by the National Academy of Sciences, it concluded that at least 4.1% of persons sentenced to death and still facing execution were falsely convicted. *See* Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7230, 7234 (2014), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2590&context=articles [https://perma.cc/84RK-MU52].

[229] *See, e.g.*, Robert Bentley & Don Siegelman, *We Oversaw Executions as Governor. We Regret It.*, WASH. POST (May 24, 2023, 6:00 AM), https://www.washingtonpost.com/opinions/2023/05/23/alabama-governors-death-penalty-regret/ [https://perma.cc/V5AZ-686U] ("One of us, Don Siegelman, is personally haunted by the case of Freddie Wright, whose execution he could have commuted [as Governor of Alabama], but did not, in 2000. Twenty-three years later, Siegelman believes Wright was wrongfully charged, prosecuted and convicted for a murder he most likely did not commit.").

[230] *See* Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, *in* AMERICA'S EXPERIMENT, *supra* note 33, at 357, 363–66.

[231] *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at ii, 5, 123 n.45 (rev. ed. 2000), https://scholarship.law.columbia.edu/faculty_scholarship/1219/ [https://perma.cc/MPR2-P5H3].

specifically designed to reduce grants of post-conviction relief, many of those defendants—wrongfully convicted once—would today not have a second chance to escape execution.[232] Yet every execution of an innocent person is uncontroversially a failure of our justice system to achieve its "central purpose."[233]

Perhaps the problem will diminish over time. Perhaps technology will get better, so wrongful convictions will become less frequent in the first place, be detected more promptly when they happen, and be corrected before wrongful executions take place. But Congress would have ample basis for rejecting that prophesy simply on the basis of what has been said in this Article so far. Lawmakers could compile a strong record showing that even as technology has advanced (calling into question along the way the forensic basis of many existing convictions),[234] the questionable quality of capital defense representation and the weakening of remedial structures warrant abolition of capital punishment as a safeguard against executions of the innocent.[235]

Surveying the problem more broadly, Congress could well conclude that the states' existing death penalty systems are not ones that produce sporadic individual injustices but instead are organized internally and positioned within the overall federal structure in such a way as to generate "normal accidents"—ones that are "inevitable" in institutional frameworks characterized by tightly coupled components whose interactions are complex.[236] A ramshackle edifice that could at any moment collapse upon some innocent person with fatal consequences is an ongoing lethal threat. A congruent and proportionate response is to destroy it.

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[232] *See* Dow & Freedman, *The Effects of AEDPA*, *supra* note 30, at 269; *supra* text accompanying notes 31–32 & note 31.

[233] Herrera v. Collins, 506 U.S. 390, 398 (1993).

[234] *See* NAT'L ACAD. OF SCIS., *supra* note 225, at 88.

[235] For a deeply researched account of an individual case illustrating this point, see JAMES S. LIEBMAN ET AL., THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION (2014). *See also* Radley Balko, *Why We Can't Trust The States to Prevent Wrongful Convictions*, WASH. POST (Aug. 9, 2021, 9:00 AM), https://www.washingtonpost.com/opinions/2021/08/09/why-we-cant-trust-states-prevent-wrongful-convictions [https://perma.cc/D6SG-QQDV].

[236] *See* CHARLES PERROW, NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES 4–5 (1999); Austin Sarat, *Just Another Death Row Exoneration?*, VERDICT (June 19, 2023), https://verdict.justia.com/2023/06/19/just-another-death-row-exoneration [https://perma.cc/A9HB-ULRB].

7. Execution by Torture

a. Overview

The current law regarding torturous executions is simple: the Eighth Amendment forbids them[237] but the Supreme Court permits them. That is not because the Court has changed its view of the meaning of the constitutional prohibition.[238] Instead, the Court has created a presumption that whatever method of execution a state is using is constitutional. To mount a successful challenge through litigation, a capital prisoner must demonstrate the availability of a substantially superior constitutionally compliant system that also abides by a series of judicially created limitations.

