RECENT DEVELOPMENTS

CONSTITUTIONAL LIMITS TO PUNITIVE DAMAGE AWARDS: *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989).

Over the last two decades, American juries have been increasingly generous in awarding punitive damages in tort actions. Although this trend has helped to curb egregious behavior by potential tortfeasors, it has also had costly repercussions. For businesses and their insurers, the costs of potential tort liability can be almost incalculable, leading to arbitrary pricing and chilling the research and development of new products.[1] Punitive damage awards have become so unpredictable that litigants involved in actual suits cannot negotiate informed or efficient settlements—a development that undermines the value of legal advice and embarrasses the legal profession. As they watch punitive damage awards climb and call for reform, insurance companies, corporate officers, and defense counsel all wonder if the sky has become the limit for punitive damages.

In the 1989 term, the Supreme Court considered the proposition that the Constitution (rather than the sky) limits punitive damage awards. The case, *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*[2] gave an equivocal response to this proposition. On one hand, the Court refused to apply the Excessive Fines Clause of the Eighth Amendment[3] as a limit to civil punitive damages. On the other hand, the Court seemed to invite litigants to challenge excessive punitive damages under a substantive application of the Due Process Clause.[4]

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1. *See, e.g.*, Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2924 (O'Connor, J., concurring in part and dissenting in part).

2. 109 S. Ct. 2909 (1989).

3. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

4. U.S. CONST. amend. XIV ("nor shall any State deprive any person of life, liberty, or property without due process of law").

Excessive punitive damage awards could be challenged under both substantive due process and the procedural due process doctrine of vagueness. This essay addresses the possibility of a *substantive* due process challenge to excessive punitive damage awards as opposed to a *procedural* due process or vagueness challenge.

The majority raised the possibility of a substantive due process challenge. *See* 109 S. Ct. at 2921 ("[P]etitioners make no claim that the proceedings themselves were unfair, . . . [i]nstead they seek further due process protections, addressed directly to the size of the damages award."). The concurrence also focused on a possible substantive due process challenge. It cited cases in which the court reviewed under substantive due process the size of punitive damage awards made pursuant to a statutory scheme. *See*

This result is not only disappointing to the business community[5] but ironic as well. The Court based its Eighth Amendment result on the underlying purpose of that Amendment, and yet its decision ultimately turned on a formalistic interpretation of the Framers' intent. The Court's apparent willingness to consider a challenge grounded in substantive due process, one of the least formalistic constitutional theories ever developed, seems paradoxical. It would be far easier to infer a constitutional limit to punitive damages and a workable judicial standard from the Eighth Amendment, as interpreted by the dissent, than from the Due Process Clause. The hope that some take from the Court's apparent invitation to a substantive due process challenge[6] may be misplaced. Even if the Court does hold that substantive due process places limits on punitive damages, it is unlikely that a workable judicial standard will emerge to impose significant restraints on the size of punitive damage awards.

Browning-Ferris arose from an action for predatory pricing in the garbage collection and disposal industry. In 1976 petitioner

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109 S. Ct. at 2923 (Brennan, J., concurring) (citing St. Louis, I.M. & S.R. Co. v. Williams, 251 U.S. 63, 66-67 (1919); Southwestern Telegraph & Telephone Co. v. Danaher, 238 U.S. 482, 491 (1915)).

Justice Brennan also wrote that he would look more critically at awards of punitive damages that were made pursuant to only minimal legislative guidance than at those that were made within a legislatively imposed range. *See* 109 S. Ct. at 2923 (Brennan, J., concurring). His inclination to give more deferenc to damages set by the legislature could be attributed to the view that a legislatively determined amount is likely to comply with societal notions of fairness, and thus comport with the fundamental fairness required by substantive due process.

The dissent alludes to the possibility of a challenge under the notions of both procedural and substantive due process. *See* 109 S. Ct. at 2924 (O'Connor, J., concurring in part and dissenting in part) ("[N]o due process claims—either procedural or substantive—are properly presented in this case. . . . I share Justice Brennan's view . . . and adhere to my prior comments . . . regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages.").

For a discussion of the distinctions between substantive and procedural due process, see Daniels v. Williams, 474 U.S. 327, 337-40 (1984) (Stevens, J., concurring) (arguing that substantive due process prevents certain government actions "regardless of the fairness of the procedures used to implement them," while procedural due process prevents certain deprivations without adequate procedures).

5. *See, e.g., Judicial Restraint Means No Big Wins For Corporate America*, Legal Times, July 24, 1989, at 45; *A Right Turn, But No Free Ride For Business*, BUS. WEEK, July 10, 1989, at 27.

6. *See, e.g.*, Life & Health: Financial Services Edition, July 24, 1989, at 12 ("We are gratified by the opinions rendered in . . . *Browning-Ferris*." "[The ruling] was a temporary setback for the business community, but it also cleared a neat path for a conclusive decision on the constitutional fairness of unconstrained punitive assessments sometime in the future."); *Ray of Hope*, Automotive News, July 3, 1989, at 4.

Browning-Ferris Industries (BFI) began to offer "roll-off" collection services in Burlington, Vermont.[7] Roll-off waste collection is preformed at industrial and construction sites and requires large-scale equipment. Browning-Ferris was the sole provider of roll-off services in the Burlington market until 1980, when BFI's local district manager, respondent Joseph Kelley, left to begin his own company, respondent Kelco Disposal. By 1982, Kelco had acquired forty-three percent of the roll-off market.[8] After receiving explicit instructions from BFI's regional vice-president to put Kelco out of business,[9] BFI's Burlington office reduced its roll-off prices by forty percent for approximately six months.[10] Mr. Kelley and Kelco filed suit, alleging that, through this price reduction, BFI had attempted to monopolize the Burlington roll-off market in violation of section 2 of the Sherman Act[11] and had interfered with Kelco's contractual relations in violation of Vermont tort law.[12] The jury found against BFI on both counts and returned a verdict for $51,146 on the antitrust claim and for $51,146 in compensatory damages on the tort claim.[13] In addition, the jury awarded $6 million in punitive damages on the tort claim.[14] The Second Circuit affirmed,[15] and the Supreme Court granted BFI's petition for certiorari.[16]

Browning-Ferris argued before the Supreme Court that such enormous punitive damages were prohibited by the Eighth Amendment's Excessive Fines Clause, the Fourteenth Amendment's Due Process Clause, and federal common law. In a seven-to-two decision, the Court held that the Excessive Fines Clause does not apply to punitive damages in private suits

7. BFI operates a nationwide waste-collection and disposal service. It offered roll-off services in Burlington through its subsidiary, Browning-Ferris Industries of Vermont. *See* 109 S. Ct. at 2912.

8. *See id.*

9. According to evidence produced at trial, Browning-Ferris's regional vice president told the Burlington manager, "Put [Kelley] out of business. Do whatever it takes. Squish him like a bug." The Burlington salesman was also ordered to put Kelley out of business and was told to "give the stuff away" if necessary. *Id.* at 2912.

10. *See* Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vt., Inc., 845 F.2d 403, 406 (2d Cir. 1988).

11. 15 U.S.C. § 2 (1982).

12. *See* 109 S. Ct. at 2913.

13. *See* 845 F.2d at 406-07.

14. *See id.* The punitive damage award of 117 times the actual damages suffered by Kelco far exceeded the highest award of punitive damages previously recorded in Vermont. *See* 109 S. Ct. at 2924 (O'Connor, J., concurring in part and dissenting in part).

15. *See* 845 F.2d 403 (2d Cir. 1988).

16. *See* 488 U.S. 2914 (1988).

where the government neither prosecutes the action nor has an interest in collecting any of the proceeds.[17] All nine justices agreed that the due process claim had not been properly presented because it had not been raised below and had not been mentioned specifically in the petition for certiorari.[18] The Court also refused to find that the due process claim was within the "clear intendment" of the petitioner's other claims.[19] Finally, the Court unanimously refused to adopt a federal common-law standard of excessiveness.[20]

The majority opinion, written by Justice Blackmun and joined by Chief Justice Rehnquist, and Justices Kennedy, Scalia, and White,[21] based its Eighth Amendment holding on its finding of Framers' intent. In the absence of direct evidence regarding what the Framers had meant by the word "fine," the Court relied on evidence that at the time the Eighth Amendment was drafted, this term referred to a sum paid to a sovereign in criminal actions, while the term "damages" was limited to the civil context.[22] The Court also looked to the origins and historical purpose of the Clause, finding that it was directed at limiting potential abuse of the government's prosecutorial power.[23] Specifically, the Court found that the Excessive Fines Clause was based on an earlier clause in the Virginia Declaration of Rights, which had in turn adopted verbatim a clause from the English Bill of Rights of 1689.[24] The Court found that this portion of the English Bill of Rights was aimed at the practice whereby the king's judges would impose fines on the king's enemies.[25] Justice Blackmun concluded that the Framers of our

17. *See* 109 S. Ct. at 2914.

18. *See id.* at 2921.

19. *See id.* at 2921 n.23.

20. The Court noted that in an action where state law determines the basis for decision, the factors that a jury may consider in setting a punitive damage award and the propriety of a given award are matters of state law, while federal law controls the standards of judicial review. The Court refused to adopt a federal common-law standard of excessiveness based on proportionality between punitive and compensatory damages or reference to statutory penalties for similar conduct because doing so would ignore the distinction between issues of state and federal law. *See id.* at 2922.

21. Justices Brennan and Marshall concurred in the Court's Eighth Amendment holding.

22. The Court based these conclusions on contemporary legal commentaries and dictionaries. *See* 109 S. Ct. at 2915 nn.6 & 7.

23. *See id.* at 2915.

24. *See id.* at 2916. Clause 10 of the English Bill of Rights states that "Excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 W. & M., 2nd Sess., ch. 2, 3 Stat. at Large 440, 441 (1689).

25. *See* 109 S. Ct. at 2916 (citing Lord Townsend v. Hughes, 2 Mod. 150, 86 Eng.

Bill of Rights had intended the Excessive Fines Clause to limit the government's prosecutorial power because they were aware of the abuses that had led to the English Bill of Rights, and, in addition, the word "fines" in that document had the same definition as it had when our own Excessive Fines Clause was drafted.[26]

Browning-Ferris argued that the Court should trace the history back further and look to the predecessor of the English Bill of Rights, the Magna Carta, and the limits it placed on amercements.[27] At common law, "amercements" were payments required of individuals who were in the "king's mercy" for conduct deemed offensive to the crown.[28] Chapter 20 of the Magna Carta limited amercements by (1) permitting amercements to be awarded only where there was some genuine offense against the crown, (2) prohibiting amounts that were disproportionate to the offense or that would deprive the wrongdoer of his livelihood, and (3) requiring that the amount of an amercement be fixed by the offender's peers.[29] Justice Blackmun responded that the Court was reluctant to rely on Thirteenth-Century English practice that conflicts with more recent history, and, in any event, the Court's understanding of amercements differed from BFI's.[30] Whereas the petitioner characterized amercements as civil,[31] the Court viewed amercements strictly as payments to the crown.[32] The Court further

Rep. 994 (C.P. 1677)). The Court argued that this interpretation of the English clause is supported by English case law decided prior to the adoption of the Bill of Rights, which stressed the difference between civil damages and criminal fines. *But see* 109 S. Ct. at 2929 (O'Connor, J., concurring in part and dissenting in part) (arguing that *Hughes* is inapposite because it was decided at a time when damages were understood only as compensation and because the *Hughes* jury was instructed to award damages only for the harm sustained by the plaintiff).

26. The Court found that the definitions of "fine" and "damages" in use when the Eighth Amendment was drafted had already been established when the English Bill of Rights was written. *See* 109 S. Ct. at 2916.

27. *See* Brief for Appellant at 18, Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vt., Inc., 109 S. Ct. 2909 (1989) (No. 88-556).

28. *See* 109 S. Ct. at 2917; *id.* at 2927 (O'Connor, J., concurring in part and dissenting in part).

29. *See id.* at 2918.

30. *See id.* at 2916-17.

31. *See* Reply Brief for Appellant at 4-5, Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vt., Inc., 109 S. Ct. 2909 (1989) (No. 88-556).

32. *See* 109 S. Ct. at 2917. In doing so, the Court ignored BFI's contention that amercements were not always paid to the king. "In some instances, they were payable to the local lord, the sheriff, or even the sewer commission." Reply Brief for Appellant at 6 (citing 2 F. POLLOCK & W. MAITLAND, HISTORY OF ENGLISH LAW, 513 (2d ed. 1899); CALLIS ON SEWERS, 210-13 (4th ed. 1824)). Although the Court did not address the point, it could be argued that the local lord, the sheriff, and the sewer commission were

found that the Magna Carta was aimed at limiting the tyrannical use of amercements to raise revenues unfairly and to oppress the king's political opponents and asserted that concerns regarding such potential abuse "are clearly inapposite in a case where a private party receives exemplary damages . . . and the government has no share in the recovery."[33] The Court ended its discussion of English history by asserting that any confusion between criminal and civil law at the time of the Magna Carta is irrelevant because the English courts themselves have never understood the amercements clause to be relevant in the context of private damages.[34]

Although the Court acknowledged that it has recognized the need to be flexible in Eighth Amendment jurisprudence,[35] it concluded that such flexibility is inappropriate here. Justice Blackmun based this conclusion on the fact that the practice of awarding punitive damages existed when the Eighth Amendment was drafted, but the Framers failed to include punitive damages expressly within the scope of the Amendment.[36] In short, the Court refused to extend the Excessive Fines Clause beyond what the Court perceived to be its intended context, the protection of individuals from arbitrary criminal prosecutions and civil actions in which government power might be

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all representatives of the king. The Court's characterization of amercements as payments to the crown is more problematic, however, if a portion of the amercement was paid to a wrongful death victim's family—a possibility raised by the dissent. *See* 109 S. Ct. at 2927 (O'Connor, J., concurring in part and dissenting in part) (citing R. STINGHAM, MAGNA CARTA: FOUNTAINHEAD OF FREEDOM 40 (1966)).

33. 109 S. Ct. at 2918.

34. *See id.* at 2919 ("It is difficult to understand how Magna Carta or the English Bill of Rights as viewed through the lens of Magna Carta, compels us to read our Eighth Amendment's Excessive Fine Clause as applying to private damages when those documents themselves were never so applied.") In support of this argument the Court noted that when the House of Lords put limits on exemplary damages, it mentioned neither the Magna Carta nor the Bill of Rights. *See id.* at 2919 n.18 (citing Rookes v. Barnard [1964] A.C. 1129, 1221-31). *But see id.* at 2930 (O'Connor, J., concurring in part and dissenting in part) (The failure to cite the Magna Carta or English Bill of Rights is insignificant because English courts need not cite these two documents as they are ingrained as part of English common law.).

Even if the English court deliberately did not apply the Magna Carta or the English Bill of Rights to private damages, the majority's reliance on this omission is odd. The fact that our constitutional prohibition against excessive fines originated from the English provisions does not mandate that the development of our Excessive Fines Clause imitate the development of English constitutional law.

35. "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." *Id.* at 2919-20 (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

36. *See id.* at 2919-20.

used to harass individuals.[37] Noting the lack of positive state action, the Court dismissed as unpersuasive the fact that punitive damages are imposed through the courts and thereby advance governmental interests of punishment and deterrence.[38]

Justice O'Connor, joined by Justice Stevens, dissented from the Court's Eighth Amendment holding.[39] According to Justice O'Connor's interpretation of the history of the Excessive Fines Clause and the nature of punitive damages, the Clause applies to punitive damages.[40] Justice O'Connor examined the history of both amercements and fines and concluded that the limitations in the Magna Carta and the English Bill of Rights applied to penalties paid to private individuals, as well as to those paid to the king. She concluded that because there was little distinction between tort law and criminal law when amercements originated, they were neither completely civil nor completely criminal.[41] According to Justice O'Connor's understanding of the historical record, a fine was a "voluntary" payment made to the crown to avoid a prison sentence for a common-law crime or to avoid royal displeasure.[42] Although in theory one was voluntary and the other was not, fines and amercements served the same function and it was difficult to distinguish them in practice. By the Seventeenth Century, fines had displaced amercements as the preferred sanction; the term "fine" adopted its modern meaning; and the term "amercements" dropped out of usage.[43] When the English Bill of Rights was

37. *See id.* at 2920.

38. *See id.* Although BFI did argue that punitive damages serve the same purpose as criminal penalties (*see* Brief for Appellants at 17), it did not invoke the reasoning of Shelley v. Kraemer, 334 U.S. 1 (1948), to argue that the imposition of punitive damages through the courts constitutes punishment by the state, even in the absence of "positive action" by the state. Browning-Ferris might have chosen to avoid such an argument in light of recent courts' refusals to extend *Shelley* beyond its facts. *See, e.g.*, Mahoney v. National Organization for Women, 681 F. Supp. 129, 133 (D. Conn. 1987).

39. Justices O'Connor and Stevens concurred in the Court's due process and federal common-law holdings.

40. Before addressing the issue of whether the Eighth Amendment applies to punitive damages, Justice O'Connor first claimed that the Excessive Fines Clause applies to the States, as it was incorporated through the Due Process Clause of the Fourteenth Amendment. She also argued that a corporation is protected by the Excessive Fines Clause. *See* 109 S. Ct. at 2925-26 (O'Connor, J., concurring in part and dissenting in part). The majority did not reach these two threshold issues because they were unnecessary in light of its holding. *See* 109 S. Ct. at 2921 n.22.

41. *See id.* at 2927 (O'Connor, J., concurring in part and dissenting in part).

42. *See id.* at 2928 (O'Connor, J., concurring in part and dissenting in part).

