STATE CONSTITUTIONAL LAW — CAPITAL PUNISHMENT — WASHINGTON STATE SUPREME COURT DECLARES DEATH PENALTY UNCONSTITUTIONAL IN WASHINGTON. — *State v. Gregory*, 427 P.3d 621 (Wash. 2018).

Although they lack the headlines and academic attention of the Federal Constitution, state constitutions can prove immensely consequential within our federalist system. Recently, in *State v. Gregory*,[1] Washington's Supreme Court held that the state's death penalty scheme violated article I, section 14 of Washington's constitution — a provision that bars "cruel punishment" — because it was administered in an "arbitrary and racially biased manner."[2] In doing so, it became the first American court to declare the death penalty unconstitutional based primarily on statistical evidence of racial bias in sentencing. *Gregory* contrasts markedly with *McCleskey v. Kemp*,[3] in which the U.S. Supreme Court rejected a similar claim under the Eighth Amendment.[4] A comparison of the cases reveals that the Supreme Court may be cautious in recognizing new constitutional claims, but that state court decisions like *Gregory* can allay the Court's concerns and thereby lay the groundwork for a subsequent broader reading of the Federal Constitution.

In 2001, Allen Gregory was convicted of aggravated first-degree murder and sentenced to death.[5] The Washington Supreme Court reversed and remanded the death sentence because of prosecutorial misconduct and the jury's reliance on Gregory's reversed rape convictions during sentencing.[6] After a new jury resentenced him to death, Gregory appealed again.[7] He argued Washington's death penalty statute violated the Eighth Amendment of the United States Constitution, as well as article I, section 14 of the Washington Constitution.[8] He claimed the statute failed to narrow the class of defendants eligible for the death

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[1] 427 P.3d 621 (Wash. 2018).

[2] *Id.* at 636.

[3] 481 U.S. 279 (1987).

[4] *See id.* at 312–13.

[5] *Gregory*, 427 P.3d at 627.

[6] *Id.*

[7] *Id.*

[8] Reply Brief of Appellant at 55, *Gregory*, 437 P.3d 621 (No. 88086-7). Gregory also presented a statutory argument under section 10.95.130(2)(b) of the Revised Code of Washington that his sentence was excessive and disproportionate. *Gregory*, 427 P.3d at 629. The court declined to address the statutory argument, finding that Gregory's challenge was to the "process by which the death penalty is imposed," and that a statutory claim can challenge only the specific death sentence, not the overall process of the whole system. *Id.* at 631. Gregory also challenged his conviction, arguing the trial court would not have issued certain orders and warrants against him if it had known Gregory's alleged rape victim had a history as a confidential informant. *Id.* at 638. The Washington Supreme Court refused to review Gregory's conviction, finding that Gregory had known about the evidence at trial but failed to raise it as an issue, Gregory was not raising new grounds, and no intervening changes in the law justified review. *Id.* at 639–40.

penalty, thereby resulting in "arbitrary imposition" and "room for the play of [racial] prejudices" in sentencing.[9] In support, Gregory offered the Beckett Report, a regression analysis showing black defendants in Washington were 4.5 times more likely to be sentenced to death than similarly situated white defendants.[10]

The Washington Supreme Court reversed Gregory's death sentence.[11] Writing for the majority, Chief Justice Fairhurst[12] held that Washington's death penalty scheme, as it was maintained, was unconstitutional under the state's constitution.[13] In particular, the court held that the state's scheme violated article I, section 14 because it was administered "in an arbitrary and racially biased manner."[14]

Washington's death penalty statute[15] was modeled on the Georgia statute deemed constitutional by the U.S. Supreme Court in *Gregg v. Georgia*.[16] The statute provides a bifurcated proceeding for imposing the death penalty: first the defendant must be found guilty of aggravated first-degree murder, and then a judge or jury must find that no sufficient mitigating circumstances merit leniency.[17]

In addressing Gregory's claim that Washington's death penalty statute violated both the United States and Washington Constitutions, Chief Justice Fairhurst acknowledged that precedent required the court to "resolve constitutional questions first under the provisions of [its] own state constitution before turning to federal law."[18] Addressing both state and federal law provides Washington's citizens "double security," as state constitutional provisions may be more protective than counterpart provisions of the United States Constitution.[19] The court then insulated its holding from Supreme Court review by declaring that the case would be resolved on adequate and independent state constitutional grounds.[20]

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[9] Reply Brief of Appellant, *supra* note 8, at 55 (alteration in original) (quoting Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring)).