The powers of Congress, unlike those of the United States Supreme Court, do not instantiate judicial creativity. Congress's function is to determine (a) whether a social problem needing correction or prevention exists and, (b) if so, whether it has legislative authority to respond. With respect to the social problem of executing prisoners by torturous methods the answers to those questions are not difficult to discern: (a) yes and (b) yes. The abolition of all executions would be a congruent and proportional response to the states' dismal forty-year record of violating a core Eighth Amendment right.

b. Existing Supreme Court Doctrine

According to a syllogism that now commends itself to a majority of the Court, "because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'"[239] Therefore:

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[237] *See In re* Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . ."); Wilkerson v. Utah, 99 U.S. 130, 136 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment . . . .").

[238] In *Gregg v. Georgia*, 428 U.S. 153, 169–72 (1976), the Court cited and specifically approved of *Kemmler* and *Wilkerson*. The only arguable doctrinal change in recent years has been with respect to how much pain is needed to render the method unconstitutional. *See infra* note 242.

[239] *See* Glossip v. Gross, 576 U.S. 863, 869 (2015) (citing Baze v. Rees, 553 U.S. 35, 47 (2008) (plurality opinion)). For further discussion of *Baze*, *see infra* note 249.

> [P]risoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is "'*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" To prevail on such a claim, "there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' . . . " [P]risoners "cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." Instead, prisoners must identify an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain."[240]

Notwithstanding the powerful critique that this "flawed syllogism" transforms a fundamental restraint on state power into a capital prisoner's burden,[241] the Court is currently committed to its views.[242] So be it.

c. Congressional Power

In considering ending torturous executions by statute, Congress does not play on the Court's field. Congress is not constrained by the various pragmatic rules that

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[240] *Glossip*, 576 U.S. at 877 (citations omitted). Such challenges are to be timely brought under 42 U.S.C. § 1983, not the habeas statute. *See* Nance v. Ward, 597 U.S. 159, 163 (2022); Hill v. McDonough, 547 U.S. 573, 583–84 (2006); Nelson v. Campbell, 541 U.S. 637, 650 (2004).

[241] *See Glossip*, 576 U.S. 863 at 973–75 (Sotomayor, J., dissenting) ("If a State wishes to carry out an execution, it must do so subject to the constraints that our Constitution imposes on it, including the obligation to ensure that its chosen method is not cruel and unusual. Certainly the condemned has no duty to devise or pick a constitutional instrument of his or her own death.").

[242] *See* Bucklew v. Precythe, 587 U.S. 119, 172–74 (2019). That case may also be said to have had a frail majority in support of the idea that the Eighth Amendment ban on torturous methods of execution applies only to ones that are so painful as to support an inference that they were being used "to inflict pain for pain's sake," *id.* at 136–37.

the Court has created to manage litigation.[243] Nor is Congress constricted by the nuances of the Court's shifting statements of how much pain is too much.[244]

In any event, the abolition of capital punishment as it now exists would be warranted by the need to prevent the occurrence of executions that violate even the most relaxed standards the Court has enunciated. The argument is not that every execution is torturous—any more than that every Death Row prisoner is innocent—but rather that a significant number are. That is why a prophylactic remedy is needed.

The torture problem has been documented time and time again.[245] Executions have been repeatedly botched,[246] causing states to study their protocols[247] and

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[243] These include the timing of requests for relief, *compare id.* at 147–50, *with id.* at 167–70 (Breyer, J., dissenting), *and id.* at 170–74 (Sotomayor, J., dissenting), and the precise contents of the requirement that the plaintiff demonstrate a feasible alternative method of execution. For example, in *Hamm v. Smith*, 142 S. Ct. 1108 (2023), in which, after numerous relists, certiorari was denied over two dissents, the state complained that the mere fact that a particular method was authorized by its statutes did not make the method available where the inmate had failed to explain in sufficient detail how the state should implement it. *See* Petition for a Writ of Certiorari at i, *Hamm*, 142 S. Ct. 1108 (No. 22-580), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-580.html [https://perma.cc/2866-K9ZG].

[244] *See supra* text accompanying notes 49–51.