43. *See id.* (O'Connor, J., concurring in part and dissenting in part). The terminology continued to cause confusion. To demonstrate that the two terms were synonymous, Justice O'Connor noted that William Shakespeare was an "astute observer of English

adopted, therefore, it incorporated the existing constitutional law, including the Magna Carta's prohibition against excessive amercements.[44] Because the term "amercement" had dropped out of usage by the time the English Bill of Rights was adopted, the dissent concluded that the word "fine" in Article 10 referred to all monetary penalties.[45]

After tracing the history of the Excessive Fines Clause, Justice O'Connor argued that the Clause applies to punitive damages because of their penal nature.[46] Justice O'Connor also criticized the majority's assumption that governmental abuse can occur only when a penalty is paid to the government[47] as unduly formalistic, pointing out that the government can abuse its powers even if the damage awards are paid to a private individual.[48]

The dissent concluded by offering a framework for determining whether a particular award is excessive. Here Justice O'Connor proposed a proportionality framework, similar to the approach applied under the Cruel and Unusual Punishment Clause.[49] Specifically, Justice O'Connor would adopt the framework developed in *Solem v. Helm*,[50] which would arguably require the reviewing court to (1) defer to legislative judgments of appropriate sanctions for the conduct at issue, (2) examine the gravity of the defendant's conduct and the harshness of the

law and politics" and quoted a passage from Romeo and Juliet in which he used the terms interchangeably. *See id.* at 2928 (quoting Act III, scene 1, lines 186-89). In response to this, Justice Blackmun observed that "Though Shakespeare, of course,/ Knew the Law of his time,/ He was foremost a poet/ In search of a rhyme." 109 S. Ct. at 2915-16 n.7. For a discussion of the mystery surrounding the author of this verse, see *Four Mysterious Lines (About Fines)*, N.Y. Times, June 30, 1989, at B6, col. 3.

44. *See* 109 S. Ct. at 2928 (O'Connor, J., concurring in part and dissenting in part).

45. *See id.* at 2929 (O'Connor, J., concurring in part and dissenting in part).

46. Justice O'Connor based her characterization of punitive damages as penal on language in recent cases and the fact that punitive damages satisfy the requirements delimited in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (In determining whether a sanction is penal, the court considers, *inter alia*, whether it has historically been regarded as punishment, whether it is applicable on a finding of scienter, and whether it will promote retribution and deterrence.). *See* 109 S. Ct. at 2932 (O'Connor, J., concurring in part and dissenting in part).

47. *See* 109 S. Ct. at 2929 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor asserted that this assumption is based on the mere "historical accident" that monetary sanctions were paid to the king and his barons prior to the mid-1700s.

48. *See id.* at 2932 (O'Connor, J., concurring in part and dissenting in part). As analogous support for this argument, Justice O'Connor cited Lugar v. Edmundson Oil Co., 457 U.S. 922 (1982) (due process applies to prejudgment attachment procedure when state officers act jointly with private creditor to secure property in dispute).

49. U.S. CONST. amend. VIII ("nor cruel and unusual punishments inflicted").

50. 463 U.S. 277 (1983).

punitive damage award, and (3) compare civil and criminal penalties imposed in that jurisdiction for different types of conduct, as well as civil and criminal penalties imposed by different jurisdictions for the same or similar conduct.[51]

Both the majority and the dissent justified their decisions in terms of the underlying purpose of the Eighth Amendment: protecting the individual from arbitrary government action. The majority's view of government action, however, is unduly narrow. It represents a formalistic understanding of state action that cannot survive post-realist jurisprudence and contradicts precedent.[52] Throughout its opinion, the majority focused on whether the government is an actual party to the litigation, concluding that the Excessive Fines Clause is implicated only when the government prosecutes the action or is a recipient of the damages.[53] The Court recognized that the Eighth Amendment limits the steps the government can take against the individual as punishment,[54] but it found that the Excessive Fines Clause is not implicated where the government is not directly involved as a party. According to the Court's logic, the Eighth Amendment's purpose of protecting the individual against arbitrary government action is implicated in criminal actions, not because the state imposes criminal penalties, but because the state prosecutes the action. Yet, if the Eighth Amendment were directed at the government's prosecutorial function, it follows that the Amendment would limit prosecutorial discretion to some extent. The Eighth

51. *See* 109 S. Ct. at 2933-34 (O'Connor, J., concurring in part and dissenting in part).

52. *Cf.* Lugar v. Edmundson Oil Co., Inc., 457 U.S. 922 (1981) (Constitutional due process requirements apply to pre-judgment attachment procedures whenever state actors act jointly with a private creditor to secure the property in dispute.).

53. *See, e.g.*, 109 S. Ct. at 2915 ("[T]he primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial power' . . . ."); *id.* at 2918 (Concerns that the King would use his power to oppress political opponents or unfairly raise revenues are "clearly inapposite in a case where . . . the government had no share in the recovery.").

The majority did leave open expressly the question whether a *qui tam* action, in which a private party brings a suit in the name of the United States and shares in any damage award, falls within the Excessive Fines Clause. *See id.* at 2920 n.21. *But see id.* at 2932-33 (O'Connor, J., concurring in part and dissenting in part) (arguing that the majority's opinion logically compels that the Excessive Fines Clause apply whenever a portion of a punitive damage award is recovered by a government entity, despite the majority's claim of having left the question open).

54. "[T]he Eighth Amendment places limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments." *Id.* at 2920.

Amendment, however, cannot be directed at governmental discretion over which prosecutions to pursue or what punishments to seek[55]; it can only be directed at what strictures can be imposed during the pendency of a case and what punishments can be inflicted upon conviction. The Eighth Amendment is aimed at the actual determination of punishment, which is both a legislative and judicial task[56] that involves the government *regardless* of whether it is a party to the action. Although the majority's approach ignores this logic, the dissent's approach recognizes it by focusing on the penal nature of punitive damages. Thus, the dissent's result is more defensible in light of the purpose behind the Eighth Amendment, even as that purpose is articulated by the majority.[57] The majority's result, on the other hand, can only be rationalized by a strict construction of the Framers' intent based on a formal distinction between civil and criminal actions.

The Court's literalist approach in this case not surprisingly has disappointed the business community.[58] However, the Court did offer some hope for constitutional relief from growing punitive damage awards. All nine justices wrote or joined opinions that expressly left open the question whether substantive due process places limits on the size of private punitive damage awards when such awards are not determined legislatively.[59] In an almost explicit invitation, Justice Brennan, joined by Justice Marshall, wrote separately to emphasize that a due process challenge has not been foreclosed, and he indicated that he might look favorably upon one.[60] Indeed, this is the

55. This is necessarily so if the Eighth Amendment is to be read so as not to conflict with the executive prerogative of prosecutorial discretion under Article II. Without this distinction, the Court's reasoning on the Eighth Amendment would conflict with separation of powers. The Court has held that a prosecutor has broad discretion in deciding which actions to prosecute so long as he does not single out members of racial, religious, or ethnic groups or individuals with certain political beliefs. *See, e.g.*, United States v. Smith, 354 A.2d 510, 513 (D.C. App. 1976) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886); United States v. Falk, 479 F.2d 616 (7th Cir. 1973)).

56. *Cf.* Mistretta v. United States, 109 S. Ct. 647, 650 (1989) (In upholding the new federal sentencing guidelines, the Court found that determination of punishment in the criminal sentencing context was not assigned exclusively to any branch of government.).

57. The dissent recognizes that there is a possibility of arbitrary government action against the individual even when the government is not a party to the action. *See* 109 S. Ct. at 2929 (O'Connor, J., concurring in part and dissenting in part).

58. *See supra* note 5.

59. *See supra* note 4.

60. "I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in

second time since 1988 that a concurring opinion has indicated an inclination to find due process limits to punitive damages.[61] Despite these clear signals, the Court has thus far avoided the issue. Since *Browning-Ferris* was decided, the Court has denied certiorari in three cases raising the issue.[62] The Court may have found that these cases were procedurally flawed[63] or that they were not compelling cases in which to decide the issue.[64] Some members of the Court also may have felt that the issue was not ripe for consideration in light of the fact that it has yet to be decided by any circuit.[65] Whatever the reason, the Court is apparently unwilling to confront the issue in the near future.

Even if the Court does consider the issue soon and holds that substantive due process does limit punitive damages, it is unlikely that the Court will add any significant restraints to the existing system. The development of standards specific enough to give due process review of punitive damages any critical power would entail "judicial legislation" that this Court is unlikely to undertake.[66] It is likely that the substantive due pro-

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civil cases brought by private parties." 109 S. Ct. at 2923 (Brennan, J., concurring). It is somewhat ironic that these two Justices would encourage an application of substantive due process to property interests in a manner reminiscent of the Lochner era. It has been suggested that Justices Brennan and Marshall were concerned that applying the Eighth Amendment to civil fines would dilute the protection given to civil liberties, but that the case-by-case substantive due process analysis would alleviate such a risk. *See* Nat'l L.J., July 10, 1989, at 1 (quoting Geoffrey Miller).

61. *See* Bankers Life and Casualty Co. v. Crenshaw, 108 S. Ct. 1645, 1655-56 (1988) (O'Connor, J., concurring) ("Appellant has touched on a due process issue that I think is worthy of the Court's consideration.").

62. *See* Goodyear Tire & Rubber Co. v. Hodder, 109 S. Ct. 3265 (1989); Cudahy Co. v. Miller, 109 S. Ct. 3265 (1989); Metromedia, Inc. v. April Enterprises, Inc., 109 S. Ct. 3242 (1989).

63. The Court could have found that the due process issue was not adequately preserved at the trial or appellate level, the same reason it refused to consider the issue in *Browning-Ferris*. *See* 109 S. Ct. at 2921.

64. In *Goodyear Tire & Rubber*, the state court had already reduced the punitive damage award from $12.5 million to $4 million. *See* Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988). In *Cudahy*, the $10 million punitive damage award was only three-and-one-third times the $3.06 million compensatory damage award. *See* Miller v. Cudahy Co., 858 F.2d 1449 (10th Cir. 1988).

65. *See* Eichenseer v. Reserve Life Insurance Co., 881 F.2d 1355, 1365 (5th Cir. 1989) (The Fifth Circuit expressly avoided the issue, refusing to be the first circuit court to confront it and found that even if excessive private punitive damages do violate substantive due process, the award at issue was not excessive.). Although no circuit has confronted this precise issue, some circuits have addressed whether due process imposes some limits on multiple punitive damage awards arising from the same conduct but paid to different plaintiffs. *See, e.g.*, In re School Asbestos Litigation, 789 F.2d 996 (3d Cir. 1986); Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. 1985).

66. Instead of reviewing the actual size of an award, the Court could review the jury instructions, scrutinizing the factors to be considered in calculating the damage award

cess requirements that the Court would impose on punitive damages would be too vague to have any practical predictive effect. To hold that substantive due process limits the amount of punitive damages that can be assessed against a defendant would be to hold that freedom from excessive punishment in the form of financial deprivations is a basic liberty interest worthy of constitutional protection.[67] Instead of specifying a quantitative standard—such as, punitive damages that exceed some multiple of compensatory damages violate substantive due process—the Court would probably articulate a more abstract test—such as, punitive damages that are unreasonable in light of the circumstances violate substantive due process.[68] Standards to be considered in evaluating the reasonableness of an award would probably include factors such as the malice of the defendant, the nature and extent of the harm caused, the amount that the defendant gained from the wrong, and the defendant's net financial worth or ability to pay. Due process review conducted pursuant to such standards would simply repeat the inquiry conducted by the jury[69] and merely allow the judge to substitute his evaluation of reasonableness for the jury's. Trial court judges already have this ability under the rules governing remittitur. If a judge finds that a particular ver-

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and determining if the instructions are sufficiently specific. Under this approach, the Court would consider whether a state's laws for determining punitive damages are unconstitutionally vague, a procedural due process analysis, which would differ from a substantive due process review of the size of the award itself. *Cf.* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (holding that the ordinance under which petitioner had been convicted was unconstitutionally vague because it failed to give adequate notice that certain conduct was prohibited.).

67. The debate over how to define the type of rights protected by substantive due process has not been (and probably never will be) resolved. A discussion of the different approaches that have been advanced is beyond the scope of this essay. This essay assumes that substantive due process protects rights that are "implicit in the concept of ordered liberty" and represent basic societal values, independently of the other provisions of the Bill of Rights. *See* Griswold v. Connecticut, 381 U.S. 479, 500-01 (Harlan, J., concurring) (quoting Palko v. Conneticut, 302 U.S. 319, 325 (1937)).

68. In the abortion context, members of the Court have criticized the development of over-specific guidelines under substantive due process. In Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), a plurality of the Court rejected the rigid trimester analysis of Roe v. Wade, 410 U.S. 113 (1973), and criticized the development of a "web of legal rules that have become increasingly intricate, resembling a code of regulations." *See Webster*, 109 S. Ct. at 3056-57; Note, *Judicial Restraint and the Non-Decision in* Webster v. Reproductive Health Services, 13 HARV. J.L. & PUB. POL'Y 263 (1990) (this issue).

69. Such review would add nothing to even the vaguest jury instructions. *See, e.g.*, 109 S. Ct. at 2923 (Brennan, J., concurring) (Jury instructions that state that "[i]n determining the amount of punitive damages, you may take account of the character of the defendants, their financial standing, and the nature of their acts" are "scarcely better than no guidance at all.").

dict is unreasonable, he has the option of ordering remittitur.[70] Substantive due process review of the size of punitive damages, therefore, would simply give judges another avenue to reduce punitive damage verdicts that they find unreasonable; it would not increase the likelihood that a judge would find a particular award to be unreasonable. In this sense, then, substantive due process review would be superfluous, and the size of punitive damage awards would remain a matter of judicial discretion.[71]

To infuse real authority into a substantive due process review of punitive damages, the Court would have to do more than merely announce a broad reasonableness standard and the factors to be considered. It would have to specify the relative weights to be given to each of the relevant factors, a task that this Court is likely to leave to legislatures.[72] Determining the appropriate weights to give each of the relevant factors would involve an intricate analysis of the goals of punitive damages and the divergent situations in which they are necessary.[73] Along with the practical difficulties, the Court would probably find it difficult to justify specific guidelines in terms of substantive due process.

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70. If the trial court judge believes that a damage award is excessive, he may offer the plaintiff the option of accepting a lower damage award in lieu of ordering a new trial. *See* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2806, at 43-44; § 2807; § 2820, at 132 (1973) (Remittitur is always offered as an alternative to new trial. A judge can grant a motion for new trial, even if substantial evidence supports the jury's verdict, if, after weighing the evidence for himself, he believes that the jury's verdict goes against the weight of the evidence. The trial court's denial of a motion for remittitur may be reversed only upon showing of abuse of discretion.).

71. Substantive due process review would increase the likelihood that awards would be struck down only if appellate judges are more likely to find that jury awards are unreasonable than trial court judges. Appellate courts can only reverse a refusal to grant remittitur or new trial upon showings of abuse of discretion. Under substantive due process review, however, an appellate judge would be able to reduce any award he found to be excessive, whether or not the trial court abused its discretion. At most, therefore, substantive due process would add a second level of judicial review in situations where a trial court judge refused to reduce a jury award. The practical impact of this review would depend on the inclination of appellate court judges to find that juries acted unreasonably relative to the inclination of trial court judges to do so.

72. This conclusion is not meant to imply that the Court will not review legislatively established frameworks. It is easier for the judiciary to review the reasonableness of an intricate law in light of the considerations articulated by the legislature than it is for the Court to establish standards itself.

73. Punitive damages function to punish undesirable behavior and to deter such behavior in the future. *See* 109 S. Ct. at 2920. Punitive damages also provide an incentive for victims to bring suits in order that punishment and deterrence can be realized. *See* W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS 12 (5th ed. 1984). These goals are implicated in situations where the harm actually caused may be large or small, the defendant may be rich or poor, and the defendant's intentions may have been mildly reprehensible or extremely malicious.

Ironically, if the Court had limited punitive damages under the Excessive Fines Clause of the Eighth Amendment, as the dissent urged, it would have been guided by the well-established standards that have developed in the criminal context under the Eighth Amendment.[74] Substantive due process has no equivalent historical content and no basis on which to rationalize specific guidelines regulating punitive damages. Any standards that the Court might announce could be criticized as arbitrary. Given the Court's reluctance to engage in "judicial legislation" through substantive due process in other contexts,[75] it is unlikely that it will give substantive due process review of punitive damages any critical force.

In *Browning-Ferris*, the business community had hoped that the Court would apply the Eighth Amendment as a limit to punitive damages. With a literal, formalistic interpretation of the Framers' intent, the Court refused to do so. Observers remain optimistic that a constitutional limit may still be found in the Due Process Clause in light of the Justices' express invitation to bring such a challenge. This invitation holds little promise. Even if the Court were to hold that substantive due process forbids excessive punitive damages, the likely constitutional review would be too vague to alter significantly the existing judicial review of punitive damages. The development of specific standards that would actually affect the determination of punitive damages is a task that the Court probably will and should leave for legislatures. Instead of relying on constitutional relief, therefore, tort reformers are better advised to focus on another forum, the state legislatures.

Elaine C. Fry

74. *See* 109 S. Ct. at 2933-34 (O'Connor, J., concurring in part and dissenting in part).

75. *See supra* notes 66-68 and accompanying text.

DISPARATE IMPACT DOCTRINE REVISITED: *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989).