[10] *Gregory*, 427 P.3d at 630.

[11] *See id.* at 642 (holding that all death sentences, including Gregory's, would be converted to sentences of life imprisonment).

[12] Justices Wiggins, Gordon McCloud, and Yu joined the opinion. Justice González joined in the result only.

[13] *Gregory*, 427 P.3d at 627.

[14] *Id.* at 636.

[15] WASH. REV. CODE ANN. §§ 10.95.050–060 (West 1981), *invalidated by Gregory*, 427 P.3d 627.

[16] 428 U.S. 153 (1976); *see Gregory*, 472 P.3d at 628–29.

[17] WASH. REV. CODE ANN. §§ 10.95.050–060.

[18] *Gregory*, 427 P.3d at 631 (quoting Collier v. City of Tacoma, 854 P.2d 1046, 1050 (Wash. 1993)).

[19] *Id.* (quoting Alderwood Assocs. v. Wash. Envtl. Council, 635 P.2d 108, 113 (Wash. 1981)). In the specific context of punishment, the court noted that Washington's "cruel punishment clause often provides greater protection than the Eighth Amendment." *Id.* (quoting State v. Roberts, 14 P.3d 713, 733 (Wash. 2000)).

[20] *See id.* at 632; *cf.* Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and

The court proceeded to declare Washington's death penalty unconstitutional under article I, section 14.[21] Chief Justice Fairhurst found it "now apparent that Washington's death penalty is administered in an arbitrary and racially biased manner," thereby violating the state constitution.[22] In doing so, the court afforded "great weight" to the Beckett Report commissioned by Gregory.[23] The court acknowledged that "we are not statisticians" but explained how the statistics would aid its conclusion.[24] First, the court established the purpose of the statistical evidence: Does it show that race has a meaningful impact on death penalty sentencing?[25] Second, the court announced the burden of proof was not "indisputably true social science,"[26] but rather "more likely [true] than not true."[27] The court noted that, at most, there was an eleven percent chance that the association between race and the death penalty was random.[28] Third, the court relied upon nonstatistical information to dispel any belief that the association may be random. Given the "judicial notice of implicit and overt racial bias against black defendants in [the state of Washington]," the court was "confident that the association between race and the death penalty is *not* attributed to random chance."[29] Concluding that the Beckett Report showed that race had a meaningful impact on death penalty sentencing, the court declared Washington's statute unconstitutional.[30]

Chief Justice Fairhurst ended her opinion by noting that Washington had tried, but failed, to address the problem of "arbitrariness" identified by the U.S. Supreme Court in *Furman v. Georgia*.[31] However, she noted that the death penalty is not a per se violation of Washington's constitution, but rather is unconstitutional as applied in Washington.[32]

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independent state grounds, [the Supreme Court] of course, will not undertake to review the decision.").

[21] *Gregory*, 427 P.3d at 633.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 634 (quoting State v. Davis, 290 P.3d 43, 83 (Wash. 2012)).

[25] *Id.*

[26] *Id.*

[27] *Id.* at 635 (alteration in original) (quoting State v. Santiago, 122 A.3d 1, 78 (Conn. 2015)).

[28] *Id.* at 634.

[29] *Id.* at 635.

[30] *Id.* at 636. The court also found that an arbitrary and racially biased death penalty cannot serve the legitimate penological goals of retribution and deterrence. *Id.*

[31] 408 U.S. 238 (1972) (per curiam). In *Furman*, the Supreme Court held that all death penalty statutes then existing were unconstitutional under the Eighth Amendment's Cruel and Unusual Punishment Clause. *See id.* at 256–57 (Douglas, J., concurring). The decision is understood to prevent the "arbitrary" imposition of the death penalty. Samuel R. Gross, *David Baldus and the Legacy of* McCleskey v. Kemp, 97 IOWA L. REV. 1905, 1908–09 (2012).