[245] *See* AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 5, 11 (2016).

[246] *See, e.g.*, Michael L. Radelet, *Examples of Post*-Furman *Botched Executions* (Dec. 6, 2022), https://deathpenaltyinfo.org/executions/botched-executions [https://perma.cc/42YH-JFY3] (presenting illustrative but incomplete listing of 59 botched executions between 1982 and 2022); Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825, 827–36 (2015) (describing four botched executions in first half of 2014).

[247] *See* Austin Sarat, *GOP Governor's Study Offers Backstage View into Negligence and Cruelty of Lethal Injection Process*, THE HILL (Jan 10, 2023, 2:00 PM), https://thehill.com/opinion/criminal-justice/3806666-gop-governors-study-offers-backstage-view-into-negligence-and-cruelty-of-lethal-injection-process/ [https://perma.cc/VV6H-779B] (discussing Tennessee); Dakin Andone, *Oklahoma, With a History of Botched Lethal Injections, Prepares to Start Executing a Man a Month*, CNN (Aug. 20, 2022, 3:02 AM), https://www.cnn.com/2022/08/20/us/oklahoma-botched-executions-history/index.html [https://perma.cc/78W9-HC83].

implement reforms that don't work.[248] Moreover, whatever is known about the problem is incontestably understated. The states have been systematically concealing their own wrongs, both by creating protocols specifically designed to hide suffering when it happens[249] and by enshrouding their procedures for the conduct of executions in thicker and thicker layers of secrecy.[250]

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[248] *See* DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2022: YEAR-END REPORT 2, https://dpic-cdn.org/production/documents/reports/year-end/Year-End-Report-2022.pdf [https://perma.cc/MJ2S-YGUR] ("2022 could be called 'The Year of the Botched Execution' because of the high number of states with failed or bungled executions. Seven of the 20 execution attempts were visibly problematic—an astonishing 35%—as a result of executioner incompetence, failures to follow protocols, or defects in the protocols themselves."); Associated Press, *Alabama Failed to Complete an Execution by Lethal Injection for a Third Time*, NPR (Nov. 19, 2022, 1:31 AM), https://www.npr.org/2022/11/19/1137951509/alabama-fails-lethal-injection-3rd-time-capital-punishment [https://perma.cc/Q6ET-9KGZ]. For a detailed discussion of the Alabama situation, see Alexandra L. Klein, *The 2022 Alabama Executions and the Crisis of American Capital Punishment*, 24 NEV. L.J. 1 (2023).

[249] Many states have utilized a three-drug protocol consisting of one to induce unconsciousness, one to paralyze, and one to kill. The third is concededly excruciatingly painful. That is why the first one is used. But the second will prevent observers from detecting any failure on the part of the first. *See* Deborah W. Denno, *Back to the Future with Execution Methods*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 212, 215–16 (Meghan J. Ryan & William W. Berry III eds., 2020). A badly fractured Court rejected a challenge to the Kentucky implementation of this protocol in *Baze v. Rees*, 553 U.S. 35, 41 (2008), with the plurality observing that the prisoners had conceded that the protocol would be humane if implemented as envisioned but were simply arguing that there was an unacceptable risk that it would not be. Although the use of the three-drug protocol by the states subsequently declined, *see* Denno, *supra*, at 215–17; *see also* Glossip v. Gross, 576 U.S. 863, 869–71 (2015), it persists in some places, and is the subject of continuing and ordinarily unsuccessful litigation. *See, e.g.*, Khaleda Rahman, *Thomas Loden Jr.'s Final Words Before Mississippi Execution*, NEWSWEEK (Dec. 15, 2022, 11:08 AM), https://www.newsweek.com/thomas-loden-jr-final-words-mississippi-execution-1767254 [https://perma.cc/2Y7C-PPZG] ("His execution went ahead after a federal judge declined to block it amid a pending lawsuit by him and four other Mississippi death row inmates over the state's use of three drugs for lethal injections.").

