KILLING STAYS

MADALYN K. WASILCZUK*

For decades, the Supreme Court has been suspicious of litigation under warrant in capital cases. The Court has described last-minute litigation as manipulative and dilatory, a result of gamesmanship by people on death row and their lawyers. With the confirmation of Justice Brett Kavanaugh in 2018, the Court began to extinguish the opportunity to assert death row detainees' rights against unlawful death sentences and executions, reaching a crescendo of stay vacaturs and denials during the Trump executions. Despite this sea change in capital stay jurisprudence and practice, few scholars have focused on the capital stay as a vital component of capital jurisprudence or recognized the effects of upending the regular practice of litigation under warrant.

This Article clarifies the importance of the capital stay to the adjudication of death row detainees' rights and argues that the Court's hostility to the capital stay has four principal effects: First, the Court's evisceration of the capital stay moots the substantive rights of those facing execution. Second, it undermines the role of the federal courts to protect the rights of Black, disabled, and other disfavored litigants. Third, it warps the usual jurisprudential development of death penalty law by eliminating merits rulings and breaking new ground on the shadow docket. Finally, it instantiates the Court's refusal to be bound by law or facts, thereby subverting the rule of the law. The capital stay requires additional theoretical development. This Article lays the foundation for that work.

Introduction 860
I. The Law of Stays of Execution 864
  A. Staying in Context 864
  B. Stay Jurisprudence 866
  C. Stays by the Rules 873
  D. To Stay or Enjoin? 875
II. Shadows Over the Death Chamber 879
  A. 2019: Clash of Conservatives 880
  B. 2020 through January 2021: The Trump Executions 886
  C. 2021 to 2022: Routine Emergency Executions 895

---

* Assistant Professor of Law, University of South Carolina Joseph F. Rice School of Law. https://orcid.org/0000-0002-3445-0478 [https://perma.cc/VF3X-CELN]. Thank you to Alexandra Natapoff, Lee Kovarsky, Steve Vladeck, Jill Engle, Sam Kamin, Anna Roberts, Alexandra Klein, Etienne Toussaint, Laura Lane-Steele, and Meghan Brooks for their generous and thoughtful feedback. I am grateful to the participants at the Richmond Junior Faculty Forum, CrimFest!, and the AALS Law Professors with Disabilities & Allies Section Works-in-Progress Session for their engagement with this Article. Thank you also to Christel Purvis for fabulous research assistance.

https://doi.org/10.59015/wlrSEDB3100

D. 2023: The Vanishing Capital Stay 900
III. Vacating Rights on Death Row 901
A. Devolving Standards of Decency 902
1. Mooting Rights to a Legal Conviction and Sentence .. 902
2. Mooting Rights to a Lawful Execution 904
B. The Precedential Cliff 906
C. Unprecedented Lawmaking 912
D. The Court above the Law 918
1. Legal Standards 919
2. Factual Analysis 921
E. Reinforcing the Radicalized Death Penalty 923
Conclusion 928

INTRODUCTION

On January 25, 2024, the Supreme Court denied a stay to Kenneth Eugene Smith, allowing Alabama to execute him by pumping nitrogen into a gas mask, thereby depriving him of oxygen.[1] A first-of-its-kind execution, Alabama had promulgated a heavily redacted version of the protocol five months earlier with the intention of executing Smith, whose execution by lethal injection the Alabama Department of Corrections (ADOC) had botched in November 2022.[2]

In the lead-up to Smith's prior attempted execution, the Eleventh Circuit had granted a stay of execution on the grounds that Alabama's lethal injection protocol would subject Smith to an unconstitutional risk of pain.[3] The Supreme Court vacated that stay without opinion or reasoning over three dissents.[4] As Justice Sonia Sotomayor noted before the state's second execution attempt, "Smith's predictions came true. He 'survived to describe the intense fear and pain [he] experienced during Alabama's torturous attempts to execute [him].'"[5]

This time, there was no need for the Court to act, having already disciplined the lower courts through repeated stay denials and vacaturs.[6]

---

1. *Smith v. Hamm*, No. 23-6562 (23A688), slip op. at 1 (U.S. Jan. 25, 2024) (Sotomayor, J., dissenting).

2. *Id.* (Sotomayor, J., dissenting).

3. *See id.* at 5 (Sotomayor, J., dissenting); *Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13846, 2022 WL 19831029 (11th Cir. Nov. 17, 2022).