Benjamin Hooks, Director of the National Association for the Advancement of Colored People, told a crowd of 35,000 protestors last August that the Supreme Court's employment discrimination decisions last Term constituted "the legal lynching of black America's hope . . . to become full partners in the American dream."[1] Mr. Hooks had four cases in mind when he made his remarks.[2] One of these cases, *Wards Cove Packing Co. v. Atonio*,[3] prompted Justice Blackmun to write a brief dissent in which he wondered "whether the majority still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was."[4]

The uproar surrounding the *Wards Cove* decision was largely, though not entirely, warranted. The decision contained three holdings clarifying the procedures and evidentiary standards by which Title VII[5] disparate impact employment discrimination claims are to be tried. The first two of the three holdings outlined the initial burden plaintiffs must meet in presenting a prima facie disparate impact case. First, the Court held that plaintiffs must come forward with statistics showing that the ra-

1. Chicago Tribune, Aug. 27, 1989, at 1, col. 3.

2. *See id.* The four cases were (1) Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (discussed *infra*); (2) Martin v. Wilks, 109 S. Ct. 2180 (1989) (allowing white fire fighters to challenge as discriminatory under Title VII an affirmative action plan that had been entered as a consent decree between the City of Birmingham and its black fire fighters following a previous discrimination suit brought by the black fire fighters); (3) Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (holding that anti-discrimination provisions of the Civil Rights Act of 1866 apply only to the terms of contracts and not to the actual performance of the parties), and (4) City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (declaring unconstitutional a city's plan to set aside thirty percent of its contracts for minority-owned contractors).

Mr. Hooks could have added to this list the case of Lorance v. AT&T Technologies, 109 S. Ct. 2261 (1989) (holding that for Title VII claims alleging intentionally discriminatory seniority systems, the statute of limitations begins to run at the time of implementation of a new seniority system, as opposed to the time when a concrete effect of the new system is felt). *But see* Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (holding that a Title VII plaintiff who shows that discriminatory intent played a partial, though not exclusive, role in an adverse employment decision shifts the burden of persuasion to the defendant to show that it would have made the same decision relying solely on legitimate grounds).

3. 109 S. Ct. 2115 (1989).

4. *Id.* at 2136 (Blackmun, J., dissenting).

5. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 to 2000e-17 (1982).

cial composition of the employer's labor force does not conform with that of the relevant labor force.[6] Second, the Court held that plaintiffs must also identify particular practices of the employer and link them to the statistical disparity in order to establish a prima facie case.[7] These two holdings were merely careful formulations of what implicitly had been the law already.

The Court's third holding, however, did depart from precedent in an important way by lessening considerably the evidentiary burden imposed upon an employer once the plaintiffs make out a prima facie showing. Previously, the employer-defendant had to meet a burden of proof, taken to mean burden of persuasion,[8] that the challenged employment practice was justified by "business necessity."[9] *Wards Cove* lessened the employer's burden to one of merely *producing* evidence that the challenged practice "serves, in a significant way, the legitimate goals of the employer."[10]

Neither logic nor legal reasoning compelled the reduction of the employer's burden from a burden of persuasion to a burden of production. Rather, this third holding seems to have been motivated by the policy-based preferences of a majority of the Justices—that is, by their feelings about what employment discrimination law "should" look like. A majority on the Court would appear to believe that employment discrimination law has laid too heavy a burden on employers, and in *Wards Cove* they have changed the law according to their perceived views.

The respondents in *Wards Cove* were nonwhite former cannery workers.[11] These mostly Filipino and Alaska Native workers had been employed by two companies that operate salmon canneries during the summer months in a remote area of Alaska. In accordance with a hiring hall agreement with the canneries, the Filipinos had been hired through and dispatched to Alaska for the summer months by a Seattle local of the International Longshoremen's Workers Union. The Alaska Natives

6. *See* 109 S. Ct. at 2121.

7. *See id.* at 2124.

8. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2792 (1988) (Blackmun, J., concurring in judgment).

9. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

10. 109 S. Ct. at 2126-27.

11. *See id.* at 2119-21.

primarily resided in villages near the cannery facilities and had been hired by the canneries directly.

At the petitioners' salmon packing facilities, there were two types of jobs: (1) unskilled cannery jobs on the cannery lines, filled predominantly by nonwhites, and (2) non-cannery jobs, most of which were skilled, higher paying, and filled by white workers. Perceiving that discrepancy, the respondents brought suit under Title VII of the Civil Rights Act of 1964,[12] alleging employment discrimination.[13] They initially argued under both "disparate treatment" and "disparate impact" theories that a number of petitioners' hiring and promotion practices were responsible for the racial stratification of the work force and had denied the respondents non-cannery employment on the basis of race.

Disparate impact and disparate treatment are the two main theories on which individuals or classes may base employment discrimination claims under Title VII.[14] Under the disparate treatment theory, the employee alleges that his employer has intentionally discriminated against him because of his membership in a protected class.[15] By contrast, under the disparate impact theory, the employee alleges that a *facially neutral* practice, such as a high school diploma requirement, has had a disproportionately adverse effect on members of a protected class and is discriminatory as such, absent a legitimate business justification.[16] In other words, under the disparate impact basis for

12. 42 U.S.C. § 2000e-2(a) provides in part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

13. *See* Atonio v. Wards Cove Packing Co., 34 Empl. Prac. Dec. (CCH) ¶ 437 (W.D. Wash. 1983).

14. In addition to disparate treatment and disparate impact theories, an employee may sue his employer under Title VII for "failure to make reasonable accommodations" for the employee's handicap or religious beliefs. *See* Corbett, *Proving and Defending Employment Discrimination Claims*, 47 MONT. L. REV. 217 (1986); *see also* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1983 & Supp. 1983-85).

15. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (alleging intentional gender discrimination); McDonnell Douglas v. Green, 411 U.S. 792 (1973) (alleging intentional race discrimination).

16. A unanimous Supreme Court first formulated the disparate impact theory of Ti-

liability, a facially neutral employment practice may be deemed violative of Title VII regardless of the employer's actual intent.

The respondents challenged many of the companies' practices, including nepotism, a rehire preference, a lack of specified objective hiring criteria for many jobs, separate hiring channels for the cannery and non-cannery jobs, a practice of not promoting from within, and separate housing and dining facilities for the cannery and non-cannery workers.[17] The district court conducted a bench trial, after which it rejected all of respondents' disparate treatment claims. The trial judge held that the respondents had failed to prove that the companies intentionally discriminated against them; instead he ruled that the challenged practices arose from the unique institutional features of the salmon packing business.[18]

The district court also rejected respondents' disparate impact claims. The court concluded that respondents had failed to prove that the companies' "objective" employment practices (for example, an on-the-job English language requirement, failure to post non-cannery job opportunities, and the rehire preference) actually produced a disparate impact harming a group

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tle VII liability in 1971 in Griggs v. Duke Power Co., 401 U.S. 424 (1971). In *Griggs*, the Court found that an employer's requirements of a high school diploma and a satisfactory score on a written test violated Title VII, regardless of the employer's intent, because these particular employment practices had a disparate impact on black and white job applicants, favoring the white applicants, and because the requirements in question were insufficiently indicative of future job performance. Writing for the Court, Chief Justice Burger construed Title VII to proscribe "not only overt discrimination but also practices that are fair in form but discriminatory in operation," adding that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' [sic] for minority groups and are unrelated to measuring job capability." *Id.* at 431-32.

17. *See* 34 Empl. Prac. Dec. (CCH) ¶ 437 (W.D. Wash. 1983).

18. For example, according to the trial court, although the mostly non-white cannery workers were housed together in facilities inferior to those in which the mostly white non-cannery workers were housed, this segregation was not the result of discriminatory intent. Instead, the non-cannery workers had to arrive in Alaska several weeks before the cannery workers, when the weather was still cold. Consequently, the non-cannery workers' housing was better insulated and sturdier. Furthermore, the company minimized costs by opening only one dormitory at a time as different classifications of workers arrived en masse.

Similarly, the district court found no discriminatory intent underlying the rehire preference, which it considered tantamount to a seniority system. The policy of not promoting from within was also exonerated, as the court accepted the company's explanation that the short, intense salmon packing season did not permit time for training cannery workers for non-cannery jobs. The other challenged practices either were found also not to have been the result of discriminatory intent, or, like nepotism, were found not to have existed at all. *See* Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1126 (9th Cir. 1985).

protected under Title VII.[19] The employees, however, had also argued that the court should analyze the companies' "subjective" employment practices[20] under the disparate impact theory. The challenged subjective practices included a lack of stated objective qualifications for many classifications of jobs, word-of-mouth recruiting, operation of separate hiring channels for cannery and non-cannery jobs, and the policy that for many jobs, the hiring officers were free to hire whomever they considered "best for the job." The district court, however, held that subjective practices such as these can be tested only under disparate treatment theory, which addresses intentional discrimination, and not under disparate impact theory.[21]

On appeal, a panel of the Ninth Circuit affirmed,[22] but the affirmation was then vacated when the Court of Appeals agreed to hear the case en banc.[23] The en banc hearing was ordered to settle an intra-circuit conflict over the question of whether subjective hiring practices could be analyzed under the disparate impact theory. The Ninth Circuit held, as the Supreme Court was subsequently to rule in *Watson v. Forth Worth Bank & Trust*,[24] that disparate impact analysis could indeed be applied

19. *See* 109 S. Ct. at 2120.

20. Subjective practices are considered those that involve discretion by the decisionmaker and that require the decisionmaker's drawing on his past experiences, beliefs, and perspectives. Interviews and performance evaluations based on nonquantifiable factors are two common subjective practices. *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 14, at 191-205.

21. *See* 34 Empl. Prac. Dec. ¶ 437 (W.D. Wash. 1983).

22. *See* 768 F.2d 1120 (9th Cir. 1985).

23. *See* Atonio v. Wards Cove Packing Co. 787 F.2d 462 (9th Cir. 1985) (granting petition for en banc rehearing).

24. 108 S. Ct. 2777 (1988). The *Watson* Court ruled that the plaintiff could challenge under disparate impact theory her employer's reliance on a manager's personal judgment as the main criterion for promotion. Five justices agreed that even though the employer may not have intended to discriminate, its practice of relying on the subjective judgment of managers may have had a discriminatory effect:

> Even if one assumed that [intentional] discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain. . . . If an employer's undisciplined system of subjective decision making has precisely the same effect as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discrimination should not apply.

Id. at 2786-87. Furthermore, if subjective criteria were excluded from disparate impact analysis, objective criteria could easily be shielded from scrutiny by disguising the employment practice as a subjective practice.

> Thus, for example, if the employer in *Griggs* had consistently preferred applicants who had a high school diploma and who passed the company's general aptitude test, its selection system could nonetheless have been construed 'subjective' if it also included brief interviews with the candidates . . . . If we an-

to subjective hiring practices.[25] Because the en banc holding reversed the district court's ruling on subjective employment practices, the Court of Appeals remanded the case to a panel for further proceedings.

On remand, the panel applied the en banc ruling and concluded that respondents had indeed made out a prima facie case of disparate impact in hiring for both skilled and unskilled non-cannery positions.[26] The panel relied solely on the respondents' statistics which showed a high percentage of nonwhites in cannery jobs and a lower percentage of nonwhites in non-cannery jobs. The court then remanded the case to the district court, instructing it that the employers bore the burden of persuading the factfinder that its hiring and promotion practices were justified by "business necessity" because a prima facie case had been established by respondents.[27]

The Supreme Court reversed the Ninth Circuit's ultimate holding in a five-to-four decision. For the majority, Justice White[28] wrote that the respondents had not presented a prima facie case for two reasons: First, the Court considered the respondents' statistical evidence—comparing the racial composition of cannery workers with that of non-cannery workers—to be irrelevant.[29] Second, the Court held that even if the statistics had been the right sort, the respondents would still have failed to establish a prima facie case because they had not isolated one or more particular employment practices as the cause of the statistical disparity.[30] These first two holdings amounted to explicit statements of what had implicitly been the law all along.

The Court then proceeded to depart from precedent in its third holding by declaring that once plaintiffs in a disparate impact case successfully make a prima facie showing, the burden shifts to the defendant to produce evidence that the "chal-

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nounced a rule that allowed employers so easily to insulate themselves from liability under *Griggs*, disparate impact analysis might effectively be abolished. *Id.* at 2786.

25. *See* Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1482 (9th Cir. 1987) (en banc).

26. *See* Atonio v. Wards Cove Packing Co., 827 F.2d 439 (9th Cir. 1987).

27. *See id.* at 444-45.

28. Justice White was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy.

29. *See* 109 S. Ct. at 2121.

30. *See id.* at 2124.

lenged practice serves, in a significant way, the legitimate goals of the employer."[31] In the past, a prima facie case had shifted a weightier burden of persuasion to defendants, requiring employers to prove by a preponderance of the evidence that the challenged employment practices were justified by "business necessity."[32]

Justice Stevens vigorously dissented,[33] disputing each of the three holdings. Justice Blackmun also wrote a short and passionate dissent in which Justices Brennan and Marshall joined.

Historically, the first requirement of a successful disparate impact claim has been for the employees to produce statistical evidence tending to show an imbalance of race, sex, or some other statutorily protected category, in the employer's work force.[34] The *Wards Cove* plaintiffs intended to meet this preliminary evidentiary requirement with data demonstrating that the low-paying cannery jobs were held overwhelmingly by nonwhites, whereas the higher-paying skilled and unskilled noncannery jobs were held overwhelmingly by whites. The Supreme Court, however, ruled that comparing the racial composition of the class of non-cannery workers with the racial composition of the class of cannery workers was an irrelevant comparison. Justice White explained that the proper comparison is "between the racial composition of the qualified persons in the labor market and [that of] the persons holding at-issue [non-cannery] jobs."[35] This ruling merely reiterated what had already been stated as the law.[36]

The Court reviewed the respondents' argument that they had suffered disparate impact discrimination in hiring for both types of non-cannery jobs: skilled and unskilled. With respect to *skilled* non-cannery jobs, the Court described the Ninth Cir-

31. *Id.* at 2125-26.

32. *See Watson*, 108 S. Ct. at 2792 (Blackmun, J., concurring in judgment).

33. Justice Stevens was joined in dissent by Justices Blackmun, Brennan, and Marshall.

34. *See* B. SCHLEI & P. GROSSMAN, *supra* note 14, at 98-102.

35. 109 S. Ct. at 2121. When general labor market statistics are difficult to ascertain, however, the Court stated it would allow substitution by measures indicating the racial composition of "otherwise qualified" applicants for the at-issue jobs. *Id.*; *see also* New York City Transit Authority v. Beazer, 440 U.S. 568, 585 (1979) (comparison of racial composition of at-issue jobholders with racial composition of applicants may be probative when general labor market figures are unavailable).

36. *See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977) ("proper comparison [is] between the racial composition of [the at-issue] jobs and the racial composition of the qualified . . . population in the relevant labor market").

cuit's acceptance of the comparison between the racial composition of the cannery work force and that of the non-cannery work force as "nonsensical" because the cannery work force "in no way reflected 'the pool of *qualified* job applicants' or the '*qualified* population in the labor force.' "[37] Justice White further reasoned that "[i]f the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault), petitioners' selection methods of employment practices cannot be said to have had a 'disparate impact' on nonwhites."[38]

With respect to *unskilled* non-cannery jobs, the Supreme Court also rejected the statistical comparison between the cannery and non-cannery jobs. The Court held that

> [r]acial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions, even where workers for the different positions may have somewhat fungible skills (as is arguably the case for cannery and unskilled noncannery workers).[39]

The Court rejected the respondents' argument that the cannery workers should be considered the potential labor force against which to compare the racial composition of the unskilled non-cannery jobs. Justice White reasoned that the relevant labor market for the at-issue unskilled non-cannery jobs was much broader than merely the pool of cannery workers, as "there are obviously many qualified persons in the labor market for noncannery jobs who are not cannery workers."[40]

Justice White's opinion also pointed to the "peculiar facts" of the case which "further illustrate[d] why a comparison between the percentage of nonwhite cannery workers and nonwhite noncannery workers is an improper basis for making out a claim of disparate impact."[41] The nonwhites had not so much been *under*represented in non-cannery positions, as they had been *over*represented in cannery positions. The salmon packing companies had contracted with a predominantly Filipino union local to fill the cannery jobs. If the employers had hired from a

37. 109 S. Ct. at 2121.
38. *Id.*
39. *Id.*
40. *Id.* at 2123.
41. *Id.*

more racially balanced union for cannery jobs and had otherwise maintained the very same employment policies with regard to non-cannery jobs, then respondents' argument for disparate impact would evaporate. The ironic result of the respondents' theory that a racial imbalance across divisions of a company should be sufficient to demonstrate disparate impact is that employers may simply take efforts to ensure that minorities are never overrepresented in any segment of the company. The Court feared that respondents' theory would force employers to establish quotas across all departments of their work force to avoid costly litigation. The Court, however, noted that a quota system would be contrary to Congress's intent in passing Title VII.[42]

Justice Stevens's dissent countered that comparing the racial composition of the non-cannery jobs with the "untailored general population statistics on which [the employers] focus" was actually less probative than a comparison against the cannery workers.[43] Justice Stevens pointed out that the majority's relevant work force—all unskilled workers in California, Alaska, and the Pacific Northwest—is not a group that is necessarily willing to travel to remote Alaska for the temporary work. Rather, the cannery workers are a better tailored group for comparison purposes because they have already demonstrated their willingness to work in the industry and in remote Alaska.[44] Nevertheless, the respondents made no showing that unskilled west coast workers are generally unwilling to work summers in Alaska or that the cannery workers themselves sought the unskilled non-cannery positions.[45] Upon finding the statistical evidence inadequate to support a prima facie case,

42. *See id.* at 2122. Title 42 U.S.C. § 2000e-2(j) states:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion . . . in any community, state, section, or other area, or in the available work force in any community, state, section, or other area.

