SUPREME COURT OF THE UNITED STATES

No. 07–5439

RALPH BAZE AND THOMAS C. BOWLING, PETITIONERS *v.* JOHN D. REES, COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April 16, 2008]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I join the opinion of JUSTICE THOMAS concurring in the judgment. I write separately to provide what I think is needed response to JUSTICE STEVENS' separate opinion.

I

JUSTICE STEVENS concludes as follows: "[T]he imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Ante*, at 17 (opinion concurring in judgment) (internal quotation marks omitted; second bracket in original).

This conclusion is insupportable as an interpretation of the Constitution, which generally leaves it to democratically elected legislatures rather than courts to decide what makes significant contribution to social or public purposes. Besides that more general proposition, the very text of the document recognizes that the death penalty is a permissible legislative choice. The Fifth Amendment expressly

requires a presentment or indictment of a grand jury to hold a person to answer for "a capital, or otherwise infamous crime," and prohibits deprivation of "life" without due process of law. U. S. Const., Amdt. 5. The same Congress that proposed the Eighth Amendment also enacted the Act of April 30, 1790, which made several offenses punishable by death. 1 Stat. 112 (1st Cong., 2d Sess. 1790); see also *Gregg* v. *Georgia*, 428 U. S. 153, 176–178 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). Writing in 1976, Professor Hugo Bedau—no friend of the death penalty himself—observed that "[u]ntil fifteen years ago, save for a few mavericks, no one gave any credence to the possibility of ending the death penalty by judicial interpretation of constitutional law." The Courts, the Constitution, and Capital Punishment 118 (1977). There is simply no legal authority for the proposition that the imposition of death as a criminal penalty is unconstitutional other than the opinions in *Furman* v. *Georgia*, 408 U. S. 238 (1972), which established a nationwide moratorium on capital punishment that JUSTICE STEVENS had a hand in ending four years later in *Gregg*.

II

What prompts JUSTICE STEVENS to repudiate his prior view and to adopt the astounding position that a criminal sanction expressly mentioned in the Constitution violates the Constitution? His analysis begins with what he believes to be the "uncontroversial legal premise" that the "'extinction of life with only marginal contributions to any discernible social or public purposes . . . would be patently excessive' and violative of the Eighth Amendment." *Ante*, at 14 (quoting in part *Furman*, *supra*, at 312 (White, J., concurring)); see also *ante*, at 9 (citing *Gregg*, *supra*, at 183, and n. 28). Even if that were uncontroversial in the abstract (and it is certainly not what occurs to me as the meaning of "cruel and unusual punishments"), it is assur-

edly controversial (indeed, flat-out wrong) as applied to a mode of punishment that is explicitly sanctioned by the Constitution. As to that, *the people* have determined whether there is adequate contribution to social or public purposes, and it is no business of unelected judges to set that judgment aside. But even if we grant JUSTICE STEVENS his "uncontroversial premise," his application of that premise to the current practice of capital punishment does not meet the "heavy burden [that] rests on those who would attack the judgment of the representatives of the people." *Gregg*, *supra*, at 175 (joint opinion of Stewart, Powell, and STEVENS, JJ.). That is to say, JUSTICE STEVENS' policy analysis of the constitutionality of capital punishment fails on its own terms.

According to JUSTICE STEVENS, the death penalty promotes none of the purposes of criminal punishment because it neither prevents more crimes than alternative measures nor serves a retributive purpose. *Ante*, at 9. He argues that "the recent rise in statutes providing for life imprisonment without the possibility of parole" means that States have a ready alternative to the death penalty. *Ibid.* Moreover, "[d]espite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders." *Ante*, at 10. Taking the points together, JUSTICE STEVENS concludes that the availability of alternatives, and what he describes as the unavailability of "reliable statistical evidence," renders capital punishment unconstitutional. In his view, the benefits of capital punishment—as compared to other forms of punishment such as life imprisonment—are outweighed by the costs.

These conclusions are not supported by the available data. JUSTICE STEVENS' analysis barely acknowledges the "significant body of recent evidence that capital punishment may well have a deterrent effect, possibly a quite powerful one." Sunstein & Vermeule, Is Capital Punish-

ment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 Stan. L. Rev. 703, 706 (2006); see also *id.*, at 706, n. 9 (listing the approximately half a dozen studies supporting this conclusion). According to a "leading national study," "each execution prevents some eighteen murders, on average." *Id.*, at 706. "If the current evidence is even roughly correct . . . then a refusal to impose capital punishment will effectively condemn numerous innocent people to death." *Ibid.*

Of course, it may well be that the empirical studies establishing that the death penalty has a powerful deterrent effect are incorrect, and some scholars have disputed its deterrent value. See *ante*, at 10, n. 13. But that is not the point. It is simply not our place to choose one set of responsible empirical studies over another in interpreting the Constitution. Nor is it our place to demand that state legislatures support their criminal sanctions with foolproof empirical studies, rather than commonsense predictions about human behavior. "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Gregg*, *supra*, at 186 (joint opinion of Stewart, Powell, and STEVENS, JJ.). Were JUSTICE STEVENS' current view the constitutional test, even his own preferred criminal sanction—life imprisonment without the possibility of parole—may fail constitutional scrutiny, because it is entirely unclear that enough empirical evidence supports that sanction as compared to alternatives such as life with the possibility of parole.