4. *Smith*, slip op. at 2 (Sotomayor, J., dissenting).

5. *Id.* at 5 (Sotomayor, J., dissenting) (quoting *Barber v. Ivey*, 143 S. Ct. 2545, 2551 (2023) (Sotomayor, J., dissenting)).

6. The district court denied the preliminary injunction and stay, finding that Smith failed to prove both the likelihood of a substantial risk of pain and that there was

At the end of 2022, the Supreme Court had vacated several reasoned Eleventh Circuit orders staying two of three botched executions.[7] In the end, despite ADOC's assurances that the nitrogen hypoxia method would render Smith unconscious within seconds and then kill him,[8] Smith was again proven right. "For four minutes, [Smith] was gasping for air. He appeared to be conscious. He was convulsing, he was writhing, the gurney was shaking noticeably."[9]

The Supreme Court's responses to the series of botched executions reflect a trend in capital litigation: the Court has become far less solicitous of capital litigation once an execution date has been set, often intervening to allow executions to proceed while rejecting most applications for relief.

Recent scholarly and public discourse has elevated awareness of the "shadow docket," the non-merits, emergency docket of the Supreme Court. The death penalty shadow docket has played an important role in that conversation. Professor Stephen Vladeck has credited capital punishment as the primary issue that shaped today's shadow docket practice.[10] Professor William Baude, the originator of the term "shadow docket,"[11] noted in 2019 that the Court's behavior in death penalty cases demonstrated that it was "attempting to signal a significant shift in how

---

a "feasible, readily-implemented alternative" because Smith had proposed a list of changes to the execution protocol. *Id.* at 3 (Sotomayor, J., dissenting) (quoting *Smith v. Hamm*, No. 23-cv-656, 2024 WL 262867, at *2 (M.D. Ala. Jan. 24, 2024)). The Eleventh Circuit panel sided 2-1 with the district court, unanimously holding that while Smith had not failed the readily implementable alternative prong, two judges determined he had not established a risk of substantial harm. *Id.* (Sotomayor, J., dissenting) (citing *Smith v. Comm'r, Ala. Dep't of Corr.*, No. 24-10095, 2024 WL 266027, at *8 n.7 (11th Cir. Jan. 24, 2024)). The panel further concluded that the district court's factual findings were not "clearly erroneous." *Id.* (Sotomayor, J., dissenting). *See also Barber v. Ivey*, No. 23-5145, slip op. at 8 (U.S. July 21, 2023) (mem.) (Sotomayor, J., dissenting) ("Unfortunately, lower courts are receiving the message.").

7. *Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13781, 2022 WL 17069492, at *5 (11th Cir. Nov. 17, 2022) (per curiam). In Alan Eugene Miller's case, the district court granted a preliminary injunction, while in Kenneth Eugene Smith's case, a stay of execution was granted. *Miller v. Hamm*, 640 F. Supp. 3d 1220, 1227 (M.D. Ala. 2022); *Smith*, 2022 WL 19831029, at *1.

8. Nicholas Bogel-Burroughs, *A Select Few Witnessed Alabama's Nitrogen Execution. This Is What They Saw.*, N.Y. TIMES (Feb. 1, 2024), https://www.nytimes.com/2024/02/01/us/alabama-nitrogen-execution-kenneth-smith-witnesses.html.

9. *Id.*

10. *See* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 105–07, 111–12 (2023).

11. *See generally* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1 (2015).

it handles death-penalty litigation, but it [was] struggling over how to carry it out, and also likely divided over whether that shift is a good idea in any event."[12] By 2023, the conservative majority reached consensus.

Despite the central role of the capital stay in death penalty litigation and its importance to the scope and nature of the shadow docket, few scholars have examined its transformation since 2019,[13] and none have theorized the distinct role of capital stays in Eighth Amendment jurisprudence. As the Court has signaled that it will continue to disfavor end-stage litigation in death penalty cases, this Article clarifies the current state of stay jurisprudence and focuses on stays as a central locus for enforcement of the rights of those on death row.

Scholarship examining the shadow docket and stay jurisprudence tends to view death cases as exceptional.[14] The capital stay serves a different role than stays from other court orders.[15] In death penalty cases, a stay ensures that government administers the punishment pursuant to law. This occurs in two distinct ways. First, stays ensure that the convicted person has an opportunity to fully litigate the legality of the adjudicatory process. Second, stays afford individuals the chance to assert their right to an execution free from cruel and unusual punishment.