43. 109 S. Ct. at 2134-35 (Stevens, J., dissenting).

44. *See id.* at 2135 (Stevens, J., dissenting).

45. *See id.* at 2123.

the Court remanded to the district court for determination of whether the record supported some other basis for a disparate impact finding.

In addition, the Court held that even if the statistics had somehow proven adequate, statistical evidence *alone* would not have sufficed to make out a prima facie disparate impact case.[46] According to the Court, the respondents also would have had to identify a particular employment practice as the cause of the disparity in racial composition between the non-cannery jobholders and the relevant external labor market. As Justice White wrote for the majority, "a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate impact suit under Title VII."[47] The Court feared that if evidence of "specific causation" were not required of plaintiffs, employers would potentially be liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces."[48] Furthermore, the Court argued that if statistics alone could create a prima facie disparate impact case, Title VII could have the effect of imposing quotas upon employers who would fear the costs of defending themselves in future litigation, contrary to Congress's intent in passing Title VII.[49] Indeed, employers that are found liable in a case based solely on statistics would not have been put on notice as to which practice they should change because of its wholly unintended discriminatory effect.

This "specific causation" requirement was first articulated by the plurality in *Watson*.[50] Even before *Watson*—although the specific causation requirement was never expressly mentioned by name—plaintiffs still in effect had the burden of identifying the specific employment practices as the cause of the disparate impact. In prior cases, plaintiffs had linked particular employment practices and devices with the racial imbalance they had demonstrated. These practices have included written examina-

46. *See id.* at 2124-25.

47. *Id.*

48. *Id.* at 2125 (quoting *Watson*, 108 S. Ct. at 2787 (plurality opinion)).

49. *See* 42 U.S.C. § 2000e-2(j); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring) (Title VII not intended to impose hiring quotas); *Watson*, 108 S.Ct. at 2780 (1988) (plurality opinion).

50. *Watson*, 108 S. Ct. at 2788 (plurality opinion). Justice O'Connor's opinion was joined by Chief Justice Rehnquist, Justice White, and Justice Scalia.

tions,[51] diploma requirements,[52] minimum height and weight requirements,[53] and rules against employing drug users.[54] Plaintiffs had also been free to challenge more than one practice.[55]

The fact that the Court never enunciated the specific causation requirement prior to *Watson* and *Wards Cove* reflects not the newness of the requirement, but the fact that plaintiffs had previously isolated the practices they alleged were producing a disparate impact. Prior to *Watson*, the Court did not have occasion to articulate a specific causation requirement. The *Watson* decision, however, massively expanded the scope of disparate impact liability by ruling that subjective employment practices may be challenged under the disparate impact theory. Consequently, the *Watson* plurality found that the "extension of disparate impact analysis" called for a close examination of the "constraints that operate to keep that analysis within its proper bounds,"[56] and in the course of its review articulated the "specific causation" requirement.[57] The Ninth Circuit's final *Wards Cove* decision also demonstrated that the specific causation requirement is indeed nothing novel. That court held that "it is . . . essential that the practices identified by the cannery workers be linked causally with the demonstrated adverse impact."[58]

Despite this fact, the Supreme Court's express announcement of a specific causation requirement has aroused a great deal of opposition. Justice Stevens wrote in dissent that the "additional proof requirement [of specific causation] is unwarranted," though he did not adequately explain why. He conceded that "a plaintiff cannot recover upon proof of injury alone; rather, the plaintiff must connect the injury to an act of the defendant in order to establish prima facie that the defendant is liable."[59]

In the political sphere, Democratic Sen. Howard Metzen-

51. *See* Connecticut v. Teal, 457 U.S. 440 (1982); *Albemarle Paper*, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

52. *See Griggs*, 401 U.S. 424 (1971).

53. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977).

54. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979).

55. *See Griggs*, 401 U.S. 424 (1971) (challenging both diploma requirement and written examination).

56. *Watson*, 108 S. Ct. at 2788 (plurality opinion).

57. *Id.* (plurality opinion).

58. 827 F.2d at 445 (decided before *Watson*).

59. 109 S. Ct. at 2132-33 (Stevens, J. dissenting).

baum of Ohio has introduced a bill that would undo the specific causation requirement. His proposed "Fair Employment Reinstatement Act"[60] would amend the Civil Rights Act of 1964 and would allow employees to meet their preliminary prima facie burden by demonstrating that "a group of employment practices results in a disparate impact" without having to demonstrate "which specific practice or practices within the group resulted in such disparate impact."[61]

Although the specific causation requirement did not represent a break from the past, the Supreme Court's next holding—that an employee's prima facie showing shifts to the employer only a "burden of *producing* evidence of a business justification for his employment practice"[62]—is indeed a significant change in the law. In prior cases, the Court had ruled that a prima facie disparate impact case shifts a burden of proof to the defendant.[63] While acknowledging that "some of our decisions can be read as suggesting otherwise," Justice White claims that "to the extent that those cases speak of an employer's 'burden of proof' with respect to a legitimate business justification defense, . . . they should have been understood to mean an employer's production—but not persuasion—burden."[64] Despite the Court's attempt to equate the burden of proof with only a burden of production, commentators,[65] the Courts of Appeals,[66] and even the Supreme Court[67] have understood the earlier Supreme Court decisions to mean a burden of persua-

60. S. 1261, 101st Cong., 1st Sess. (1989).

61. S. 1261, 101st Cong., 1st Sess. § 2 (1989).

62. 109 S. Ct. at 2126 (emphasis added).

63. *See, e.g., Albemarle Paper*, 422 U.S. 405, 425 (employer must "meet the burden of *proving* that its tests are 'job related' ") (emphasis added); *Dothard*, 433 U.S. 321, 329 (1977) (employer must "*prov[e]* that the challenged requirements are job related") (emphasis added); *Griggs*, 401 U.S. 424, 432 ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question"); *see also Watson*, 108 S. Ct. at 2792 (Blackmun, J., concurring in judgment).

64. 109 S. Ct. at 2126.

65. *See, e.g., Disparate Impact Test for Sex Discrimination in Employment Under Title VII of Civil Rights Act of 1964*, 68 A.L.R. FED 19, 26; Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1211 (1981).

66. *See, e.g.*, Bunch v. Bullard, 795 F.2d 384, 393-94 (5th Cir. 1986); Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 572 (4th Cir. 1985); Nash v. Consolidated City, 763 F.2d 1393, 1397 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249, 1267 (D.C. Cir. 1984), *cert. denied sub nom.* Meese v. Segar, 471 U.S. 1115 (1985); Moore v. Hughes Helicopters, Inc. a Division of Summa Corp., 708 F.2d 475, 481 (9th Cir. 1983); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983); Johnson v. Uncle Ben's, Inc., 657 F.2d 750 (5th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982); Grant v.

sion, and not production, when they used the term "burden of proof." Indeed, the primary meaning generally assigned to "burden of proof" is "burden of persuasion," and not "burden of production."[68]

The Court's effort to reinterpret the meaning of "burden of proof" was foreshadowed by the plurality's opinion in *Watson*, which stated that only a burden of production shifts.[69] In *Wards Cove*, Justice Kennedy joined the four justices of the *Watson* plurality to forge a majority and effect this reinterpretation of the evidentiary standards. Thus, although this third holding of *Wards Cove* represents a break from the common understanding of the prior law, it should not be considered a complete surprise, as the groundwork clearly was laid by the *Watson* plurality.

Nonetheless, the reallocation of burdens will have a significant effect on disparate impact cases. In the past, business necessity was an affirmative defense to a prima facie case,[70] subject to a rebuttal by the plaintiffs that there was a less discriminatory alternative practice available that would achieve the same business objectives. After *Wards Cove*, however, "lack of legitimate business justification" will become in effect a necessary allegation that the plaintiffs will have to prove by a preponderance of the evidence. Now, once an employer produces evidence[71] of a business justification to rebut the employees' prima facie claim, plaintiffs once again will have the burden of persuasion upon them on the business rationale issue.

This reallocation of evidentiary burdens will in all likelihood make disparate impact cases significantly more difficult for plaintiffs to win. The defendants' burden of production should

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Bethlehem Steel Corp., 635 F.2d 1007, 1015 (2d Cir. 1980); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 330 (5th Cir. 1977).

But see Croker v. Boeing Co., 662 F.2d 975, 991 (3d Cir. 1981) (en banc) (relying on Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (a disparate treatment case)).

67. *See* Washington v. Davis, 426 U.S. 229, 248 (1976) (holding in dictum that Title VII disparate impact litigation involves a "probing judicial review and [low] deference to the seemingly reasonable acts of [employers]" and that employer response to prima facie case must go beyond demonstration of "some rational basis for the challenged practice").

68. *See* 31A C.J.S. *Evidence* § 103 (1964 & Supp. 1989).

69. *Watson*, 108 S. Ct. at 2790 (plurality opinion).

70. *See, e.g*, *Albemarle Paper Co.*, 422 U.S. at 425.

71. Although the majority's opinion does not explain how much evidence the employer must produce, presumably it must be "legally sufficient to justify a judgment for defendant." *Burdine*, 450 U.S. at 255.

not be difficult to meet. By contrast, the plaintiffs lack easy access to the information necessary for them to prove the existence of alternative practices that would feasibly satisfy the same legitimate business objectives, though with less racial impact, or to prove that the challenged practice is completely unrelated to the stated business rationale. Such information would typically be in the employer's hands. For this reason, from the standpoint of judicial economy, the burden of proof on the issue of business necessity should be on the employer.

The majority insisted that its decision not to transfer a burden of persuasion to the defendant is in keeping with Federal Rule of Evidence 301, which provides that a presumption

> imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party [the burden of persuasion] . . ., which remains throughout the trial upon the party on whom it was originally cast.[72]

The Court also stated that its decision not to shift the burden of persuasion is in keeping with its decision in *Texas Department of Community Affairs v. Burdine*.[73] In *Burdine*, the Court held that in a *disparate treatment* case, the burden of persuasion always remains with the plaintiff, and that a plaintiff's prima facie case shifts to the defendant only a burden of production.

As Justice Stevens correctly argued in dissent, the effort to merge the evidentiary and procedural requirements of disparate treatment and disparate impact cases is not at all compelled by logic, reason, or consistency.[74] The two theories involve vastly different proof mechanisms. In the disparate treatment context, plaintiffs establish a prima facie case with circumstantial evidence creating a presumption of discriminatory intent.[75] Like other presumptions, however, the presumption of discriminatory intent can be destroyed by the mere

72. FED. R. EVID. 301. Rule 301 adopts Professor Thayer's "bursting bubble" argument, that a presumption bursts like a bubble once rebutted by the production of opposing evidence. *See* J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 346 (1898).

73. 450 U.S. 248 (1981).

74. *See* 109 S. Ct. at 2129-2132 (Stevens, J., dissenting).

75. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the Supreme Court set forth the typical requirements for circumstantial evidence necessary to create a presumption of discriminatory intent: the complainant must show "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

production of evidence undermining the validity of the presumption,[76] in this case with evidence that the challenged practice is justified on business grounds. Intent is the ultimate fact to be proved in disparate treatment cases, and the burden of proving unlawful intent remains always with the plaintiff. As Justice Stevens argued, business necessity is not introduced as an affirmative defense, but to dispute directly plaintiff's allegation of unlawful discriminatory intent.[77]

On the other hand, in a disparate impact case, the plaintiff does not resort to presumptions to prove his allegations. A prima facie case consisting of statistics demonstrating discriminatory results and linked to one or more employment practices does not create a "presumption" of disparate impact; the prima facie case proves directly all the necessary elements of harm and causation. Unlike the disparate treatment context, in disparate impact litigation, presumptions are not used to support an allegation. The defense of business justification is not offered to "burst" a presumption of disparate impact; rather it works as an affirmative defense to the statistically demonstrated disparate impact.[78] As Justice Stevens pointed out, a defense of business necessity does not deny the validity of what the plaintiff has proven, as it does in the disparate treatment context where it weighs against the plaintiff's typically circumstantial evidence of unlawful intent.[79] Instead, a legitimate business rationale for the challenged practice explains *why* the disparate impact is necessary or unavoidable given the current labor market structure. Accordingly, the effect of the *Wards Cove* decision is to convert what had been an affirmative defense into a necessary allegation for the plaintiffs, provided that the employer can meet the relatively modest burden of producting evidence.

The Court's decision not to shift the burden of persuasion in disparate impact cases is probably best explained simply as a "sojourn into judicial activism," as charged by Justice Stevens.[80] A majority on the Court seems to feel that disparate impact cases should be tougher for plaintiffs to win and is willing to ignore stare decisis[81] arguments in their desire to change

76. *See* FED R. EVID. 301.
77. *See* 109 S. Ct. at 2131 (Stevens, J., dissenting).
78. *See id* (Stevens, J., dissenting).
79. *See id.* (Stevens, J., dissenting).
80. *Id.* at 2128 (Stevens, J., dissenting).
81. Stare decisis ensures that "the law will not merely change erratically" and "per-

the law according to their tastes. Although matters of judicial procedure are traditionally within the ambit of the Court, and although courts fill in gaps in the law all the time, once a procedure for trying a case is settled, changing the procedure is in effect changing the substantive law, and changing the law judicially is a more extreme step than filling in gaps in the first instance.

The members of the Court apparently were motivated by a concern that Title VII has been abused, is weighted too heavily in favor of plaintiffs, and unduly pressures employers. The decision to discontinue the established practice of shifting the burden of persuasion to employers upon the plaintiffs' showing of prima facie cases is the sort of policy decision that should be reserved for Congress. Ideally, Congress will consciously act soon to either endorse or overturn the *Wards Cove* decision by statute. Indeed, the Congress may in fact act on this issue. Senator Metzenbaum's proposed "Fair Employment Reinstatement Act" would override the *Wards Cove* decision and require employers, in responding to prima facie disparate impact cases, to "demonstrate that such [challenged] practices are required by business necessity."[82] Senator Metzenbaum, however, will have to contend with supporters of the decision who believe the burden of proving lack of business necessity should be on the plaintiffs.[83] Such a legislative battle should be welcomed, for the legislature is the proper forum for establishing substantive policy.

If the Court's holdings in *Wards Cove* will spur Congress into performing its proper role of debating and setting policy, then it will have been a good decision. In the meantime, however, its decision to disregard prior law by ruling that a prima facie disparate impact case shifts only a burden of production and not of persuasion, can be criticized as an unnecessary disruption of the existing political status quo. Indeed, one can understand how a civil rights activist could regard this as a "legal lynching," especially in light of the Court's other recent rulings on

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mits society to presume that bedrock principles are founded in law rather than in the proclivities of individuals." Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2370 (1989) (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986) (refusing to overrule Runyon v. McRary, 427 U.S. 160 (1976), on grounds of stare decisis)).

82. S. 1261, 101st Cong., 1st Sess. § 2(B) (1989).

83. *See* Wall St. J., Sept. 18, 1989, at A18, col. 1.

civil rights.[84]

On the other hand, the Court's "specific causation" holding was merely a more clearly defined statement of what had impliedly been the law all along and was proper, considering the congressional intent that Title VII not be construed so as to impose quotas. The Court's other holding was that the statistical evidence necessary to support a prima facie case must compare the group composition of the at-issue jobs with the composition of qualified applicants or the composition of the external relevant work force. Plaintiffs cannot merely compare the group composition of at-issue jobs with other segments of the employer's work force. This holding was also logical and proper, lest an imbalance because of the *overrepresentation* of minorities in one segment of the employer's work force subject him to Title VII liability.

Wards Cove is sure to be considered a landmark in employment discrimination law. Although two of its holdings should really be understood as explicit restatements of prior law, the third holding did upset the common understanding of the Court's precedents, and it seems to reflect the political belief of a majority of the Court that Title VII disparate impact analysis has "gone too far" and that the evidentiary burdens should be reallocated so as to make disparate impact cases more difficult for plaintiffs to win.

Jesse A. Witten

RELIGIOUS DISPLAYS AND THE FIRST AMENDMENT: *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989).

The case-by-case development of American jurisprudence often results in controversies and conflicts among the lower courts. Students of the Supreme Court hope that over time the Court will resolve these conflicts, so that this method will result in the progressive evolution of rules of law. In the area of Establishment Clause jurisprudence, however, very nearly the opposite has occurred. In a case decided last Term, *County of Allegheny v. American Civil Liberties Union*,[1] the Supreme Court ad-

84. *See supra* notes 1-2.

1. 109 S. Ct. 3086 (1989). This case involved three petitioners against the respon-

dressed once again the issue of whether governmental displays of religious symbols violate the separation of church and state under the First Amendment.[2] Rather than clarifying any preexisting principles, the Court's answer only multiplied the confusion. Indeed, if anything remains clear after *Allegheny*, it is that Establishment Clause jurisprudence has substantially *devolved*. Two hundred years after the adoption of the Constitution, the separation of church and state remains essentially undefined.

In *Allegheny*, the Court produced a patchwork of five opinions and no fewer than four formulations of Establishment Clause jurisprudence. Because of the abstruse pattern of partial concurrences and dissents,[3] no single one of these formulations can confidently be presumed to express an authoritative principle of law. This essay examines original and present understandings of the Establishment Clause and suggests that, while no formulation may be perfect, the time certainly has come for the Supreme Court to select and to establish a uniform approach for Establishment Clause analysis.