But even if JUSTICE STEVENS' assertion about the deterrent value of the death penalty were correct, the death penalty would yet be constitutional (as he concedes) if it served the appropriate purpose of retribution. I would

think it difficult indeed to prove that a criminal sanction fails to serve a retributive purpose—a judgment that strikes me as inherently subjective and insusceptible of judicial review. JUSTICE STEVENS, however, concludes that, because the Eighth Amendment "protect[s] the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim," capital punishment serves no retributive purpose at all. *Ante*, at 11. The infliction of any pain, according to JUSTICE STEVENS, violates the Eighth Amendment's prohibition against cruel and unusual punishments, but so too does the imposition of capital punishment *without pain* because a criminal penalty lacks a retributive purpose unless it inflicts pain commensurate with the pain that the criminal has caused. In other words, if a punishment is not retributive enough, it is not retributive at all. To state this proposition is to refute it, as JUSTICE STEVENS once understood. "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg*, 428 U. S., at 184 (joint opinion of Stewart, Powell, and STEVENS, JJ.).

JUSTICE STEVENS' final refuge in his cost-benefit analysis is a familiar one: There is a risk that an innocent person might be convicted and sentenced to death—though not a risk that JUSTICE STEVENS can quantify, because he lacks a single example of a person executed for a crime he did not commit in the current American system. See *ante*, at 15–17. His analysis of this risk is thus a series of sweeping condemnations that, if taken seriously, would prevent any punishment under any criminal justice system. According to him, "[t]he prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive."

Ante, at 15. But prosecutors undoubtedly have a similar concern that *any* unanimous conviction would rarely be returned by 12 randomly selected jurors. That is why they, like defense counsel, are permitted to use the challenges for cause and peremptory challenges that JUSTICE STEVENS finds so troubling, in order to arrive at a jury that both sides believe will be more likely to do justice in a particular case. JUSTICE STEVENS' concern that prosecutors will be inclined to challenge jurors who will not find a person guilty supports not his conclusion, but the separate (and equally erroneous) conclusion that peremptory challenges and challenges for cause are unconstitutional. According to JUSTICE STEVENS, "the risk of error in capital cases may be greater than in other cases because the facts are often so disturbing that the interest in making sure the crime does not go unpunished may overcome residual doubt concerning the identity of the offender." *Ibid.* That rationale, however, supports not JUSTICE STEVENS' conclusion that the death penalty is unconstitutional, but the more sweeping proposition that any conviction in a case in which facts are disturbing is suspect—including, of course, convictions resulting in life without parole in those States that do not have capital punishment. The same is true of JUSTICE STEVENS' claim that there is a risk of "discriminatory application of the death penalty." *Ante*, at 16. The same could be said of any criminal penalty, including life without parole; there is no proof that in this regard the death penalty is distinctive.

But of all JUSTICE STEVENS' criticisms of the death penalty, the hardest to take is his bemoaning of "the enormous costs that death penalty litigation imposes on society," including the "burden on the courts and the lack of finality for victim's families." *Ante*, at 12, and n. 17. Those costs, those burdens, and that lack of finality are in large measure the creation of JUSTICE STEVENS and other Justices opposed to the death penalty, who have "encum-

ber[ed] [it] . . . with unwarranted restrictions neither contained in the text of the Constitution nor reflected in two centuries of practice under it"—the product of their policy views "not shared by the vast majority of the American people." *Kansas* v. *Marsh*, 548 U. S. 163, 186 (2006) (SCALIA, J., concurring).

III

But actually none of this really matters. As JUSTICE STEVENS explains, "'objective evidence, though of great importance, [does] not wholly determine the controversy, for the Constitution contemplates that in the end *our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment*.'" *Ante*, at 14 (quoting *Atkins* v. *Virginia*, 536 U. S. 304, 312 (2002); emphasis added; some internal quotation marks omitted). "I have relied *on my own experience* in reaching the conclusion that the imposition of the death penalty" is unconstitutional. *Ante*, at 17 (emphasis added).

Purer expression cannot be found of the principle of rule by judicial fiat. In the face of JUSTICE STEVENS' experience, the experience of all others is, it appears, of little consequence. The experience of the state legislatures and the Congress—who retain the death penalty as a form of punishment—is dismissed as "the product of habit and inattention rather than an acceptable deliberative process." *Ante*, at 8. The experience of social scientists whose studies indicate that the death penalty deters crime is relegated to a footnote. *Ante*, at 10, n. 13. The experience of fellow citizens who support the death penalty is described, with only the most thinly veiled condemnation, as stemming from a "thirst for vengeance." *Ante*, at 11. It is JUSTICE STEVENS' experience that reigns over all.

* * *

I take no position on the desirability of the death penalty, except to say that its value is eminently debatable and the subject of deeply, indeed passionately, held views—which means, to me, that it is preeminently not a matter to be resolved here. And especially not when it is explicitly permitted by the Constitution.