The Court's skepticism of end-stage litigation arises from its concerns that justice in capital cases is being undermined by

---

12. Will Baude, *Death and the Shadow Docket*, REASON: VOLOKH CONSPIRACY (Apr. 12, 2019, 3:30 PM), https://reason.com/volokh/2019/04/12/death-and-the-shadow-docket/ [https://perma.cc/6XYP-86NK].

13. *See* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 156–57 (2019); Isaac Green, Note, *A Cruel and Unusual Docket: The Supreme Court's Harsh New Standard for Last Minute Stays of Execution*, 16 HARV. L. & POL'Y REV. 623, 626 (2022); Jenny-Brooke Condon, *The Capital Shadow Docket and the Death of Judicial Restraint*, 23 NEV. L.J. 809, 836 (2023); Brendan McGraw, Comment, *A Low Bar for Death: 2020's Historic String of Federal Executions*, 72 DEPAUL L. REV. 509, 524–25 (2022–23).

14. *See, e.g.*, Portia Pedro, Comment, *Stays*, 106 CALIF. L. REV. 869, 883 n.69 (2018) ("This Article sets aside stays regarding criminal matters for future exploration in large part because of the differences in what is at stake and for whom between (non-habeas) civil and criminal matters."); Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J. L. & PUB. POL'Y 827, 863 (2021) ("Given the finality of capital punishment, the fact-intensive nature of sentencing generally, and the Court's unique treatment of this class of cases in the past, it would not be surprising if stays of execution would be treated both by the Supreme Court and lower courts as *sui generis*. Additionally, because the death penalty is 'exacted with great infrequency,' decisions to stay these executions may not, as a practical matter, offer lower courts much precedential value. Stays in the capital punishment context may thus create an unusual subset of issues warranting further study." (footnotes omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976))).

15. *See* Pedro, *supra* note 14, at 889–92 (explaining the procedural posture and functions of stays pending appeal).

gamesmanship.[16] To address these concerns, the Court has adopted presumptions against end-stage capital claims—even those that district or circuit courts have found meritorious. In doing so, the Court has differentiated the otherwise trans-substantive stay standard when capital litigants are involved.[17] The Court's differentiated capital stay standard leads it to deny stay applications and vacate reasoned stays from circuit courts without providing legal or factual bases for its actions. Such decisions are not only fatal to capital defendants; they are fatal to the Eighth Amendment, to the equal protection of the laws, and to the rule of law itself.

While the Court often repeats that "death is different," the erosion of its stay jurisprudence resonates with larger troubling trends.[18] It is part of the Court's rollback of Eighth Amendment protections for capital defendants more generally. It is part of the Court's deference to local legal processes and politics at the expense of disfavored defendants and other vulnerable litigants. And it is part of the Court's refusal to be constrained by the law or facts before it. While the technical workings of the stay process in capital cases might seem obscure, they provide a window into the erosion of constitutional rights.

Part I of this Article describes the place of stays in capital litigation and outlines the law of stays of execution. Part II explains the evolution of the Court's death penalty shadow docket by examining stays and vacaturs by the Supreme Court over the past several years. Part III argues that the Court's displacement of capital stays from their role in end-stage capital litigation threatens to unwind Eighth Amendment protections, cedes the lawfulness of execution to local and state political control at the expense of vulnerable defendants, and reflects the Court's increasing unaccountability to the rule of law. This Article concludes that these trends, emergent in other areas of constitutional litigation, undermine the purpose of the Eighth Amendment and mark a retreat from the principles animating the modern era of the death penalty in the United States.

---

16. For a view of why gamesmanship is both an inevitable byproduct and a beneficial outgrowth of an adversarial criminal litigation process, see John D. King, *Gamesmanship and Criminal Process*, 58 AM. CRIM. L. REV. 47 (2020).

17. Professor Katherine A. Macfarlane calls such differentiation "prisoner procedure," noting that civil procedure rules disadvantage incarcerated litigants in civil rights and habeas proceedings. Katherine A. Macfarlane, *Prisoner Procedure*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 58, 58–63 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022).