[250] *See* Deborah W. Denno, *Lethal Injection Chaos Post*-Baze, 102 GEO. L.J. 1331, 1382 (2014) (presenting results of empirical study of over 300 cases):

> [A]s risk and confusion surround lethal injection procedures, the only overarching constant appears to be states' desire for secrecy regarding execution practices. Amidst the chaos of drug shortages, changing protocols, legal challenges, and botched executions, states are unwavering in their desire to conceal this disturbing reality from the public. In fact, the current chaos may be viewed at least in part as a repercussion of that reticence: any efforts to fix the system via legal challenges and legislation are hindered by the difficulty in gathering enough information to even understand its problems.

See also Renuka Rayasam, *States Try to Obscure Execution Details as Drugmakers Hinder Lethal Injection*, KFF HEALTH NEWS (Mar. 30, 2023), https://khn.org/news/article/lethal-injection-death-penalty-drugmakers-opposition/ [https://perma.cc/84NE-2RGR].

Looking at this record and measuring it against the constitutional command that no "cruel and unusual punishments [shall be] inflicted,"[251] Congress could well conclude that they have been inflicted in the past, are being inflicted in the present, and that the states' predictable behavior in the future will be the continued pursuit of a course of human experimentation on capital prisoners.[252]

The case law of the Supreme Court envisions a realm in which the death penalty is constitutional and is carried out without the infliction of gratuitous pain. While not questioning the first half of that description, Congress could most certainly reject the idea that the second is an accurate description of the sublunary world. Abolition of the death penalty as a response would fall comfortably within Section Five.

B. Taking a Holistic View

Abolition of the death penalty in the states would be a congruent and proportional response to each of the seven constitutional issues just described if they were taken individually. But Congress need not consider them individually.[253] Congress has already concluded that the pervasive denial of effective assistance of counsel augments the risk of execution of the innocent,[254] and might easily reach that conclusion with respect to execution of the mentally impaired.[255] So too, Congress might well conclude that racism exacerbates the failure of the states to structure their death penalty

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[251] U.S. CONST. amend. VIII.

[252] *See* Denno, *supra* note 249, at 227, 232; *see also* Barber v. Governor Ala., 73 F.4th 1306, 1341 (11th Cir. July 19, 2023) (Pryor, J., dissenting) (reviewing recent Alabama lethal injection history and concluding, "Three botched executions in a row are three too many. Each time, ADOC has insisted that the courts should trust it to get it right, only to fail again . . . . Meanwhile, ADOC has refused to answer discovery . . . . The State [should have] to answer for its extraordinary and systemic failures."). When Barber's case reached the Supreme Court, he was denied a stay of execution over an extended dissent by three Justices reiterating these points. *See* Barber v. Ivey, 142 S. Ct. 2545, 2545 (2023) (Sotomayor, Kagan & Jackson, JJ., dissenting). He was executed a few hours later. *See* Adam Liptak, *Over Dissent, Court Allows An Execution in Alabama*, N.Y. TIMES (July 21, 2023), https://www.nytimes.com/2023/07/21/us/alabama-inmate-execution-scotus.html [https://perma.cc/MX9T-C56X]. For discussion of a similar case, the 2010 execution of Jeffrey Landrigan by Arizona, see Freedman, *No Execution*, *supra* note 213, at 661 n.80.

[253] As noted *supra* note 150, the Court in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003) endorsed the power of Congress to attack "mutually reinforcing stereotypes [which created] a self-fulfilling cycle of discrimination."

[254] *See* H.R. REP. NO. 108-711, *supra* note 74, at 5.

[255] *See* Perlin et al., *"A World of Steel-Eyed Death," supra* note 59, at 264–69, 272–74.

systems so as to reliably result in the execution of the most culpable offenders,[256] leaving ones that are ever more driven by the caprices of a minuscule number of county prosecutors.[257]

Moreover, Congress is certainly entitled to view the above seven issues in the context of other features of the states' death penalty systems that it is not attacking directly. For example, the Supreme Court has upheld against constitutional attack the practice of "death qualification," i.e., preventing venire members who would be impartial on guilt from serving as jurors at capital trials on the basis that they would not be impartial if there were to be a penalty phase.[258] However constitutional the practice may be, Congress need not ignore the voluminous evidence—which death penalty advocates do not dispute[259]—that death qualification further entrenches the already intractable problems of convicting the innocent, seating racially skewed juries, and failing to ensure that the outcomes generated by death penalty systems

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[256] *See* William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 266 (2001) (reporting that a study of 1,155 capital jurors who served on 340 trials in 14 states reveals that race of juror has significant impact on willingness to entertain doubts about guilt and vote for life sentence); *supra* text accompanying note 113.