[32] *See Gregory*, 427 P.3d at 636. The court left open the possibility that the legislature could draft a constitutional death penalty statute. *Id.*

In a concurring opinion, Justice Johnson[33] acknowledged the racial bias concern, but wrote separately to highlight county-by-county variation in executions that also raised arbitrariness concerns. Within Washington, only two of thirty-nine counties had carried out executions since 2000, meaning that "*[w]here* a crime is committed is the deciding factor, and not the facts or the defendant."[34]

Gregory illustrates the important role that state constitutional law can play in our federalist system. When the U.S. Supreme Court reads the Federal Constitution narrowly, state court decisions like *Gregory* can lay the foundations for the Supreme Court to later adopt a broader reading. *Gregory* stands in stark contrast to the Supreme Court's rejection of a virtually identical claim under the Eighth Amendment in *McCleskey*. The *McCleskey* Court was particularly concerned about overriding state democratic processes and about the innovative nature of the plaintiff's claim, suggesting the Court may have applied a "federalism discount" — an especially narrow interpretation of federal constitutional rights — to the Eighth Amendment.[35] Decisions like *Gregory* can allay the concerns that encourage the Court to apply a federalism discount in two ways. First, *Gregory* adds Washington to the growing list of states to have voluntarily abolished the death penalty, thereby lessening the Court's democratic override concern. Second, by accepting an innovative claim, Washington becomes a laboratory for constitutional interpretation, testing whether *McCleskey*'s slippery-slope concerns will play out (or not) in Washington.

Comparing *McCleskey* with *Gregory* illustrates that the Supreme Court was constrained by limitations not applicable to Washington's highest court. In *McCleskey*, Warren McCleskey was convicted of murder in Georgia and sentenced to death.[36] As part of a habeas corpus petition, McCleskey argued that Georgia's death penalty scheme was administered in a racially discriminatory manner in violation of the Eighth Amendment.[37] He supported his claim with a statistical report, the Baldus Study, which showed defendants charged with killing white victims were 4.3 times as likely to receive the death penalty as defendants who had killed black victims.[38] The Court rejected McCleskey's

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[33] Justices Owens, Madsen, and Stephens joined the opinion.

[34] *See Gregory*, 427 P.3d. at 646 (Johnson, J., concurring).

[35] As explained by Judge Sutton, the Court may apply a "federalism discount" to federal constitutional rights because of the difficulty of imposing a one-size-fits-all constitutional solution on the entire country. In particular, the Court is incentivized to read the Constitution narrowly when a broad reading would override state democratic processes and pose slippery-slope case-management problems nationwide. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 17 (2018).

[36] McCleskey v. Kemp, 481 U.S. 279, 284–85 (1987).

[37] *Id.* at 286.

[38] *Id.* at 286–87.

Eighth Amendment challenge to Georgia's statute.[39] An analysis of the similar facts and differing outcomes of *McCleskey* and *Gregory* suggests the Court may have applied a federalism discount.

The *McCleskey* Court, hearing the claim in 1987, had compelling reasons to avoid overruling states' democratic processes.[40] Just fifteen years earlier, in *Furman v. Georgia*, the Court had declared every state's death penalty scheme unconstitutional for arbitrariness.[41] Some Justices believed *Furman* would spell the end of the American death penalty,[42] but the Court suffered a sharp democratic rebuke when thirty-five states swiftly enacted new death penalty laws.[43] This experience almost certainly affected the Court's holding in *McCleskey*. In his majority opinion, Justice Powell acknowledged the democratic action to reinstall the death penalty, stating that "[c]apital punishment is now the law in more than two-thirds of our States."[44] Not only would a decision in McCleskey's favor have overridden state democratic processes; it would have also intruded into criminal law, a field over which states traditionally exercise sovereignty.[45]

In comparison, the *Gregory* court did not face any comparable constraint. For one, the Washington court could consider local evidence of in-state democratic support for abolishing the death penalty. Justice Johnson's concurrence noted that Washington's Governor Jay Inslee had issued a moratorium on executions,[46] and the court may also have been aware that over two-thirds of Washingtonians oppose the death penalty.[47] And even if the court badly misjudged public sentiment, dem-

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[39] *Id.* at 319–20.

[40] McCleskey challenged just Georgia's death penalty statute, but had the Court struck down Georgia's statute, the decision would have quickly led to similar claims in other states. Justice Powell acknowledged as much, recognizing that "McCleskey's wide-ranging arguments . . . basically challenge the validity of capital punishment in our multiracial society." *Id.* at 319.

[41] 408 U.S. 238, 238–39 (1972) (per curiam); *see also* Carol S. Steiker & Jordan M. Steiker, *Abolishing the American Death Penalty: The Court of Public Opinion Versus the U.S. Supreme Court*, 51 VAL. U. L. REV. 579, 584 (2017).