The case of *Allegheny* dealt with the constitutionality of two religious displays located on government property in Pittsburgh. The first display involved a crèche on the "Grand Staircase" of the Allegheny County Courthouse; the crèche included a banner proclaiming "Gloria in Excelsis Deo!" The staircase is the "main," "most beautiful," and "most public" part of the courthouse.[4] The display was a visual representation of the scene after the birth of Jesus and consisted of a wooden backdrop with figures representing Mary, Joseph, Jesus, an angel, shepherds, the wise men, and farm animals. The crèche had been displayed there each year since 1981 by the Holy Name Society, a Roman Catholic group. There was a sign stating that the display was donated by the Holy Name Society. Surrounding the crèche were some poinsettias and a small evergreen tree. The crèche was the setting for the county's annual Christmas carol program, held during lunch hours in the month of December.[5]

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dent, American Civil Liberties Union (ACLU). The consolidated cases include County of Allegheny v. ACLU, Chabad v. ACLU, and City of Pittsburgh v. ACLU.

2. U.S. CONST. amend I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

3. *See* 109 S. Ct. at 3092-93.

4. *Id.* at 3093-94.

5. *See id.*

The second display consisted of a forty-five foot decorated Christmas tree next to an eighteen-foot Chanukah menorah on the steps of the City-County building, located a block away from the Courthouse. The menorah was owned by a Jewish group called Chabad, but was stored, erected, and removed each year by the city.[6] The display also contained a sign with the mayor's name and the saying, "Salute to Liberty."[7] The litigation challenged the menorah, not the Christmas tree.

The ACLU sued the County of Allegheny with respect to both displays and the City of Pittsburgh with respect to the display of the menorah. Chabad intervened on the issue of the menorah display. The District Court for the Western District of Pennsylvania found for the defendants.[8] The ACLU appealed, and the Court of Appeals for the Third Circuit found that both the crèche and the menorah violated the First Amendment.[9]

The Supreme Court granted certiorari and ruled that the crèche violated the Establishment Clause in a five-to-four decision written by Justice Blackmun,[10] with Justices Kennedy, Scalia, White, and Chief Justice Rehnquist dissenting. The Court separately ruled that the menorah did *not* violate the Establishment Clause. Here the majority included Justices Blackmun and O'Connor, who were also in the majority on the crèche display, and the four dissenters from the decision on the crèche display. In the dissent on the menorah portion were Justices Brennan, Marshall, and Stevens, all of whom believed that both displays violated the Establishment Clause.

The Supreme Court first thoroughly discussed the Establishment Clause in 1947 in *Everson v. Board of Education*,[11] where it specifically applied the First Amendment to the States. Justice Black, in a discussion of the historical backdrop for the adoption of the First Amendment, described the early settlers that came to America "to escape the bondage of laws which compelled them to support and attend government[-]favored churches."[12] Despite this background, the practices of the old

6. *See* ACLU v. County of Allegheny, 842 F.2d 655, 657-58 (3d Cir. 1988).
7. 109 S. Ct. at 3095.
8. *See* ACLU v. County of Allegheny, No. 86-2617 (W.D. Pa. 1987).
9. *See* 842 F.2d at 656-57.
10. Justice Blackmun was joined by Justices Brennan, Marshall, O'Connor, and Stevens.
11. 330 U.S. 1 (1947) (held constitutional for New Jersey to reimburse parents for the cost of transporting children to private, as well as public, schools).
12. *Id.* at 8.

world began to be transplanted to the new world,[13] and the First Amendment was adopted, according to Justice Black, to halt the spread of governmental influence on religion.[14] In *Everson*, the Court set forth its first definition of the "establishment of religion." The definition included that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another."[15] The Court felt that the First Amendment, to use Thomas Jefferson's words, established a "wall of separation" between church and state.[16]

The Supreme Court expounded on the meaning of the Establishment Clause in *Lemon v. Kurtzman*[17] by establishing a three-prong test to determine the constitutionality of state actions affecting religion. First, a statute must have a secular purpose.[18] To determine if a statute meets this prong, the state must first explain its secular purpose. The court need not accept the explanation provided by the state and can determine that the statute's true purpose is to affect religion.[19] The second prong requires that the statute's primary effect be one that neither advances nor inhibits religion.[20] Third, the statute must not foster excessive government entanglement with religion.[21] To determine if there is excessive entanglement, the Court in *Lemon* suggested examination of three factors: (1) the character and purposes of the institutions benefitted, (2) the nature of the aid that the state provides, and (3) the relationship between the government and the religious authority.[22]

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13. *See id.* at 9-10. The English charters granted to citizens gave them the authority to erect religious establishments that everyone would be required to attend. This authority was accompanied by a repetition of the persecutions in Europe. Catholics were hounded and proscribed because of their religion. Quakers were sent to jail, and various Protestant sects harassed members of other Protestants sects.

14. *See id.* at 11. The Founders felt that religious liberty could best be achieved if the government had no power to tax, support, or otherwise assist any or all religions.

15. *Id.* at 15. This definition was also cited by Justice Blackmun in *Allegheny*, 109 S. Ct. at 3100.

16. 330 U.S. at 16; *see, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878); 16 T. JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 281-82 (Library ed. 1904).

17. 403 U.S. 602 (1971).

18. *See id.* at 612; *see also* Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

19. *See* Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (refusing to accept Kentucky's avowed secular purpose for the posting of the Ten Commandments in public school classrooms and thus found that the statute violated the first prong of the *Lemon* test).

20. *See* 403 U.S. at 612; *see also* Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

21. *See* 403 U.S. at 613; *see also* Waltz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

22. *See* 403 U.S. at 615.

The Supreme Court next applied this three-prong test to a case involving religious symbols in *Lynch v. Donnelly*.[23] There the Court found that a crèche that was included as part of a city's Christmas display did not violate the Establishment Clause.[24] The display also included Santa Claus, reindeer, carolers, a Christmas tree, and a banner that read, "Season's Greetings." A park owned by a nonprofit organization in the heart of the shopping district contained the display, which was paid for by the city of Pawtucket, Rhode Island.[25] The Court stated that the First Amendment does not mandate complete separation; rather, it mandates accommodation, not just tolerance, of all religions, and forbids hostility towards any.[26]

In applying the *Lemon* test in *Lynch*, the Court concluded that Pawtucket had a secular reason for celebrating the birth of Jesus as an historical event, and it held that the crèche depicted the historical origins of the event.[27] The primary effect was not the advancement of religion because the display did not promote religion any more than the legislative prayer upheld in *Marsh v. Chambers*[28] or the Sunday closing laws upheld in *McGowan v. Maryland*.[29] Any benefit to religion was remote or incidental.[30] Finally, the third prong of the *Lemon* test was not violated because there was no evidence of any contact with church authorities concerning the Christmas display.[31] Although it applied the *Lemon* test in *Lynch v. Donnelly*, the Court emphasized its unwillingness "to be confined to any single test or criterion."[32] As an example, Chief Justice Burger pointed to two cases where the *Lemon* test was not applied, *Marsh v. Chambers*[33] and *Larson v. Valente*.[34] Rather than spend-

23. 465 U.S. 668 (1984).
24. *See id.* at 672.
25. *See id.* at 671.
26. *See id.* at 673; *see also* Zorach v. Clausen, 343 U.S. 306 (1952); Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203 (1948).
27. *See* 465 U.S. at 680.
28. 463 U.S. 783 (1983).
29. 366 U.S. 420 (1961).
30. *See* 465 U.S. at 683.
31. *See id.* at 684.
32. *Id.* at 679; *see, e.g.*, Tilton v. Richardson, 403 U.S. 672 (1971) (upholding Higher Education Facilities Act of 1963, allowing federal construction grants to religious colleges and universities for buildings used for nonsectarian purposes); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (holding that New York's financial aid programs can provide religious schools and their students tax relief but not direct aid to the schools or tuition reimbursements to the students).
33. 463 U.S. 783 (1983).
34. 456 U.S. 228 (1982).

ing a great deal of time discussing the three prongs, the Court emphasized that the crèche was not the only item in the challenged display but was part of a display containing other holiday objects.[35] Thus, by adding an additional factor, the context in which the religious object is displayed, the Court further clouded Establishment Clause jurisprudence for lower courts facing similar questions.

Evidence of the confusing nature of these standards can be found in the differing lower court opinions after *Lynch*. In *McCreary v. Stone*,[36] a private group was allowed to display a crèche without any other decorations in a public park in Scarsdale, New York. The court reasoned that because the crèche was allowed in *Lynch*, it should also be allowed in that case.[37] In contrast, a crèche standing alone without other decorations and owned by the city of Birmingham, Michigan, was declared unconstitutional in *ACLU v. City of Birmingham*.[38] The district court in that case distinguished *Lynch* and applied the three-prong *Lemon* test.[39] In short, the status of governmental displays of religious symbols was unclear when the Court decided *Allegheny*.

In response to this confusion, *Allegheny* provided four formulations of analysis for meeting the requirements of the Establishment Clause. Labelled here for convenience, these are (1) Justice Blackmun's "secularism" theory,[40] (2) Justice O'Connor's "pluralism" theory,[41] (3) Justice Kennedy's "nonproselytization" theory,[42] and (4) Justices' Brennan and Stevens' "neutrality" theory.[43]

Justice Blackmun focused on whether the challenged display has the effect of endorsing a particular religion. In evaluating the effect of the display, he argued that courts must look at the entire context—the season of year, the location, and other ob-

35. *See* 465 U.S. at 680-81.

36. 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court sub nom.* Bd. of Trustees v. McCreary, 471 U.S. 83 (1985) (per curiam).

37. *See id.* at 725.

38. 588 F. Supp. 1337 (E.D. Mich. 1984).

39. *See id.* at 1339.

40. *See* 109 S. Ct. at 3101.

41. *See id.* at 3117 (O'Connor, J., concurring).

42. *See id.* at 3134 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy was joined by Justices White and Scalia and Chief Justice Rehnquist.

43. *See id.* at 3124 (Brennan, J., concurring in part and dissenting in part); *id.* at 3129 (Stevens, J., concurring in part and dissenting in part). Justice Marshall joined both Justices Brennan and Stevens, and they joined in each other's opinions.

jects in the display. If the net effect of the display is "secular," then it does not violate the Establishment Clause.[44]

To support his secularism theory, Justice Blackmun relied heavily in *Allegheny* on Justice O'Connor's concurring opinion in *Lynch*.[45] He explained that the Court was not using *Allegheny* to overturn *Lynch*, a case in which Justice Blackmun had dissented.[46] Instead, he declared that "[t]he rationale of the majority opinion in *Lynch* is none too clear"[47] and that opting to rely on Justice O'Connor's concurrence in *Lynch* for guidance was therefore warranted. Justice Blackmun explained that Justice O'Connor "provides a sound analytical framework for evaluating governmental use of religious symbols."[48] In *Lynch*, Justice O'Connor had proposed that any endorsement of religion is invalid, and to determine if the government is endorsing religion, courts must look at the context of the display and how a person is likely to respond to it.[49] In applying this standard, Justice Blackmun asked whether the reasonable nonadherents to the religion portrayed in the display would perceive the display as an official disapproval of their religious beliefs.[50]

Justice Blackmun concluded that the crèche conveyed a religious message.[51] He discussed at length the fact that the crèche was standing alone, with only a floral decoration around it, in contrast to the Santa Claus and other holiday symbols around the crèche in *Lynch*. The central placement of the display, notwithstanding the sign indicating that a religious organization donated the display, implied that the government was endorsing, not merely accommodating, religion.[52]

In contrast to Justice Blackmun's approach, Justices Brennan, Marshall, and Stevens advocated a "neutrality" theory that would draw a strict line between the secular and the sacred,

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44. *See id.* at 3101.
45. *See Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).
46. *See id.* at 726 (Blackmun, J., dissenting).
47. 109 S. Ct. at 3101.
48. *Id.* at 3102.
49. *See* 465 U.S. at 688 (O'Connor, J., concurring); *see also* School Dist. v. Ball, 473 U.S. 373, 389 (1985) ("If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.").
50. *See* 109 S. Ct. at 3103.
51. *See id.* at 3103-04; *see also Lynch*, 465 U.S. at 685; *id.* at 692 (O'Connor, J., concurring); *id.* at 701 (Brennan, J., dissenting); *id.* at 727 (Blackmun, J., dissenting).
52. *See* 109 S. Ct. at 3104-05, 3105 n.51.

focusing on the religious significance of the object itself. To them, there were two problems with Justice Blackmun's approach of not overturning *Lynch*.[53] First, Justice Blackmun changed the analysis of *Lynch* by in fact adopting the reasoning of Justice O'Connor's concurrence, which had added an "endorsement" test to the majority's analysis.[54] Second, the decisions in *Lynch* and *Allegheny* are inconsistent. The difference between the two cases ultimately turns on whether the crèche is surrounded by plastic Santas and reindeer.[55] For these three Justices, a claim that the placement of other decorations around the religious symbol makes the display secular as a whole ignores and devalues the significance of the religious symbol.[56] Further, such a standard leaves a large ambiguity as to when the secular objects in a display outweigh the religious ones. If a town government displays a crèche accompanied by a plastic Santa Claus, is that enough to pass constitutional muster or are poinsettias and reindeer required? The majority's standard in *Allegheny*, as advanced by Justice Blackmun, leaves Establishment Clause jurisprudence confused and legal advice on the subject, largely guesswork.

In contrast to the crèche, Justice Blackmun found the menorah constitutional. He held that the menorah, although a religious object, acquired secular meaning by being placed next to a secular object, the Christmas tree. Thus, the Christmas tree transfers secular meaning to the menorah.[57] This concept forms the basis for Justice Blackmun's theory. If enough secular objects surround the religious one, the net effect is secular and precludes any endorsement of religion. According to Justice Blackmun, the objects from both religions, as well as the mayor's sign, made it unlikely that an average viewer of this display would see it as an endorsement of religion.[58]

Justice Blackmun's securalism approach appears flawed.

53. *See id.* at 3124 (Brennan, J., concurring in part and dissenting in part); *id.* at 3133 (Stevens, J., concurring in part and dissenting in part).

54. *See Lynch*, 465 U.S. at 690-93 (O'Connor, J., concurring).

55. Justice Blackmun admitted that the other decorations were the only differences between the two cases, writing that "[h]ere, unlike in *Lynch*, nothing in the context of the display detracts from the crèche's religious message." *Allegheny*, 109 S. Ct. at 3103-04. In the next paragraph, Justice Blackmun discussed the floral decoration around the crèche in *Allegheny* and how that "contributes to, rather than detracts from, the endorsement of religion conveyed by the crèche." *Id.* at 3104.

56. *See id.* at 3127 (Brennan, J., concurring in part and dissenting in part).

57. *See id.* at 3113-14.

58. *See id.* at 3112-15.

Although he agreed that the menorah has religious meaning,[59] it does not necessarily follow, as Justice Blackmun contended, that the menorah's placement next to the secular Christmas tree takes the religious meaning away. If any transfer of meaning takes place, it is probably that the menorah gives the Christmas tree religious meaning.[60] The menorah, with its clear religious message, would tend to overshadow the secular Christmas tree and amplify the religious message underlying the Christmas tree. If this is the case, then the display violates the Establishment Clause because the government is endorsing not one but two religions. After all, the Establishment Clause definition first formulated in *Everson*, and applied by Justice Blackmun in *Allegheny*, held that the government cannot favor religion over nonreligion.[61]

There are two basic problems with the secularism test, as advocated by Justice Blackmun. First, the test is subjective. Besides the practical difficulty of looking at a display as an "average" American would, there is the theoretical difficulty of defining an average American in the first place. "Average" Americans have an abundance of religious views and sensitivities. To use the secularism test, the judge must choose whose eyes to look through, make assumptions as to what the display would mean to that individual, and then decide how that person would react to that meaning. Using the secularism test, it is therefore possible to reach different, yet equally plausible, results. A reasonable observer could find the menorah offensive or not offensive and still be a reasonable observer. An adherent whose symbol is being displayed might find it an enjoyable way to celebrate the holiday season, or the adherent might believe that such a religious symbol should only be displayed in a revered place, not in a public park or on courthouse steps.[62] It would seem impossible for the Court to determine what the average observer would feel, unless it is willing to accept polling data from the people in the area of the display. Second, Justice Blackmun's standard potentially results in inconsis-

59. *See id.* at 3112.

60. *See id.* at 3133 (Stevens, J., concurring in part and dissenting in part); *id.* at 3127 (Brennan, J., concurring in part and dissenting in part). Justice O'Connor also disagreed with Justice Blackmun's analysis on this point. *See id.* at 3122 (O'Connor, J., concurring).

61. *See supra* note 15 and accompanying text.

62. *See* 109 S. Ct. at 3131 (Stevens, J., concurring in part and dissenting in part).

tency. Justice Blackmun admitted in a footnote that the combined display of a Christmas tree and a menorah might not always be constitutional—it would depend upon the setting.[63] Such emphasis on the fact-specific context of the display also prevents the secularism approach from offering would-be displayers meaningful guidance.