[257] *See supra* text accompanying notes 116, 121 & note 121.

[258] *See* Lockhart v. McCree, 476 U.S. 162, 173 (1986).

[259] *See* Adam Liptak, *Court Ruling Expected to Spur Convictions in Capital Cases*, N.Y. TIMES (June 9, 2007), https://www.nytimes.com/2007/06/09/us/09death.html [https://perma.cc/U2DY-9YDH] (discussing Uttecht v. Brown, 551 U.S. 1 (2007)).

are proportionate to culpability.[260] Nor need Congress blind itself to an adjacent problem: many of the challenges for cause that routinely succeed in actual courtrooms are entangled in racial bias yet are in practice unreviewable.[261]

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[260] *See* BRIGHT & KWAK, *supra* note 94, at 85–86 (discussing racial effects); Craig Haney et al., *The Continuing Unfairness of Death Qualification: Changing Death Penalty Attitudes and Capital Jury Selection*, 28 J. PSYCH. PUB. POL'Y & L. 1, 12–13 (2022) (reporting findings from California, New Hampshire, and Florida that death-qualified jurors are more willing to use aggravating factors to issue a death sentence, less likely to take mitigating factors into account, and whiter); Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 LAW & POL'Y 148, 148, 167 (2018) (concluding from California study that "by creating a jury whose members are unusually hostile to mitigation, death qualification may functionally undermine capital defendants' ability to have their case in mitigation accurately heard, properly understood, and effectively acted upon. This risk is particularly high in cases involving African American defendants, especially where white men dominate the jury"); Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997–2012*, 9 NE. U. L. REV. 299, 345 (2017) (reporting findings from South Carolina and concluding that death qualification process results in juries that are racially unrepresentative and not impartial); Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 131, 156 (2016) (reporting results of study of Louisiana trials resulting in death verdicts from 2009 to 2013 which concludes that death qualification has racially biasing effect on jury composition); Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 553, 573 (2013) (reporting results of a study covering Alabama, Arizona, California, Florida, Oklahoma, and Texas which concluded that death-qualified jurors had more implicit and explicit (self-reported) racial biases); Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 807 (2006) ("For over fifty years, empirical investigation has demonstrated that death qualification skews juries toward guilt and death."); Robert L. Young, *Guilty Until Proven Innocent: Conviction Orientation, Racial Attitudes, and Support for Capital Punishment*, 25 DEVIANT BEHAV. 151, 161 (2004) (reporting study concluding that death-qualified jurors are not only more likely to harbor racially prejudicial attitudes, but also are more likely to favor the conviction of innocent defendants over letting guilty ones go free); John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1232 (2001) (noting that among the biasing effects of death qualification is that it selects jurors who are "more likely to believe that the defendant deserves the death penalty"); Liebman, *supra* note 68, at 2097 n.164 (discussing studies demonstrating that death qualification process produces juries more likely to convict than non-death-qualified juries, and that repeated discussion of death penalty during voir dire in capital cases makes jurors substantially more likely to vote for death).

I have limited the citations in the paragraph above to ones relevant to the concerns canvassed in the foregoing sections of text, thereby excluding studies discussing the biasing effects of death qualification where the defendants are women, LGBTQ+ individuals, or are otherwise at heightened risk of unfairness.

[261] *See* BRIGHT & KWAK, *supra* note 94, at 85; Frampton, *supra* note 94.

Congress would be on solid ground in characterizing the death penalty system that actually exists in the retentionist states today as one where "unanticipated, unrecognizable interactions of failures occur, and the system does not allow for recovery."[262] If the members of Congress needed to defend in court scrapping that system they could call their statute "prophylactic;" in all other fora, they could call it simple good sense.