[42] *See* Scott E. Sundby, *The Loss of Constitutional Faith:* McClesky v. Kemp *and the Dark Side of Procedure*, 10 OHIO ST. J. CRIM. L. 5, 8 (2012).

[43] *See* Steiker & Steiker, *supra* note 41, at 595. The states were able to reenact their statutes by curing them of the arbitrariness defect that the Court identified in *Furman*. *See* John Charles Boger, McCleskey v. Kemp*: Field Notes from 1977–1991*, 112 NW. U. L. REV. 1637, 1637 (2018).

[44] *McCleskey*, 481 U.S. at 319.

[45] Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 117 (2014).

[46] *Gregory*, 427 P.3d at 646 (Johnson, J., concurring).

[47] *Poll: Washington State Voters Overwhelmingly Prefer Life Sentences to Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/node/7149 [https://perma.cc/V4C2-VXS9]; *cf.* Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1682 (2010) (stating that most pathbreaking courts on same-sex marriage were within states where voters and/or political leaders supported permitting same-sex marriage).

ocratic remedies are readily available. Washington's justices are democratically elected in contested elections[48] and are therefore not insulated from the democratic process in the way that life-tenured Supreme Court Justices are.[49] Indeed, state supreme court justices in California and Tennessee have been ousted for voting against the death penalty.[50] Washington's justices also know Washington's constitution can be amended more easily than the U.S. Constitution.[51] Fears of overriding the democratic process were therefore far less pronounced in *Gregory* than in *McCleskey*.

In addition to concerns about overriding state democracy, the *McCleskey* Court was concerned with several "slippery slopes" that could arise from a broad reading of the Eighth Amendment. While most judges worry about the next case when making constitutional law, Supreme Court Justices have even more reason not to recognize new types of claims given the breadth of their jurisdiction and the potential for nationwide floods of litigation.[52] In rejecting McCleskey's claim, the Court expressed its concern that there was "no limiting principle" to McCleskey's argument.[53] Noting that the Eighth Amendment applies to all punishment, not just the death penalty, the Court stated that striking down the death penalty on evidence of bias would "throw[] into serious question the principles that underlie our entire criminal justice system."[54] The Court was also concerned that if penalties were invalid based on sentencing discrepancies related to race, then litigation may ensue if discrepancies in other variables were found, such as in facial characteristics or physical attractiveness.[55] Given that these potential case management problems would apply nationwide, the *McCleskey* Court may have applied a federalism discount to the Eighth Amendment.

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[48] Charles K. Wykes, *The Washington State Supreme Court Elections of 2006: Factors at Work and Lessons Learned*, 46 JUDGES' J. 33, 33 (2007).

[49] *See* Devins, *supra* note 47, at 1648.

[50] *Id.* at 1655.

[51] A Washington constitutional amendment can be proposed by either legislative chamber, must pass with a two-thirds vote in both chambers, and then requires majority approval by electors. WASH. CONST. art. XXIII, § 1. Washington's constitution has been amended eighty-three times since its inception in 1889. *Washington State Constitution: Amending the Constitution*, GALLAGHER L. LIBR., https://guides.lib.uw.edu/law/waconst/amend [https://perma.cc/86MR-7AJJ]; *see also* Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1701 (2010) (noting that it is easier to amend the state constitution in most states compared to the U.S. Constitution). When a state court misjudges public sentiment, the decision can often be remedied by a constitutional amendment, such as when Hawaii voters amended their constitution to overrule their state supreme court's recognition of same-sex marriage. *See* Devins, *supra* note 47, at 1630.

[52] *See* SUTTON, *supra* note 35, at 16–17.

[53] McCleskey v. Kemp, 481 U.S. 279, 318 (1987).

[54] *Id.* at 314–15.

[55] *Id.* at 317.