18. *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

I. THE LAW OF STAYS OF EXECUTION

Stays of execution play a crucial role in ensuring a person's opportunity to assert their rights in capital cases.[19] When reinstating the modern death penalty, the Supreme Court did so under the assumption that meaningful review by appellate courts—including, and especially, federal courts—would prevent states from imposing the death penalty arbitrarily and capriciously.[20] Stays, then, are a natural consequence of the multiplicity of legal grounds that exist to overturn a death sentence, many of which can only be litigated after direct appeals have been completed.[21] Without stays, states could not be prevented from using torturous methods of execution, people who lack competency could be executed, and state courts could not be required to apply the law in protection of vulnerable defendants. Quite simply, without stays, much of the regulatory scheme of the modern death penalty unravels.

A. Staying in Context

The procedural constraints of litigation and the irremediable harm of unlawful executions make stays central to capital litigation. Execution dates usually are not set during the pendency of direct review or the first round of post-conviction litigation. If an execution date is set prior to the completion of one round of state and federal habeas review, courts tend to stay the execution as a matter of course.[22] To avoid delay under such circumstances, some courts have expedited review with the blessing of

19. People sentenced to death are overwhelmingly men. *See* DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 3 (2024), https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf [https://perma.cc/Y87Q-3F8H] ("There were 50 women on death row as of October 1, 2022. This constitutes 2.12% of the total death row population."). For this reason, this Article generally refers to people on death row by using he/him/his pronouns.

20. *Gregg*, 428 U.S. at 188–89, 195 ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

21. VLADECK, *supra* note 10, at 124–25.

22. *See, e.g.*, *Pizzuto v. Richardson*, No. 22-cv-00452, slip op. at 2 (D. Idaho Mar. 9, 2023) (order granting application for stay of execution) ("[T]he Supreme Court has made clear that, if a 'district court cannot dismiss the [habeas] petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot.'" (quoting *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996))); *Holt v. Sec'y, Pa. Dep't of Corr.*, No. 22-cv-1766 (W.D. Pa. Feb. 14, 2023) (order granting request for a stay of execution).

the Supreme Court.[23] At the point an execution date is set, death penalty lawyers refer to any further litigation as "warrant litigation."[24]

An execution date presents a challenge to the vindication of a capital litigant's constitutional rights in three ways. First, a capital litigant may file "second or successive" post-conviction petitions when new lawyers come on to the case, new evidence is discovered, or a court recognizes a new constitutional right.[25] Second, a capital litigant may file a petition alleging claims that could not have been brought before an execution date was set. Third, the litigant may challenge the method or procedures by which the state wishes to execute them under 42 U.S.C. § 1983.[26] These categories of claims often fall into a broader category of what Professor Lee Kovarsky terms "intrinsically delayed" claims, that is, claims that are raised late in "the capital litigation sequence because identifying, developing, and presenting them earlier is either theoretically or practically impossible."[27]

Just as significantly, people on death row remain "functionally unrepresented from the moment a prior post-conviction proceeding concludes until a death warrant goes into effect."[28] This makes the warrant period a critical time during which people on death row can assert, often for the first time, important constitutional and statutory claims.

When an execution date approaches, claims will only be resolved if a stay or preliminary injunction is issued. While the general procedure for obtaining a stay is the same as in other federal cases,[29] the timing is distinct. While stays are usually decided close on the heels of the injunctive order or judgment,[30] capital litigants often move for stays of execution when a new, previously unlitigated issue arises. If a stay or preliminary injunction is not issued, the person on death row will be executed despite their unresolved legal claims, which, by virtue of the

23. *See, e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

24. *See* Lee Kovarsky, *Delay in the Shadow of Death*, 95 N.Y.U. L. REV. 1319, 1321 (2020).

25. *See* 28 U.S.C. § 2244(b)(2). Some states do not allow successive post-conviction petitions. Kovarsky, *supra* note 24, at 1344–45.

26. *Nance v. Ward*, 142 S. Ct. 2214, 2219 (2022).

27. Kovarsky, *supra* note 24, at 1356.

28. *Id.* at 1323.

29. Pedro, *supra* note 14, at 883–86 (describing the mechanics of obtaining and appealing stays).

30. *Id.* at 886.

execution, will become moot.[31] While some judges find it easy to dismiss claims brought after years or decades of litigation as contrived or manipulative, the realities of indigent defendants, prosecutorial misconduct, and death penalty procedure conspire to delay meritorious claims.