In contrast, Justice O'Connor advocated a pluralism theory, which differs from Justice Blackmun's secularism theory only in that it asks whether the challenged display endorses *one religion over another*.[64] If the net effect of the display merely is to affirm religious pluralism, then Justice O'Connor perceives no First Amendment violation. Justice O'Connor agreed with Justice Blackmun's analysis of the crèche and concurred in the result but not the reasoning of his analysis of the menorah.[65] While she agreed that the menorah has religious significance, she argued that its placement next to the secular Christmas tree made it appear as if the government was endorsing not one religion but pluralism.[66]

Justice O'Connor's pluralism test has at its roots her concurrence in *Lynch*, as does Justice Blackmun's test, and it suffers from the same inadequacies as Justice Blackmun's test. With respect to the display of the menorah, Justice O'Connor's test would hold that a reasonable observer would see the display not as endorsing Judaism alone, but as endorsing pluralism. For Justice O'Connor, pluralism is governmental endorsement of several religions, not just one.[67] In reality, however, pluralism differs significantly from neutrality: It is an imposition upon atheists, who may find offensive even the display of all religions. Again, the Establishment Clause is intended to avoid endorsement of not only specific religions, but religion over nonreligion as well.[68]

A further problem with Justice O'Connor's conception of pluralism is that her argument is inconsistent. She began by claiming that a Christmas tree is a secular symbol and that the

63. *See id.* at 3115 n.69 (citing the example of a public school classroom, where such a display might be unconstitutional).

64. *See id.* at 3118 (O'Connor, J., concurring).

65. *See id.* at 3122 (O'Connor, J., concurring).

66. *See id.* at 3122-24 (O'Connor, J., concurring). To Justice O'Connor, pluralism sends a message that people have the freedom to choose their own beliefs. *See id.*

67. *See id.* at 3123 (O'Connor, J., concurring).

68. *See, e.g., Everson*, 330 U.S. at 15; Wallace v. Jaffree, 472 U.S. 38 (1985).

menorah is the central religious symbol of Chanukah. As a result, she argued, placing the menorah next to the Christmas tree achieved the goal of pluralism.[69] Yet for this argument to be convincing, Justice O'Connor must admit that the Christmas tree is religious.[70] If the tree is indeed secular, then the display only supports one religion, Judaism, represented by the menorah.

The most innovative approach to this case was Justice Kennedy's "nonproselytization" theory. Using an historical framework, Justice Kennedy argued that neither the crèche nor the menorah violated the Establishment Clause. He asserted that taken to its logical extreme, the language of neutrality would require a relentless expiration of all contact between government and religion.[71] Yet, according to Justice Kennedy, the history and purpose of the Establishment Clause provide "some latitude in recognizing and accommodating the central role religion plays in our society."[72] The threshold for Justice Kennedy was the line between accommodation and establishment, delineated by two factors. First, the government cannot coerce anyone to support a certain religion. Second, the government cannot give direct benefits to a religion in such a degree that it is in fact establishing a state religion.[73] Justice Kennedy's standard requires that the government be actually proselytizing before there is an Establishment Clause violation. Under this standard, very little violates the Clause except a decision by the government to establish a state church, forcing governmental officials to take religious oaths, or delegating state powers to religious organizations.[74] Justice Kennedy acknowledged that under his approach, religious symbols on public property would only violate the Constitution if the government recognized only one religion's holidays.[75]

Justice Kennedy's theory is supported by his historical ap-

69. Justice O'Connor stated, "[T]he Christmas tree . . . is not a religious symbol." 109 S. Ct. at 3122 (O'Connor, J., concurring); "the menorah is the central religious symbol" of Chanukah, *id.* (O'Connor, J., concurring); and "the city . . . conveyed a message of pluralism," *id.* at 3123 (O'Connor, J., concurring).

70. *See id.* at 3125-26 (Brennan, J., concurring in part and dissenting in part).

71. *See id.* at 3135 (Kennedy, J., concurring in part and dissenting in part).

72. *Id.*

73. *See id.* at 3136 (Kennedy, J., concurring in part and dissenting in part).

74. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

75. *See* 109 S. Ct. at 3139 n.3 (Kennedy, J., concurring in part and dissenting in part).

proach. He recounted that religious displays were not commonplace in 1791[76] but credibly attributed that fact to reasons other than separation of church and state. As an example of a previous Supreme Court decision finding an historical basis for allowing a religious practice, Justice Kennedy pointed to *Marsh v. Chambers*,[77] which held legislative prayer constitutional. One of the reasons given by that Court was the historical nature of legislative prayer that traced back to the First Congress.[78] Justice Kennedy claimed that any standard chosen to test the constitutionality of religious practices must allow historical practices, such as legislative prayer, to remain constitutional. Thus, any standard that would invalidate such historical practices could not be an appropriate standard.[79] Justice Kennedy rejected the pluralism test because it allowed unacceptable results. According to Justice Kennedy, among the historical practices that would be invalidated by the majority's analysis were the President's Thanksgiving proclamations, the congressional prayer room, the Pledge of Allegiance, the national motto ("In God we trust"), and legislative prayer.[80]

The main difference between the nonproselytization theory and the various other theories is that Justice Kennedy's proselytization test requires that the government express allegiance to religion before the action is unconstitutional. Justice Kennedy's standard eliminates only governmental coercion and for that reason does not protect religious freedom; it fails to take into account all of the less direct ways in which government can influence people and their religious freedom, including the erection of holiday displays that contain religious symbols.[81] Perhaps most importantly, Justice Kennedy's standard does not make sense when interpreted in light of the First Amendment as a whole: Requiring coercion for a violation of the Establishment Clause would make the Free Exercise Clause a redundancy.[82]

76. *See id.* at 3141 (Kennedy, J., concurring in part and dissenting in part) (citing J. BARNETT, THE AMERICAN CHRISTMAS: A STUDY IN NATIONAL CULTURE 2-11 (1954)).

77. 463 U.S. 783 (1983).

78. *See id.* at 790.

79. *See* 109 S. Ct. at 3142 (Kennedy, J., concurring in part and dissenting in part); *see also* Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 808 (1973) (Rehnquist, J., dissenting in part).

80. *See* 109 S. Ct. at 3142-44 (Kennedy, J., concurring in part and dissenting in part).

81. *See id.* at 3119 (O'Connor, J., concurring).

82. *See id.* at 3119-20 (O'Connor, J., concurring) (citing Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Laycock,

Second, Justice Kennedy apparently assumes that because something has existed historically, it is automatically acceptable. Although he left some room for the alteration of historical practices, he did state that "[w]hatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion."[83] Clearly, though, some historical actions and beliefs can no longer be considered acceptable. For example, in 1776, Maryland adopted a "Declaration of Rights" that allowed the legislature to impose a tax "for the support of the Christian religion" and a requirement that all state officials declare "a belief in the Christian religion."[84] History alone does not validate a practice, as is most clearly evidenced by the fact that historically based discrimination is not permissible. In addition, many other constitutional amendments, including the Fourth Amendment protections against unreasonable search and seizure, have evolved over time. The Bill of Rights can be given full meaning only after application to a number of cases.

The only precedent cited by Justice Kennedy in which his historical approach has resulted in what he believed to be the correct outcome was *Marsh*.[85] In *Marsh*, while history was one aspect of the majority's analysis, the Court said that not even the "unique history" of legislative prayer could alone justify contemporary legislative prayers that have the effect of affiliating the government with one specific faith or belief.[86] The Supreme Court has, therefore, found a difference of constitutional significance between general, nonsectarian references to religion, such as the legislative prayer allowed in *Marsh*, and practices that show a government's allegiance to a particular sect or group of religions. As a result, cases like the national motto and the pledge can be considered nonsectarian references to religion and are allowed under the reasoning adopted by the other Justices.

Another problem with the historical approach is that the Founders' intent in drafting the Establishment Clause is itself

"Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 922 (1986)).

83. 109 S. Ct. at 3142 (Kennedy, J., concurring in part and dissenting in part).

84. *See id.* at 3107 n.54 (quoting 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 865-66 (1950)).

85. 463 U.S. 783 (1983) (upholding congressional prayer as nonviolative of the Establishment Clause).

86. *See* 463 U.S. at 791, 794-95 (1983); *see also* 109 S. Ct. at 3106.

difficult to discern.[87] Some of the original colonists, including the Puritans, were opposed to any public celebration of Christmas.[88] Justice Stevens pointed out in *Allegheny* that changes from the original draft of the First Amendment to the final wording show that the Framers intended any relationship between the government and religion be disallowed.[89] Thomas Jefferson similarly claimed that different opinions are advantageous for religion and that coercion only makes the people doing the coercing look like fools. Furthermore, Jefferson believed that states without a state religion have harmony. Thus it was important that the country insure religious freedom.[90]

In a slightly different view of religious freedom, Joseph Story wrote that at the time of the passage of the First Amendment, its purpose was to discourage rivalry among Christian sects, not to require equal respect for atheists, or non-Christian sects. "[T]he universal sentiment in America was that Christianity ought to receive encouragement from the state."[91] Because it is difficult to determine what the Framers' intent actually was, historical arguments are too easy to manipulate to serve a particular agenda. Historical practice also may have misinterpreted the original intent, and, as a result, the Court's analysis should be more prospective.

A third problem with Justice Kennedy's theory is that it is unclear where he would draw the line concerning what is constitutionally permissible. He explained that if all Christian holidays and none others were recognized, this would violate the Establishment Clause.[92] Yet Justice Blackmun asked Justice Kennedy an interesting question: "Would it be enough of a preference for Christianity [and thus a constitutional violation] if that city each year displayed a crèche for [forty] days during the Christmas season and a cross for [forty] days during Lent

87. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1970).

88. *See* Lynch v. Donnelly, 465 U.S. at 720-21 (Brennan, J., dissenting); S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 209 (rev. ed. 1970).

89. "Whereas earlier drafts only barred laws 'establishing' or 'touching' religion, the final text interdicts all laws 'respecting an establishment of religion.'" 109 S. Ct. at 3130 (Stevens, J., concurring in part and dissenting in part).

90. T. Jefferson, *Religious Freedom in Virginia, 1782*, in AMERICAN PRINCIPLES AND ISSUES: THE NATIONAL PURPOSE 487 (O. Handlin ed. 1961).

91. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1874-1877 593-94 (1851); *see also* Wallace v. Jaffree, 472 U.S. 38, 57-58 (1985); 109 S. Ct. at 3109 n.56.

92. *See supra* note 75 and accompanying text.

(and never the symbols of other religions)?"[93] Justice Kennedy provided no answers to this and similar questions.

In contrast to these three theories is the view of Justices Stevens, Brennan, and Marshall, who utilized a strict application of the *Lemon* framework to find that both displays violate the Establishment Clause.[94] This "neutrality" approach parallels Justice Blackmun's analysis on the crèche but goes further and would actually overturn the precedent established in *Lynch*.[95] These Justices believe the menorah has religious meaning and that the menorah gave religious meaning to the secular Christmas tree.[96] The Establishment Clause, to these Justices, means that the government can neither endorse one religion over another, nor endorse religion over nonreligion. The government should not be allowed to display any objects with specific religious meaning, and all government action should have a secular rationale that would not offend members of different religions.[97] This approach would not abandon the *Lemon* three-prong test; it would return to a strict application of that test as it existed before being weakened by the Court in *Marsh* and *Lynch*. In *Allegheny*, both displays endorse religion and thus would be found unconstitutional.[98]

The application of the neutrality approach is simple. The first question to be answered is whether the menorah is a religious symbol. Both Justice Blackmun and Justice O'Connor agree that the menorah has religious meaning.[99] Under the neutrality theory, the analysis ends here because no religious symbol can be displayed. The theory includes a presumption against the display of any religious symbols on public property.[100] This presumption would not eliminate all contact between government and religion, as Justice Kennedy claimed the

93. 109 S. Ct. at 3108.

94. *See id.* at 3124 (Brennan, J., concurring in part and dissenting in part).

95. *See id.* (Brennan, J., concurring in part and dissenting in part).

96. *See id.* at 3127 (Brennan, J., concurring in part and dissenting in part); *id.* at 3133 (Stevens., J., concurring in part and dissenting in part).

97. *See id.* at 3124 (Brennan, J., concurring in part and dissenting in part).

98. *See id.* at 3124-28 (Brennan, J., concurring in part and dissenting in part).

99. Justice Blackmun wrote, "The menorah . . . is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud." *Id.* at 3112. Justice O'Connor wrote, "[T]he menorah is the central religious symbol and ritual object of that religious holiday [Chanukah]." *Id.* at 3122 (O'Connor, J., concurring). Justices Brennan, Stevens, and Marshall agreed. *See id.* at 3127 (Brennan, J., concurring in part and dissenting in part).

100. *See id.* at 3131 (Stevens, J., concurring in part and dissenting in part).

neutrality approach would.[101] The neutrality theory only prohibits the government from displaying nonsecular symbols. Justice Stevens offered the following illustration. A carving of Moses holding the Ten Commandments would not be allowed as the only decoration on a courtroom wall. The addition of other religious figures, such as Confucius and Mohammed, would still not save the carving because the display would still be honoring religion. Yet if secular figures, such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall were added, it would show respect not for religion, but for great lawgivers, and thus would be allowed.[102] A possible rebuttal to Justice Stevens' illustration would be that just as the secular leaders gave secular meaning to the religious leaders in the illustration, the secular Christmas tree should be considered to give secular meaning to the religious menorah. Conceivably, however, the reason such great religious thinkers would be honored by having their images carved on the courtroom wall is because they contributed ideas and theories of law that were as important as those contributed by the others pictured, whereas the Christmas tree and the menorah together still symbolize religion.

The one question the neutrality theory leaves open in this constitutional debate is the precise distinction between a religious object and a secular object. All of the Justices agree that the Christmas tree is a secular object.[103] Although it may have some religious significance, it has come to symbolize the holiday season, not a specific religious event. Furthermore, the Christmas tree is not really a Christian tradition but an American tradition. Many Christians around the world do not celebrate with a Christmas tree, and a Christmas tree does not have the religious significance that the scene of the birth of Christ does.

This secular-religious distinction, however, becomes more difficult if the status of an object changes from religious to secular over time. Such transformation appears possible. For example, one of the reasons that the national motto and pledge

101. *See id.* at 3135 (Kennedy, J., concurring in part and dissenting in part).

102. *See id.* at 3132 (Stevens, J., concurring in part and dissenting in part). The depictions described by Justice Stevens are in fact included in panels surrounding the courtroom used by the Supreme Court.

103. *See id.* at 3103; *id.* at 3122 (O'Connor, J., concurring); *id.* at 3140 (Kennedy, J., concurring in part and dissenting in part).

do not violate the Establishment Clause is that through their use over time, they have lost any religious meaning they may once have had. Similarly, it may turn out that many "secular" symbols have purely religious origins. The Christmas tree, a derivative of paganism, falls into this category.

Because the neutrality theory was not adopted by the entire Court, the present state of Establishment Clause jurisprudence remains one of confusion. The Court—using a lenient *Lemon* test, an endorsement test, and a contextual analysis—has established a system where each different fact pattern may result in a different decision. This standard will lead to conflicting lower court decisions. If the Supreme Court wishes to resolve each of these conflicts, it will have to hear a case on each of those particular fact patterns. This will likely lead in turn to endless case-by-case analysis, where small differences in facts can change the constitutionality of the display—as seen in the difference between *Lynch* and *Allegheny*.

With the Court's decision in *Allegheny*, Establishment Clause jurisprudence appears to have devolved into further confusion. Lower courts are left with a choice of four formulations for Establishment Clause analysis with no clear answer regarding which they should choose. Given the fact that none of the formulations may be "perfect," after two hundred years with the First Amendment, the Court should be able to choose one formulation so that lower courts and local governments may know what standard is to be applied. Such action would lead to consistent Establishment Clause analysis and would help to fulfill the Court's role in advancing the evolution of coherent rules of law.

Barbara S. Barrett

YOUTH, MENTAL RETARDATION, AND CAPITAL PUNISHMENT: *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989) and *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989).

On June 26, 1989, the Supreme Court handed down two of the most controversial decisions of the Term, both involving the constitutionality of capital punishment. In *Penry v. Lynaugh*,[1]

1. 109 S. Ct. 2934 (1989).

a five-to-four majority[2] held that "there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment."[3] A separate five-to-four majority[4] struck down the Texas capital punishment statute under which Mr. Penry was sentenced.[5] The Court held that the three-part test provided by the statute did not allow the sentencing jury to give full consideration to the mitigating evidence of Mr. Penry's mental retardation. In *Stanford v. Kentucky*,[6] a five-justice majority[7] held that the execution of persons who had committed murder at sixteen or seventeen years of age is not per se unconstitutional as a violation of the Eighth Amendment.[8]

Together, these two decisions outraged many of the Court's observers, who understood the decisions to demonstrate harsh insensitivity. A *New York Times* editorial, "The Supreme Court's Cruel 'Consensus,' " characterized the Court as "[d]etermined to get on with the execution of murderers" and "barely paus[ing] before deciding . . . that [sixteen] is not too young nor the bottom [two] percent of the population too feeble-minded to be eligible for the death penalty."[9] Other editorials characterized such executions as "morally repugnant and a violation of the Eighth Amendment."[10] One commentator exclaimed, "What a cruel document that Constitution must be, in the stony eyes of the Court majority—the same five justices in all these cases. . . . What a harsh and merciless reading of a

2. Justice O'Connor wrote for the majority and was joined in this section of the opinion by Chief Justice Rehnquist and Justices Kennedy, Scalia, and White.

3. 109 S. Ct. at 2955; U.S. CONST. amend. VIII ("Excessive bail shall . . . not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

4. Here Justice O'Connor was joined by Justices Blackmun, Brennan, Marshall, and Stevens.

5. TEX. PENAL CODE ANN. § 19.03 (Vernon 1974 and Supp. 1989).

6. 109 S. Ct. 2969 (1989).

7. Justice Scalia wrote for the majority and was joined in this section of the opinion by the Chief Justice and Justices Kennedy, O'Connor, and White.