The *Gregory* court was freer to rule in Gregory's favor, based on the fact that its decision "comes with no risks for other States."[56] The Supreme Court's reluctance to expose the entire country to floods of litigation is dissimilar to the decision of Washington's highest court to voluntarily accept that potential flood within its own state.[57] In addition, state supreme courts have advantages over the Supreme Court in managing the precedential scope of their decisions. They are not constrained by justiciability and political question doctrines that prohibit the Supreme Court from hearing certain cases,[58] and they are more involved in establishing procedural rules and working on law reform.[59] They can use the common law to "shape evolving legal standards more cautiously" in a way federal courts cannot.[60] And importantly, state supreme courts are more active in shaping state constitutional law than the Supreme Court is in shaping the Federal Constitution.[61]

Not only are state courts freer to read constitutional rights more broadly than their federal counterparts, but in doing so, they can allay the Supreme Court's concerns about overriding democracy and opening judicial floodgates. As discussed, the Supreme Court is reluctant to overrule state democratic processes. But this reluctance is lessened when there is a trend among the states toward recognizing a new right. For example, in recent years the Supreme Court has relied upon state trends against executing the mentally handicapped[62] and minors[63] to declare such applications of the death penalty violations of the Eighth Amendment. Other rights have seen similar treatment by the Court. For instance, seven state supreme courts provided expansive protections

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56 SUTTON, *supra* note 35, at 17.

57 *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

58 *See* Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972); *see also* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1256 (1978) ("[I]n many states, the state constitutional tradition includes ingredients which place the courts in a more active posture of reviewing legislative and administrative judgments than is presently acceptable to the federal judiciary.").

59 Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1873 (2001).

60 Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 17 (1995). When a state supreme court decides a rights issue under the common law, the legislature can easily overturn the decision. This means state courts can decide certain issues under the common law in order to avoid constitutionalizing them, whereas federal courts do not have that flexibility. *Id.* at 16–17.

61 *See* Devins, *supra* note 47, at 1635.

62 Atkins v. Virginia, 536 U.S. 304, 315 (2002) (acknowledging the "consistency of the direction of change" among states in banning the death penalty for the mentally handicapped).

63 Roper v. Simmons, 543 U.S. 551, 564 (2005) (noting the "evidence of national consensus against the death penalty for juveniles" based on thirty states banning it).

to same-sex couples under state constitutional law before *Obergefell v. Hodges*[64] was decided.[65] Justice Kennedy recognized this contribution in his majority opinion, acknowledging that "the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions."[66] *Gregory* fits within this mold of building consensus among states in order to assist the Supreme Court in recognizing broader federal constitutional rights. *Gregory* makes Washington the twentieth state to abolish the death penalty,[67] and the seventh to do so since 2007.[68] As a simple "brick in the wall" of death penalty abolition, *Gregory* helps to lay the groundwork for a later reevaluation of federal death penalty jurisprudence.

Decisions like *Gregory* are also significant in counteracting the Supreme Court's concerns about recognizing new types of constitutional claims that may have slippery-slope problems. The *McCleskey* Court worried that there was no limiting principle if *any* form of punishment could be struck down based on *any* arbitrary associations between a characteristic and punishment.[69] In adopting the reasoning the *McCleskey* Court refused to adopt, the *Gregory* court has opened up Washington as a laboratory for constitutional experimentation. Whether the *McCleskey* Court's fears were well founded can be measured by looking to see if Washington's "entire criminal justice system"[70] comes under attack post-*Gregory*. If it does not, then the experiences of Washington's courts in addressing the *McCleskey* Court's slippery-slope concerns may justify revisiting that Court's holding.

Gregory is yet another example of the important role state constitutional law can play in our federalist system. Reluctant to override state democratic processes and to subject the nation to litigation floods, the Supreme Court may apply a federalism discount to federal constitutional rights. State court decisions like *Gregory* can allay the concerns that lead the Court to apply a federalism discount by helping to build consensus state by state and by offering their states as laboratories for constitutional experimentation.

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64 135 S. Ct. 2584 (2015).

65 Devins, *supra* note 47, at 1675.

66 *Obergefell*, 135 S. Ct. at 2597.

67 Mark Berman, *Washington Supreme Court Strikes Down State's Death Penalty, Saying It Is "Arbitrary and Racially Biased*," WASH. POST (Oct. 11 2018) https://wapo.st/2PoPhop [https://perma.cc/8TBM-NJYD].

68 *See* Mark Berman, *There Are 18 States Without the Death Penalty. A Third of Them Have Banned It Since 2007.*, WASH. POST (Apr. 30, 2014) https://wapo.st/1iDesno [https://perma.cc/S7H2-ZLPW].

69 McCleskey v. Kemp, 481 U.S. 279, 315–19 (1987).

70 *Id.* at 315.