Even innocent people can remain on death row for decades before their innocence is established. There were sixteen exonerations from 2018 to 2022; on average, those sixteen people had spent twenty-seven years on death row.[32] The shortest time from conviction to exoneration was twelve years,[33] and the longest was forty-eight years.[34] Not only that, but wrongful convictions also disproportionately affect people of color. Of the sixteen exonerees, eleven were Black and three were Latine.[35] Only two were White.[36] From 1973 to January 2024, 107 of the 197 people exonerated from death row have been Black.[37] Jettisoning end-stage litigation will disproportionately harm litigants of color. The next Section will examine the substantive standard under which courts consider capital stays and thereby determine whether a legal claim will reach resolution.

B. Stay Jurisprudence

The modern era of the death penalty, beginning with *Gregg v. Georgia*,[38] created a complex regulatory scheme for the administration of the death penalty.[39] In an attempt to limit the "arbitrary and capricious action" of state criminal punishment systems, the Court introduced

31. *See, e.g.*, *Johnson v. Missouri*, 143 S. Ct. 417, 417–18 (2022) (mem.) (Jackson, J., dissenting) ("Johnson's execution irrevocably mooted our consideration of his due process claim.").

32. Austin Sarat, *Just Another Death Row Exoneration?*, VERDICT (June 19, 2023), https://verdict.justia.com/2023/06/19/just-another-death-row-exoneration [https://perma.cc/G3PR-HH6E].

33. *Id.*

34. *Glynn Simmons Exonerated 48 Years After He Was Sentenced to Death in Oklahoma*, DEATH PENALTY INFO. CTR. (Sept. 20, 2023), https://deathpenaltyinfo.org/news/glynn-simmons-exonerated-48-years-after-he-was-sentenced-to-death-in-oklahoma [https://perma.cc/35FB-NQUR].

35. Sarat, *supra* note 32.

36. *Id.*

37. *Innocence*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence [https://perma.cc/QA76-H2AZ].

38. 428 U.S. 153 (1976).

39. *Id.* at 189, 195.

procedural constraints on the imposition of capital punishment.[40] In so doing, the Court also created a regulatory scheme that ensures important rights determinations are often left unresolved until an execution date is pending.

To protect their opportunity to litigate their rights, capital litigants might file either for a stay of execution or a preliminary injunction, though the important doctrinal distinctions between the two tend to collapse under the weight of death penalty exceptionalism.[41] Likewise, the undertow of exceptionalism has wrenched the capital stay from its trans-substantive moorings.

The stay standard is meant to apply regardless of the substantive law applicable to the case. A stay will be granted in the court's discretion after consideration of four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[42]

---

40. *See* Kathryn E. Miller, *The Eighth Amendment Power To Discriminate*, 95 WASH. L. REV. 809, 820–29 (2020) (tracing the development of the Eighth Amendment's individualized sentencing requirement); CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 71 (2016) ("[T]he Court embraced at least four principles that would guide its extensive constitutional doctrine going forward: (1) states must guide sentencing discretion and narrow the class of offenders subject to the [death penalty]; (2) the death penalty must be proportionate to the offense triggering the punishment; (3) defendants must receive an individualized assessment of the appropriateness of the death penalty that includes consideration of their character, background, and the circumstances of the offense; and (4) the categorical difference between death and all other punishments ('death is different') requires that capital proceedings be especially fair and reliable.").

41. *Cf.* Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1242 (2015) ("The only plausible explanation for this practice is that the Court is now willing to engage in habeas exceptionalism—a suspension of its usual principles in order to ensure that the Writ is not granted . . . .").

42. *Nken v. Holder*, 556 U.S. 418, 434 (2009). There is a separate standard that applies for the Supreme Court to grant a stay pending certiorari which is not at issue in this Article. That standard requires a litigant to show: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (citations omitted). The full Court has never articulated a vacatur standard. *See* Vladeck, *supra* note 13, at 131 n.53 ("[I]ndividual Justices often cite then-Justice Rehnquist's in-chambers opinion in *Coleman v. Paccar, Inc.*: '[A] Circuit Justice has

The capital stay requires more of the death row detainees who seek relief. Like other "prisoner procedure" that places additional hurdles before incarcerated litigants,[43] in death penalty cases, the Court also requires lower federal courts to consider the petitioner's manipulation and delay.[44] Such fault-finding as a bar to capital stays increases the distance between rights and remedies for those sentenced to death.[45] While in other types of cases, a stay may influence whether a person suffers a breach of their rights during the pendency of litigation, in capital cases, a decision to deny a stay ends the opportunity to assert rights by extinguishing the life of the rights-holder.