8. Read in light of precedent, *Penry* and *Stanford* appear to define the limits of Eighth Amendment reach in the areas of age and mental capacity. In 1986, the Court held that it is unconstitutional to execute criminals who are insane and thus "unaware of the punishment they are about to suffer and why they are to suffer it." Ford v. Wainwright, 477 U.S. 399, 422 (1986) (Powell, J., concurring in part and concurring in judgment). More recently, the Court held that under current state statutes, it is unconstitutional to execute a person who committed murder at age fifteen. Thompson v. Oklahoma, 108 S. Ct. 2687 (1988).

9. *The Supreme Court's Cruel 'Consensus,'* N.Y. Times, June 28, 1989, at A22, col. 1.

10. *Evolving Standards of Decency*, Wash. Post, June 28, 1989, at A22, col. 1.

document written primarily to protect citizens against the powers of the state!"[11]

Such criticisms of the Court implicitly argue that in capital punishment cases, the Court has allowed itself to focus exclusively on the victim and on the heinousness of the act of murder, to the detriment of the convict who, at least arguably in the cases of Messrs. Penry and Stanford, might be a victim himself. Commentators claim that in failing to recognize retardation and youth as characteristics that set some convicts apart—enough to prevent their being subject to capital punishment—the Court has callously decided to view all killers alike.[12] The Supreme Court, it is claimed, has "dehumanized" the convict in the administration of the death penalty.

These reactions are unfair and appear to be based in large part on an incomplete understanding of the Court's holdings. If one understands "dehumanization" to mean the failure of the Court to appreciate and compensate for the differences that distinguish one convict from another, then the Court's decisions in *Penry* and *Stanford* actually serve to "humanize" the process of capital punishment. In striking down the Texas death penalty statute, the Court affirmed in no uncertain terms that administration of the death penalty must be based on an individual evaluation of the particular convict in question. Also, by insisting that the determination of whether to apply the death penalty be left to the individual states and by looking to state legislatures and sentencing juries for guidance in formulating a constitutional standard, the Court has left the capital punishment process in the hands of those most immediately familiar with the individual criminals, victims, and crimes involved.

The central debate in the *Penry* and *Stanford* cases is one of federalism and the proper role of the Supreme Court; it is not, as implied by critics who see the Court as "cruel" or "dehumanizing," a debate on the culpability of youthful and mentally retarded murderers. The Court did not address whether age and mental capacity should be factors weighed in the constitutional analysis, but rather, given that they *should* be weighed,

11. Wicker, *Death and Mockery*, N.Y. Times, June 27, 1989, at A23, col. 1.

12. *See id.* ("Even those who were legally children when the crimes for which they were convicted were committed now may be put to death constitutionally, along with the most hardened and irredeemable criminals.").

addressed the question of *who* should do the weighing. Having already passed on the constitutionality of capital punishment itself,[13] the Court sought to decide which body of government should most appropriately determine society's "evolving standards of decency,"[14] and thus determine when it is permissible to execute a given individual. The Court minority felt that society's "evolving standards of decency" should be legally defined on the federal level, by a Supreme Court that leads the States through its evaluation of expert opinions and socioscientific evidence. The majority, on the other hand, believed that society's "evolving standards" should be defined at the state level. In the latter's view, a particular application of capital punishment does not generally become a federal constitutional issue until the Court detects a "consensus" against such an application among state legislatures or sentencing juries.[15]

In *Penry*, the petitioner was charged with the brutal rape and murder of a Texas woman. He was found competent to stand trial despite a psychologist's testimony that he suffered from "mild to moderate retardation" and had a mental age of only six and one-half years.[16] The jury rejected Mr. Penry's insanity defense and found him guilty of capital murder. During the sentencing phase of the trial, the jury was instructed to consider all available evidence in answering three "special issues" that would be used in the determination of Mr. Penry's sentence:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response

13. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

14. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

15. As the law now stands, an application of capital punishment can be unconstitutional despite the absence of a clear state legislative or sentencing jury consensus if the application fails to meet the "proportionality" or "legitimate goals of punishment" tests. *Penry*, 109 S. Ct. at 2955-56 (plurality opinion). Justice Scalia, however, pointed out in his plurality opinion in *Stanford* that no punishment has ever been invalidated on one of these grounds alone. *See Stanford*, 109 S. Ct. at 2980.

16. *Penry*, 109 S. Ct. at 2941.

to the provocation, if any, by the deceased.[17]

The jury unanimously answered each issue affirmatively, which statutorily mandated the death penalty for Mr. Penry. On direct appeal, the Texas Court of Criminal Appeals affirmed the verdict, and Mr. Penry subsequently filed a federal habeas corpus petition. The district court denied relief, as did the Court of Appeals for the Fifth Circuit.[18] Although the Court of Appeals found merit in Mr. Penry's claim that the sentencing jury had been precluded from fully considering all mitigating circumstances when answering the statutory "special issues," it affirmed the judgment of the district court based on precedent.[19] The United States Supreme Court granted certiorari to resolve two issues: first, whether Mr. Penry was unconstitutionally sentenced to death because the statutory "special issues" did not adequately allow the jury to consider and give effect to all of his mitigating circumstances,[20] and second, whether it is "cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person with Mr. Penry's reasoning ability."[21]

The *Stanford* case involved a murder by a seventeen-year-old Kentucky resident and a murder by a sixteen-and-one-half-year-old Missouri resident.[22] Both petitioners were transferred, following hearings, from their respective state juvenile court systems for trial as adults and both were convicted and sentenced to death.[23] The highest courts of both states affirmed, rejecting petitioners' Eighth Amendment claims and demands for rehabilitative treatment.[24] The United States Supreme Court granted certiorari in these cases "to decide whether the Eighth Amendment precludes the death penalty for individuals who commit crimes at [sixteen] or [seventeen] years of age."[25]

17. TEX. CODE CRIM. PROC. ANN. § 37.071(b) (Vernon 1981 and Supp. 1989).

18. *See* Penry v. Texas, 832 F.2d 915 (1987).

19. *Id.* at 926 (The precedent relied on by the court was primarily Jurek v. Texas, 428 U.S. 262 (1976), which expressly held the Texas capital punishment statute constitutional.).

20. *See Penry*, 109 S. Ct. at 2943-44.

21. *Id.* at 2944.

22. The Supreme Court consolidated the appeals from two state supreme court decisions, Stanford v. Commonwealth, 734 S.W.2d 781 (Ky. 1987), and State v. Wilkins, 736 S.W.2d 409 (Mo. 1987).

23. *See Stanford*, 109 S. Ct. at 2973-74.

24. *See* Stanford v. Commonwealth, 734 S.W.2d 781 (Ky. 1987); State v. Wilkins, 736 S.W.2d 409 (Mo. 1987).

25. *Stanford*, 109 S. Ct. at 2974.

In addressing the questions it set out to answer in the *Penry* and *Stanford* cases, the Court followed an implicit reasoning structure.[26] The Court began by assuming the constitutionality of capital punishment,[27] which prevented these decisions from becoming a mere reconsideration of arguments for and against the death penalty in general. Along with this assumption, the Court recognized that imposition of the death penalty is limited by the Cruel and Unusual Punishments Clause of the Eighth Amendment[28] and that various considerations or tests must determine the constitutional limits. Precisely which tests should be employed in the Eighth Amendment standard turned out to be a major point of conflict between the majority and dissent. Finally, using the articulated set of Eighth Amendment tests, the Court had to determine whether the relevant groups—sixteen-year-olds and mentally retarded persons—fall within the constitutional limits.

The Court assumed the general constitutionality of the death penalty as an important, though not explicit, first step in both the *Penry* and *Stanford* decisions.[29] In 1976, in the case of *Gregg v. Georgia*,[30] the Court affirmed the constitutionality of the death penalty after its validity had wallowed in doubt for nearly a decade.[31] Part of the popular outrage over the *Penry* and *Stan-*

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26. This structure was not used by the Court per se, although it somewhat resembles the structure of reasoning employed by the majority. I have found it useful as a method of combining and analyzing the holdings of *Penry* and *Stanford*.

27. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

28. U.S. CONST. amend. VIII ("Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted.").

29. Justices Brennan and Marshall, who for the relevant portions of both opinions are not in the majority, have categorically and consistently refused to accept the constitutionality of the death penalty.

> Justice Brennan's eloquent dissent of course reflects his often repeated opposition to the death sentence. His views, that also are shared by Justice Marshall, are principled and entitled to respect. Nevertheless, since *Gregg* was decided in 1976, seven members of this Court consistently have upheld sentences of death under *Gregg*-type statutes providing for meticulous review of each sentence in both state and federal courts. The ultimate thrust of Justice Brennan's dissent is that *Gregg* and its progeny should be overruled.

McCleskey v. Kemp, 481 U.S. 279, 313 n.37 (1987).

30. 428 U.S. 153 (1976).

31. The Court explicitly put the constitutionality of capital punishment in doubt in Furman v. Georgia, 408 U.S. 238 (1972) (holding unconstitutional a death sentence that was imposed under a statute that gave the sentencing jury complete discretion). This doubt was addressed by the death penalty statute at issue in *Gregg*:

> In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best

ford decisions undoubtedly stems from opposition to *any* use of capital punishment, producing arguments more appropriately addressed to the *Gregg* precedent than to the current cases.[32] Legal writers[33] and even the dissenters in the *Penry* and *Stanford* cases[34] have used extensions of general anti-capital punishment logic to attack these holdings. The majority strongly resisted this tendency, in an effort to keep the debate focused upon the issues raised by these two cases. Keeping the debate narrowly focused may make the majority appear superficially "insensitive" or "dehumanizing" (eschewing human compassion for legalistic procedure), yet the confines of precedent and the limited facts of these cases require such an approach, lest every case heard by the Court related to capital punishment be, in effect, a rehearing of *Gregg* and its progeny.

After disposing of a procedural matter,[35] Justice O'Connor began the *Penry* opinion by addressing both the definition of Eighth Amendment limits and the application of those limits to the current facts. The issue was whether Mr. Penry was unconstitutionally sentenced to death "because the terms in the

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met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Gregg, 428 U.S. at 195.

32. *See, e.g.*, *Evolving Standards of Decency*, *supra* note 10 ("As opponents of capital punishment under any circumstances, we are strongly opposed to [the outcome of the *Penry* and *Stanford* cases].").

33. *See, e.g.*, Fetzer, *Execution of the Mentally Retarded: A Punishment without Justification*, 40 S.C.L. REV. 419 (1989). Professor Fetzer argues that

> since the logic of deterrence assumes that potential murderers make rational calculations prior to acting, the remote possibility of being executed likely will receive only minimal consideration in the mind of a rational murderer. The likelihood that a mentally retarded individual will be deterred under like circumstances described above is even more remote. . . .
>
> . . . [F]ollowing Justice Marshall's logic [that executing the criminally insane serves no retributive purpose], then, one reasonably may question the retributive value of capital punishment for the person of extremely low intelligence.

Id. at 438-39, 443.

34. Justice Brennan argued,

> It is highly unlikely that the exclusion of the mentally retarded from the class of those eligible to be sentenced to death will lessen any deterrent effect the death penalty may have for nonretarded potential offenders, for they, of course, will under present law remain at risk of execution. And the very factors that make it disproportionate and unjust to execute the mentally retarded also make the death penalty of the most minimal deterrent effect so far as retarded potential offenders are concerned.

Penry, 109 S. Ct. at 2962 (Brennan, J., dissenting in relevant part); *see also Stanford*, 109 S. Ct. at 2993-94 (Brennan, J., dissenting).

35. The procedural issue was the propriety of granting relief in the case, which was before the Court on collateral review. *See Penry*, 109 S. Ct. at 2944 (part II), 2944-47 (part II-B), 2952-53 (part IV-A).

Texas special issues were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering them."[36] In a portion of her opinion that has received relatively little public attention, Justice O'Connor found that Mr. Penry was indeed unconstitutionally sentenced to death for this reason.

Joined by Justices Blackmun, Brennan, Marshall, and Stevens, Justice O'Connor started with the established principle that "punishment should be directly related to the personal culpability of the criminal defendant."[37] Following this principle is the "long held [belief]" that a criminal is less culpable when she commits a crime attributable to "a disadvantaged background, or to emotional or mental problems."[38] It is imperative, therefore, that the sentencer be allowed both to hear all mitigating evidence offered by the defendant and fully to "consider and give effect to that evidence in imposing sentence."[39] Only if those conditions are met, the Court held, can the sentencer's decision be a "reasoned moral response" to the evidence, as is constitutionally required.[40]

Justice O'Connor followed with an analysis of each of the special issues, paraphrasing the issues: "Did Penry act deliberately when he murdered Pamela Carpenter? Is there a probability that he will be dangerous in the future? Did he act unreasonably in response to provocation?"[41] With little hesitation, the Court found that Mr. Penry's mental retardation could not have accrued to his benefit as a mitigating factor in the sentencing process merely through the consideration of these special issues.[42] The statute was thus invalidated precisely because it prevented the human frailties of the convict from being fully considered in the administration of capital punishment.[43]

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36. *Penry*, 109 S. Ct. at 2944.

37. *Id.* at 2947 (citing Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982)).

38. *Id.*

39. *Id.*

40. *Id.* at 2948.

41. *Id.* at 2947.

42. *See id.* at 2949 (It is true that Penry's mental retardation was relevant to the question of whether he was capable of acting "deliberately," yet his retardation also "had relevance to [his] moral culpability beyond the scope of the special verdict questions. . . . Personal culpability is not solely a function of a defendant's capacity to act deliberately." (citations omitted)).

43. This holding, now a major aspect of death penalty jurisprudence, was in large part overlooked by the press in their attacks on the opinions. Had the dissent prevailed on this issue, opponents of capital punishment would certainly have suffered a major

Four justices[44] dissented, believing that the Constitution requires only that the defendant be allowed to *present* mitigating evidence and that state law need only make such evidence "relevant" to the sentencer's verdict.[45] Justice Scalia wrote for the dissent that the States should not be hindered in their ability to "channel by law" the precise legal *effect* of the relevant mitigating circumstances, as Texas had done.[46] The dissent argued that the Texas special issues were wholly consistent with the Court's death penalty jurisprudence. The Court has sought to strike a balance between complete sentencing jury discretion, which can result in "arbitrary and capricious" sentencing, and no discretion, which prevents consideration of individual circumstances. Justice Scalia characterized the majority as "simply dump[ing] before the jury all sympathetic factors,"[47] an approach more likely to produce "unfocused sympathy" than a "reasoned moral response."[48]

The *Penry* Court next turned to the central issue of the case, whether it is per se unconstitutional to execute convicts who are mentally retarded. As discussed, the Court assumed the constitutionality of the death penalty and then employed a two-step analysis: First, the Court articulated a viable constitutional standard. Second, it applied that standard to the facts at hand.

With respect to the first step, all of the justices agreed that an Eighth Amendment analysis is premised on two basic tenets. First, "the Eighth Amendment prohibits punishment considered cruel and unusual *at the time* the Bill of Rights was

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setback because States could then structure sentencing proceedings so as to make mental retardation only indirectly relevant, or perhaps to make such evidence work to defendant's detriment.

44. Justice Scalia was joined in his dissent on this issue by the Chief Justice, Justice Kennedy, and Justice White.

45. *Penry*, 109 S. Ct. at 2966 (Scalia, J., dissenting).

46. *Id.* (Scalia, J., dissenting).

47. *Id.* at 2968 (Scalia, J., dissenting).

48. *Id.* (Scalia, J., dissenting). Elements of Justice Scalia's philosophy seem to have been vindicated in the case of South Carolina v. Gathers, 109 S. Ct. 2207 (1989), where evidence of a murder victim's character was deemed irrelevant to the defendant's moral culpability and thus inadmissable to the sentencing jury. Such evidence on the good nature of the victim is another type of "sympathetic factor," this time for the victim, that does not assist the jury in reaching a "reasoned moral response." *See also* Booth v. Maryland, 482 U.S. 496 (1987) (rejecting use of victim impact statements); Recent Developments, 13 HARV. J.L. & PUB. POL'Y 583 (1988). Interestingly, Justice Scalia dissented in the *Gathers* decision, on grounds that sentencing juries should be able to take into account the "specific harm visited upon society by a murderer," and that such a prohibition unacceptably restricts the States. *Gathers*, 109 S. Ct. at 2217 (Scalia, J., dissenting).

adopted."[49] Second, "[t]he prohibition against cruel and unusual punishment also recognizes the 'evolving standards of decency that mark the progress of a maturing society.' "[50] The Court's fundamental debate focuses on the second tenet—specifically, the question of what factors go into a determination of society's evolving standards and at what level of government that determination should be made.

A majority consisting of the Chief Justice and Justices Kennedy, O'Connor, Scalia, and White held that in determining society's "evolving standards of decency" the Court should only look to the objective evidence of state legislative enactments and the actions of sentencing juries.[51] If such data indicate a "national consensus" against a particular application of capital punishment—that is, if a large number of states outlaw capital punishment under particular circumstances or sentencing juries generally refuse to impose the death penalty under those circumstances—then that use is declared "cruel and unusual." The Court declined to attempt to interpret opinion polls or sociological studies to supplement this numerical data, stating that "[t]he public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely."[52]

Although the majority felt that an analysis of society's "evolving standards of decency" should end with these objective tests, the dissent vehemently disagreed. Justice Brennan's dissent in *Stanford*,[53] joined by Justices Blackmun, Marshall, and Stevens, claimed that "the views of organizations with expertise in relevant fields and the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society."[54] Justice Brennan then evaluated the opinions of such organizations as the American Bar Association and the American Law Institute, along with various public opinion polls and studies, so-called "socio-scientific evidence."