III. THE POLITICAL CALCULUS

What might be the costs and benefits of pursuing abolition of the death penalty in the states through the enactment of a federal statute?

There is a risk of backlash. The introduction of the legislation could serve as a rallying cry for death penalty advocates, and, more ominously, cause governors in retentionist states to schedule executions at a faster pace than they otherwise would. That is a realistic fear. It needs to be given sober consideration, which would be best done by those with current inside knowledge of the relevant political realities.

In contrast, an outside observer can see the benefits of the proposed statute. Most obviously, if passed it would benefit the roughly 2,400 prisoners on state Death Rows.[263] On the other hand, abolition of the federal death penalty, which has been proposed but is currently making no perceptible legislative progress,[264] would benefit the approximately fifty prisoners slated for execution by the federal government.[265]

But if abolition of the federal death penalty does not seem to be attracting a critical mass of legislative support, wouldn't abolition of the state death penalties be equally unlikely to succeed? Maybe—although that may not be a reason not to push ahead[266]—but maybe not. An overview of the political landscape reveals that in twenty-three states—some of which, like Alaska and North Dakota, would not leap

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[262] PERROW, *supra* note 236, at 328. The accuracy of this description would be unaffected by whether one considered AEDPA part of the problem or a failed solution. *See supra* text accompanying notes 31–34.

[263] *See Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Oct. 1, 2022), https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf [https://perma.cc/S5S9-WSLH].

[264] *See* Federal Death Penalty Prohibition Act of 2023, H.R. 4633 & S. 2299, 118th Cong. (2023); Press Release, Pressley, Durbin Reintroduce Bill to End the Federal Death Penalty (July 13, 2023), https://pressley.house.gov/2023/07/13/pressley-durbin-reintroduce-bill-to-end-the-federal-death-penalty/ [https://perma.cc/MK93-AXMZ]. A previous version was introduced as Federal Death Penalty Abolition Act, H.R. 1124, 118th Cong. (2023).

[265] This number, which combines those sentenced by the federal criminal system and by the U.S. military, is based upon *Death Penalty Census Database*, DEATH PENALTY INFO. CTR. (Jan. 1, 2022), https://deathpenaltyinfo.org/database/sentences?jurisdiction-type=Federal&jurisdiction-type=U.S.+Military&sentence-outcome=Active+Death+Sentence [https://perma.cc/N7SW-RVGM].

[266] *See infra* text accompanying notes 273–77.

to mind as hotbeds of progressivism—the death penalty has been legally abolished.[267] A closer look reveals at least a dozen states—some of which, like California, Pennsylvania, and North Carolina, have quite large Death Rows—where there have been no executions carried out in over fifteen years.[268] There is little realistic prospect that any significant number of executions will take place in those states in the years to come. It is much more likely that de facto abolition will spread.[269]

And even in those states—like Texas, Alabama, and Oklahoma—where executions are currently taking place regularly, it is highly misleading to view the matter from 30,000 feet. As already noted,[270] the death penalty actually exists in only a tiny number of counties within those states. Moreover, even where prosecutors do seek the death penalty, juries in recent years have been strikingly loathe to impose it.[271] The political implication, particularly in the House, is that there may well be members of Congress from retentionist states who will vote for an abolition bill. That is all the more probable because abolition is becoming increasingly popular among self-identified conservatives.[272]

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[267] *See States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (2023), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state [https://perma.cc/UN87-2MCD].

[268] *See States With No Recent Executions*, DEATH PENALTY INFO. CTR. (July 17, 2023), https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions [https://perma.cc/7V48-P32Z].