The Court's belief in the necessity of heightened procedural hurdles for capital stays emerged from the conditions of the modern death penalty. Along with the punishment's conditional reinstatement came a surge in the number of requests for emergency relief pending before the Supreme Court.[46] The frequency of such requests along with the

---

jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay.'" (citation omitted) (quoting *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)). For the Supreme Court's application of vacatur standards in death penalty cases, see *infra* Section III.C.

43. *See* Macfarlane, *supra* note 17, at 58–59.

44. *See, e.g.*, *Hill v. McDonough*, 547 U.S. 573, 584–85 (2006) ("A court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.' . . . The federal courts can and should protect States from dilatory or speculative suits." (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004))); *Woodard v. Hutchins*, 464 U.S. 377, 377–78 (1984) (Powell, J., concurring) ("This is another capital case in which a last-minute application for a stay of execution and a new [habeas] petition . . . have been filed with no explanation as to why the claims were not raised earlier or . . . in one petition. It is another example of abuse of the writ."); *Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983) (per curiam) (Burger, C.J., concurring) ("The argument so often advanced by the dissenters that capital punishment is cruel and unusual is dwarfed by the cruelty of 10 years on death row inflicted upon this guilty defendant by lawyers seeking to turn the administration of justice into the sporting contest that Roscoe Pound denounced . . . .").

45. *See* Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1527–28, 1553 (2018).

46. VLADECK, *supra* note 10, at 122–23. *See also* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 160–61 (2005) (comparing the typical two executions per year in the six years following *Gregg v. Georgia* to the eighty-six stay requests received during the 1983 term alone).

increasing length of time between death sentencing and execution[47] led some justices to conclude that people on death row and their counsel were gaming the system[48]—or even waging a "guerrilla war" on capital punishment.[49] The Court's suspicion of capital counsel grew alongside its reticence to vindicate the rights of condemned prisoners.[50]

From the early 1980s through the first decade of the 2000s, the Court suggested both that capital stays require heightened showings of merit relative to other stays[51] and that delay can justify denial of a stay even when claims have merit. As the Court became more explicit that capital stays should be viewed with skepticism, lower federal courts followed their lead and "invoked their equitable powers to dismiss suits they saw as speculative or filed too late in the day."[52] The Supreme Court also positioned the federal courts as protectors of state courts that faced "[r]epetitive or piecemeal litigation" and "dilatory or speculative suits."[53]

---

47. In 1960, the average time between a death sentence and execution in the United States was two years. Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 181 (1998). In 2022, the average time spent on death row between sentencing and execution was twenty-one years. *See Execution List 2022*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/2022 [https://perma.cc/S3CB-PY3B]. The shortest time spent on death row for a 2022 execution was thirteen years, while the longest was forty years. *Id.*

48. *See, e.g.*, *Sullivan*, 464 U.S. at 112 (Burger, C.J., concurring in denial of stay) ("The argument so often advanced by the dissenters that capital punishment is cruel and unusual is dwarfed by the cruelty of 10 years on death row inflicted upon this guilty defendant by lawyers seeking to turn the administration of justice into the sporting contest that Roscoe Pound denounced . . . .").

49. Erik Eckholm, *Supreme Court Justices Hear Oklahoma Inmates' Lethal Injection Case*, N.Y. TIMES (Apr. 29, 2015), https://www.nytimes.com/2015/04/30/us/supreme-court-to-hear-oklahoma-inmates-lethal-injection-case.html.

50. *Barefoot v. Estelle*, 463 U.S. 880, 888 (1983) ("It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts." (quoting *Lambert v. Barrett*, 159 U.S. 660, 662 (1895))).

51. *See id.* at 885; McFadden & Kapoor, *supra* note 14, at 840–42 (noting a "significant possibility" of success requires a higher standard than "likelihood of success on the merits"). *See also Nelson v. Campbell*, 541 U.S. 637, 649 (2004) ("[T]he mere fact that an inmate states a cognizable § 1983 claim does not warrant the entry of a stay as a matter of right.").

52. *Hill v. McDonough*, 547 U.S. 573, 584–85 (2006) (first citing *Hicks v. Taft*, 431 F.3d 916 (6th Cir. 2005); then citing *White v. Johnson*, 429 F.3d 572 (5th Cir. 2005) (per curiam); and then citing *Boyd v. Beck*, 404 F. Supp. 2d 879 (E.D.N.C. 2005)).