49. *Penry*, 109 S. Ct. at 2953 (emphasis added).
50. *Id.* (quoting Trop v. Dulles, 356 U.S. 80, 101 (1958)).
51. *See id.* at 2953-55.
52. *Id.* at 2955.
53. Justice Brennan fully discussed "evolving standards" in his dissent in *Stanford*, while concentrating on "legitimate ends of punishment" and "proportionality" in his *Penry* dissent.
54. *Stanford*, 109 S. Ct. at 2982 (Brennan, J., dissenting).

The majority's response was to "decline the invitation to rest constitutional law upon such uncertain foundations. A revised national consensus so broad . . . as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved."[55]

In essence, the majority argued that the proper role of the Court was to recognize the principles of federalism and to defer to the state legislatures; as morally charged as the issue may be, it is the state legislators who must evaluate studies and polls, must determine communal standards of decency (and be politically accountable to them), and must legislate accordingly. Only when a "consensus"[56] develops among States to outlaw capital punishment for a category of persons, or a "consensus" arises among state sentencing juries to stop imposing capital punishment upon a category of persons, can the Court step in.[57] In the minority view, on the other hand, the Court must assume a leading role with respect to the States, evaluating subjective evidence as well as objective: " '[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the [constitutional] acceptability of' a punishment."[58]

The Court next addressed whether the considerations of "proportionality" and "legitimate goals of punishment" are additional aspects of its Eighth Amendment analysis. Here, the Court again realigned, with Justices Blackmun, Brennan, Marshall, and Stevens joining Justice O'Connor to form a majority that favored inclusion of the considerations. Because Justice O'Connor disagreed with the others on how these considera-

55. *Id.* at 2979.

56. It should be noted that the definition of the term "consensus" is by no means clear. In fact, Justice Brennan explicitly disputes Justice Scalia's method of "state counting" in the *Stanford* case, though Justice Brennan stops short of claiming the existence of a consensus against teenage death sentences. *Stanford*, 109 S. Ct. at 2982-83 (Brennan, J., dissenting).

57. The concerns of federalism in this area are not new. *See, e.g.*, *Gregg*, 428 U.S. at 186-87:

> Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular [s]tate, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

58. *Stanford*, 109 S. Ct. at 2986 (Brennan, J., dissenting) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion)).

tions relate to retarded people and sixteen-year-olds, however, no majority opinion was written on the matter. Justice O'Connor described the additional considerations in her plurality opinion in the *Penry* case:

> [W]e have also considered whether application of the death penalty to particular categories of crimes or classes of offenders violates the Eighth Amendment because [1] it "makes no measurable contribution to the acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering" or because [2] it is "grossly out of proportion to the severity of crime."[59]

The two principal goals of capital punishment, she pointed out, are retribution and deterrence. Elaborating on proportionality, she wrote that it "requires a nexus between the punishment imposed and the defendant's blameworthiness."[60]

A conservative dissent[61] disagreed with the inclusion of these elements in Eighth Amendment analysis, again on grounds of federalism and a differing perception of the role of the Court.[62] Writing for the dissent in *Penry*, Justice Scalia opined:

> I think this inquiry [into proportionality and legitimate ends] has no place in our Eighth Amendment jurisprudence. "A punishment is either 'cruel *and* unusual' (i.e., society has set its face against it) or it is not." If it is not unusual, that is, if an objective examination of laws and jury determinations fails to demonstrate society's disapproval of it, the punishment is not unconstitutional even if out of accord with the theories of penology favored by the Justices of this Court.[63]

In support of his position, Justice Scalia noted that the Court has never invalidated a punishment solely on grounds of "disproportionality" or a "lack of contribution to the acceptable goals of punishment."[64]

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59. *Penry*, 109 S. Ct. at 2955 (plurality opinion) (quoting *Coker*, 433 U.S. at 592 (plurality opinion)).

60. *Id.* at 2956 (citing Enmund v. Florida, 458 U.S. 782 (1982)).

61. Written by Justice Scalia and joined by the Chief Justice and Justices Kennedy and White.

62. An aspect of the additional tests, especially the "legitimate ends" test, seems to be their inherent manipulability, though this is not explicitly mentioned in the opinions.

63. *Penry*, 109 S. Ct. at 2964 (Scalia, J., dissenting in relevant part) (quoting *Stanford*, 109 S. Ct. at 2979 (plurality opinion)).

64. Although the dissent found a retribution analysis an inappropriate exercise for the Court, it was not totally consistent on this point. For example, the four dissenters joined Justice O'Connor in her opinion on the state of the common law at the time of

Justice Brennan attacked Justice Scalia's strictly objective Eighth Amendment analysis, arguing that "Justice Scalia's approach would largely return the task of defining the contours of Eighth Amendment protection to political majorities. But '[t]he very purpose of the Bill of Rights was to . . . place [certain subjects] beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.' "[65] Justice Scalia countered that the term "evolving standard" was not meant to be a "shorthand reference to the preferences of a majority of this Court" and that the "dissent display[ed] a failure to appreciate that 'those institutions which the Constitution is supposed to limit' include the Court itself."[66]

What emerges, therefore, is a four-part standard for determining the propriety of capital punishment on a given set of facts: (1) "cruel and unusual" at the adoption of the Bill of Rights, (2) objective "evolving standards of decency," (3) "legitimate ends of punishment," and (4) "proportionality." Applying these standards to the facts of the *Penry* and *Stanford* cases, the Court had to determine whether or not the capital punishment of mentally retarded persons and sixteen-year-olds exceeds the limits of the Eighth Amendment. Though the same majority[67] in both cases held that it is not categorically unconstitutional to execute these groups of people, the Justices' reasons varied.

The "liberal minority" in both cases,[68] using its chosen set of

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the adoption of the Eighth Amendment (one of the two basic Eighth Amendment tenets). This opinion passage reveals that the common-law prohibition against punishing "idiots" was based on concepts related to retribution and deterrence. *See Penry*, 109 S. Ct. at 2953 (referring to the term "idiots" as used in 4 W. BLACKSTONE, COMMENTARIES *24-*25); *see also id.* ("[I]t may indeed be 'cruel and unusual' punishment to execute persons who are . . . wholly lacking the capacity to appreciate the wrongfulness of their actions.").

The opinion proceeds to argue implicitly that retributive and perhaps deterrent goals are met in Mr. Penry's case. The opinion describes Mr. Penry as being aware of the nature of his actions: "Penry . . . was found to have a rational as well as factual understanding of the proceedings against him." *Id.* at 2954. It thus appears that the first "objective" tenet of Eighth Amendment jurisprudence itself contains, in this case, elements of such "subjective" criteria as retributive effect.

65. *Stanford*, 109 S. Ct. at 2987 (Brennan, J., dissenting) (quoting West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943)).

66. *Id.* at 2980 (plurality opinion) (citations omitted).

67. This majority included Justice O'Connor's swing vote, combined with the votes of the "conservative minority": the Chief Justice, Justice Kennedy, Justice Scalia, and Justice White.

68. The "liberal minority" included Justices Blackmun, Brennan, Marshall, and Stevens. Justice O'Connor joined either the liberal or conservative minority in forming every majority in the *Penry* and *Stanford* cases.

Eighth Amendment tests (which includes analyses of "socio-scientific" evidence), felt that it is always unconstitutional to execute mentally retarded persons or juveniles, and therefore the groups should be categorically immune from the death penalty.[69] This minority also indicated that even if one assumes, as the plurality did, that not all applications of the death penalty to the relevant groups are unconstitutional, these groups should nonetheless be categorically immune from capital punishment because state sentencing juries will not give proper consideration to the mitigating factors on a case-by-case basis, thus resulting in some unconstitutional applications of the death sentence. The "conservative minority" in both cases, using its chosen set of two strictly objective tests, found that as a constitutional matter, it is always permissible to allow States to execute members of these groups, so long as other capital punishment precedents are met and the States allow all mitigating factors to be considered by the sentencing jury. The plurality, per Justice O'Connor, using the four-part standard, found that the execution of mentally retarded persons and sixteen-year-olds can be either constitutional or unconstitutional, depending on the individual criminal's capacity for culpability. Because a case-by-case analysis is appropriate, principles of federalism dictate that the determination lie with the States, under proper limitations as set out in this and other precedents.

In his dissent in *Penry*,[70] Justice Brennan began by asking the same question that Justice O'Connor asked in her plurality decision, yet he answered it quite differently:

> [The] one question to be asked in determining whether the execution of mentally retarded offenders is always unconstitutional because disproportionate is whether the mentally retarded as a class "by virtue of their mental retardation alone, . . . inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty."[71]

Justice Brennan answered affirmatively, stating that a mentally retarded person is incapable of sufficient blameworthiness by

69. *See Penry*, 109 S. Ct. at 2958 (Brennan, J., dissenting); *Stanford*, 109 S. Ct. at 2982 (Brennan, J., dissenting).

70. Justice Brennan was joined by Justice Marshall. Justices Blackmun and Stevens agreed that "such executions are unconstitutional" but wrote separately. *Penry*, 109 S. Ct. at 2963 (Stevens, J., concurring in part and dissenting in part).

71. *Penry*, 109 S. Ct. at 2960 (Brennan, J., concurring in part and dissenting in part) (quoting *Penry*, 109 S. Ct. at 2957 (plurality opinion)).

clinical definition. "The impairment of a mentally retarded offender's reasoning ability, control over impulsive behavior, and moral development in my view limits her culpability so that . . . the ultimate penalty of death is always and necessarily disproportionate to her blameworthiness."[72] Justice Brennan listed many of the same factors as reasons that the death penalty also fails to *deter* mentally retarded people. Even assuming that it is not *always* unconstitutional to execute the mentally retarded, Justice Brennan stated that delegating the task of determination to a sentencing jury is an insufficient safeguard for the retarded criminals:

> The consideration of mental retardation as a mitigating factor is inadequate to guarantee, as the Constitution requires, that an individual who is not fully blameworthy for her crime because of a mental disability does not receive the death penalty . . . .
>
> At sentencing, the judge or jury considers an offender's level of blameworthiness only along with a host of other factors that the sentencer may decide outweigh any want of responsibility. . . . Indeed, a sentencer will entirely discount an offender's retardation as a [mitigating factor if he believes that when a person is retarded she is more dangerous].[73]

In his dissent in *Stanford*,[74] Justice Brennan first attacked the majority for misreading the "objective" statistics of state legislative enactments. Justice Brennan felt that the majority should have included among the number of states that reject capital punishment for sixteen-year-olds those states that reject capital punishment altogether.[75] Justice Brennan's method of counting states yielded a majority of thirty (including the District of Columbia), whereas Justice Scalia counted only fifteen (those states that allow capital punishment yet limit it to murderers over the age of sixteen).

Justice Brennan also argued that juveniles generally lack responsibility, and are "more vulnerable, more impulsive, and less self-disciplined than adults."[76] He wrote that states have recognized these shortfalls by passing laws that prevent juveniles from, among other things, drinking, voting, serving on a jury, marrying without parental consent, or purchasing

72. *Id.* at 2961 (Brennan, J., dissenting).
73. *Id.* at 2961-62 (Brennan, J., dissenting).
74. Justice Brennan was joined by Justices Blackmun, Marshall, and Stevens.
75. *See Stanford*, 109 S. Ct. at 2982-83 (Brennan, J., dissenting).
76. *Id.* at 2989 (Brennan, J., dissenting).

pornography.[77]

One of Justice Brennan's most powerful arguments was lodged against the retributive justification for executing juveniles. He argued that "the very paternalism that our society shows toward youths and the dependency it forces upon them mean that society bears a responsibility for the actions of juveniles that it does not for the actions of adults who are at least theoretically free to make their own choices."[78] Here, Justice Brennan did not generalize about the characteristics of juveniles, but instead focused on society's treatment of youth and the question of whether society can legitimately take full retribution out on a group that it has, via legislation, refrained from giving full responsibility to for their own actions.

The conservative minority responded to Justice Brennan's use of state drinking, voting, and marriage statutes by arguing:

> It is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards. . . . [The laws] do not represent a social judgment that all persons under the designated ages are not responsible enough to drive, to drink, or to vote, but at most a judgment that the vast majority are not. . . . The criminal justice system, however, does provide *individualized* testing.[79]

The conservative minority found it a relatively straightforward task to apply the facts of the current cases to the two "objective" Eighth Amendment tests that it felt were required. Simply stated, in 1789, capital punishment for sixteen-year-olds was not prohibited, and although execution of "lunatics or idiots" was prohibited, those terms referred only to the insane, a category not being considered in the *Penry* case.[80] Looking next to objective evidence of society's "evolving standards of decency," sentencing juries still regularly sentence retarded people and sixteen-year-olds to death, and only a handful of states explicitly outlaw capital punishment for these groups.[81] Thus, no clear "consensus" exists for outlawing capital punish-

77. *See id.* at 2988 (Brennan, J., dissenting).
78. *Id.* at 2989 (Brennan, J., dissenting).
79. *Id.* at 2977 (plurality opinion) (emphasis added).
80. *See Stanford*, 109 S. Ct. at 2974; *Penry*, 109 S. Ct. at 2953-54.
81. *See Stanford*, 109 S. Ct. at 2975-77; *Penry*, 109 S. Ct. at 2955.

ment in these cases. With that, the conservative minority felt that the Court had completed its constitutionally required analysis.

Out of this clashing of legal philosophies emerged the Court's opinion, written by Justice O'Connor in *Penry* and Justice Scalia in *Stanford*. The Court, using the accepted set of constitutional standards,[82] held that the Constitution does not categorically prohibit the execution of either mentally retarded persons or sixteen-year-olds. Justice O'Connor stated that "[i]n light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty."[83] In referring to "diverse capacities," Justice O'Connor explicitly rejected the dissent's contention that an unconstitutionally low level of culpability is part of the clinical definition of mental retardation.[84]

Unable to categorize completely the execution of mentally retarded persons or sixteen-year-olds as either inside or outside the bounds of the Eighth Amendment, the plurality left the task of administering the punishment in these cases to the States. Militating in favor of this outcome are principles of federalism, deference to the States, and judicial restraint.

The Court kept the ultimate decision for or against capital punishment in the hands of juries in two important ways. First, the Court held that it will look to the actions of sentencing juries as one major component of its Eighth Amendment analy-

82. Only two standards (the objective standards of (1) "cruel and unusual" punishment in 1789, and (2) "evolving standards of decency" according to state legislatures and sentencing juries) were actually applied by the Court's majority in these cases. Justice O'Connor, however, refused to abandon the remaining two standards ("legitimate ends of punishment" and "proportionality"). She wrote separately to explain the necessity of their inclusion in the Court's constitutional analysis. Because she felt that in these cases the additional standards were satisfied, she joined in the judgment of the Court.

83. *Penry*, 109 S. Ct. at 2957.

84. Justice O'Connor quoted the American Association on Mental Deficiency's standard work, *Classification in Mental Retardation*.

> The term *mental retardation* . . . embraces a heterogeneous population, ranging from totally dependent to nearly independent people. Although all individuals so designated share the common attributes of low intelligence and inadequacies in adaptive behavior, there are marked variations in the degree of deficit manifested and the presence or absence of associated physical handicaps, stigmata, and psychologically disordered states.

Penry, 109 S. Ct. at 2957 (quoting AMERICAN ASS'N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 12 (H. Grossman ed. 1983)).

sis. Second, the Court held that the ultimate determination of whether or not to administer the death sentence in those states that authorize capital punishment shall be left to sentencing juries. The reason for this is the Court's view of juries as a crucial link to society's "evolving standards of decency." The 1968 decision of *Witherspoon v. Illinois*[85] best stated this view:

> [O]ne of the most important functions any jury can perform in making such a selection [for or against the death penalty] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."[86]

The majority's deference to the jury is accompanied by a general sentiment toward judicial restraint. In *Thompson v. Oklahoma*,[87] Justice O'Connor explained why the Court is reluctant to declare a "consensus" against a form of capital punishment:

> [A]ny inference of a societal consensus rejecting the death penalty [in the *Furman* case] would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.[88]

In the end, by both decentralizing the determination of the nation's "evolving standards of decency" and decentralizing the evaluation of the mitigating circumstances in individual cases, the Court largely "humanized" the process of capital punishment. The Court avoided a bright-line holding that all members of the relevant groups necessarily lack requisite culpability and instead left to the people, in the form of sentencing juries, the authority to render judgment on a case-by-case basis. The Court left each state free to outlaw punishment under any circumstance that it feels is inconsistent with society's "standards of decency." If at some time a "consensus" develops among the fifty states that a given application of capi-

85. 391 U.S. 510 (1968).
86. *Witherspoon*, 391 U.S. at 519 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
87. 108 U.S. 2687 (1988).
88. *Id.* at 2709.

tal punishment is "cruel and unusual," the Court will then find that particular application unconstitutional. This method of decentralization (or federalism) is more "humanized" than a bright-line federal rule, which would categorize convicts without the benefit of familiarity with capital punishment administration that exists at the state level.

The *Penry* and *Stanford* cases have two significant holdings: (1) a state must structure jury consideration of a defendant's mitigating circumstances so as to allow jurors to give full consideration to all such circumstances, and (2) it is not per se unconstitutional for a state to execute a mentally retarded person or someone who murdered at ages sixteen or seventeen. Looking from a broader perspective, it is clear that coalitions on the death penalty issue have emerged on the Court, and a delicate balance is now being struck by Justice O'Connor's swing vote. A change in personnel on the Court could easily upset this balance and give one coalition a solid majority. Analysis of the *Penry* and *Stanford* decisions helps one to see where the current debates stand and the points upon which future arguments will focus.

Philip C. Berg