[269] *See* Carol S. Steiker & Jordan M. Steiker, *The Court and Capital Punishment on Different Paths: Abolition in Waiting*, 29 WASH. & LEE J. C.R. & SOC. JUST. 1, 6–7 (2023); Austin Sarat, *Why Some States Retain the Death Penalty But Never Use It*, VERDICT (July 24, 2023), https://verdict.justia.com/2023/07/24/why-some-states-retain-the-death-penalty-but-never-use-it [https://perma.cc/3ZQH-QR8U] (observing that by end of summer 2023, "17 of the 27 states in which capital punishment is legal will not have carried out an execution for at least five years. And in 14 of those 17 states, no one has been put to death in the last ten years or more. As was the case in several European countries, de facto abolition is an important step on the road to ending capital punishment altogether").

[270] *See supra* note 121.

[271] *See, e.g.*, Ronald Tabak, *Capital Punishment*, *in* THE STATE OF CRIMINAL JUSTICE 2023 193, 199–200 (Elizabeth Kelley ed., 2023) (presenting Texas statistics for death sentences and executions, 1977–2022). From 2015–22 there were only about 4 death sentences a year returned statewide, a total of 31, although there were 60 executions carried out in that same period. *Id.* By way of comparison, during 2000–04 juries were returning about 29 death verdicts a year, which was fairly close to the annual average number of executions during that period, about 27. *Id.* A slightly more recent set of statistics appears at Texas Coalition to Abolish the Death Penalty, *Texas Death Penalty Developments in 2023: The Year in Review* (Dec. 14, 2023), https://tcadp.org/wp-content/uploads/2023/12/TCADP-Report-Texas-Death-Penalty-Developments-in-2023.pdf [https://perma.cc/Y3D5-SWCF].

[272] *See* CONSERVATIVES CONCERNED ABOUT THE DEATH PENALTY, https://conservativesconcerned.org/ (last visited Apr. 30, 2024); Marin Cogan, *Why Some Republicans Are Turning Against the Death Penalty*, VOX (Mar. 8, 2022, 7:30 PM), https://www.vox.com/policy-and-politics/22965507/republicans-death-penalty-abolish-ohio [https://perma.cc/6A6F-AXFM] (listing seven retentionist states where "Republicans are leading or cosponsoring efforts to repeal or limit the death penalty").

Even if abolitionists knew that there was no realistic current prospect of getting their statute enacted, there might be good reason to introduce the legislation as a messaging and organizing vehicle—one that might put pressure on the retentionist states to reform their systems. The obvious historical analogy is to anti-lynching legislation. The first bill to make lynching a federal crime was introduced at the behest of the NAACP in 1919.[273] The subsequent high-profile lobbying campaign had the effect of "increasing public awareness of societal problems yet unremedied"[274] and was credited by one contemporary observer as a factor in moving Supreme Court jurisprudence in a direction more favorable to capital defendants.[275] After a century during which similar bills were repeatedly introduced and repeatedly defeated, the political constellations aligned. The "Emmett Till Antilynching Act"[276] was passed "with overwhelming bipartisan support" and became law on March 29, 2022.[277]

CONCLUSION

A federal statute abolishing the death penalty in the states rests on a solid legal foundation of Supreme Court jurisprudence regarding both capital punishment and the Section Five power. There is ample empirical data on which Congress can rely. If engaged political actors succeed in enacting the statute, the Supreme Court will uphold it.

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[273] *See* ROBERT L. ZANGRANDO, THE NAACP CAMPAIGN AGAINST LYNCHING, 1909–1950, at 54–55 (1980) (discussing the history of the Dyer Bill).

[274] FREEDMAN, THE GREAT WRIT OF LIBERTY, *supra* note 178, at 67.

[275] *See* Note, *Mob Domination of a Trial as a Violation of the Fourteenth Amendment*, 37 HARV. L. REV. 247, 250 (1923).

[276] Pub. L. 117-107 (2022).

[277] *See* Teaganne Finn, *Biden Signs Bill Named After Emmett Till Making Lynching a Hate Crime: Congress Passed the Measure With Overwhelming Bipartisan Support*, NBC NEWS (Mar. 29, 2022, 7:00 PM), https://www.nbcnews.com/politics/white-house/biden-signs-bill-named-emmett-making-lynching-hate-crime-rcna22078 [https://perma.cc/A34R-LL4E].