53. *Id.* at 585.

Over the same period, the Court bolstered the weight of the states' interests relative to that of incarcerated persons. To achieve this, the Court first gave rhetorical heft to the states' interests in administering their legal systems.[54] The Court also abstracted the state interest from the interest in the case or controversy at issue (an individual removal or execution) to a general rule of law interest, broadening the scope of the inquiry in the state's favor.[55] Finally, the Court "merge[d]" the harm to the opposing party and the public interest "when the Government is the opposing party."[56] Through that merger the Court established that the public interest was coterminous with that of the state, indicating that citizens' interests lie only with the state and not with detainees.[57]

---

54. *Nelson*, 541 U.S. at 649 ("A stay is an equitable remedy, and '[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation.'" (quoting *Gomez v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam))). This view of state interests in capital cases preceded a broader shift in the evaluation of government interests, as Professor Stephen Vladeck has noted. *See* Vladeck, *supra* note 13, at 155 ("Recall from above that a majority of the Court has now endorsed the view Chief Justice Roberts expressed in chambers in 2012 — that '[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers))).

55. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) ("[C]ourts must be mindful that the Government's role as the respondent in every removal proceeding does not make the public interest in each individual one negligible . . . ."). Notably, the Court did so in the context of immigration proceedings, in which the Court acknowledged that a person removed from the jurisdiction of the U.S. could still litigate their claims, while an executed person decidedly cannot. *Id.* ("Although removal is a serious burden for many [noncitizens], it is not categorically irreparable, as some courts have said."). *See* Vladeck, *supra* note 13, at 131–32 (noting that the Court's government injury standard "makes it unnecessary to consider the likelihood and magnitude of these actual injuries; it substitutes an abstract injury to sovereignty that requires no proof and that may be given substantial weight in the balancing process" (quoting DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 397 (5th ed. 2019))).

56. *Nken*, 556 U.S. at 435.

57. Scholars have noted that the idea of alignment only with the prosecuting interest obscures the true stakes of our criminal legal system. *See, e.g.*, Jocelyn Simonson, *The Place of "the People" in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019); I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653 (2018); I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561 (2020); Marie Manikis, *Conceptualizing the Victim Within Criminal Justice Processes in Common Law Tradition*, *in* THE OXFORD HANDBOOK OF CRIMINAL PROCESS 246, 248 (Darryl K. Brown, Jenia I. Turner & Bettina Weisser eds., 2019). Richard Hasen has also critiqued the Court's failure to consider a range of interests when balancing stays. Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 443 (2016). I intend to explore the Court's consideration of the interests at stake in capital stays further in future work.

As the Court ratcheted up the bar for capital stays, it continued to recognize stays' centrality to the judicial process in other contexts.[58] While pushing federal courts to expedite justice in capital cases, the Court explained in immigration cases:

> The authority to hold an order in abeyance pending review allows an appellate court to act responsibly. A reviewing court must bring considered judgment to bear on the matter before it, but that cannot always be done quickly enough to afford relief to the party aggrieved by the order under review. The choice for a reviewing court should not be between justice on the fly or participation in what may be an "idle ceremony."[59]

After a period of stability, the Court issued another blow to capital stays in *Bucklew v. Precythe*.[60] Though the standard for stays of execution was irrelevant to the merits of Bucklew's challenge,[61] Justice Neil Gorsuch decried end-stage litigation and circuit courts' stay practices.[62] Leaning into the "Strategic Delay Account"[63] of methods-of-execution litigation, Justice Gorsuch wove a tale of endless, spurious litigation:

> "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." Those interests have been frustrated in this case. Mr. Bucklew committed his crimes more than two decades ago. He exhausted his appeal and separate state and federal habeas challenges more than a decade ago. Yet since then he has managed to secure delay through lawsuit after lawsuit. He filed his current challenge just days before his scheduled execution. That suit has now carried on for five years and yielded two appeals to

58. *Nken*, 556 U.S. at 427 (describing the power to grant a stay as "part of a court's 'traditional equipment for the administration of justice'" (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9–10 (1942))). The *Nken* Court went on to note the historical provenance of the stay. *Id.* ("The power to grant a stay . . . was 'firmly imbedded in our judicial system,' 'consonant with the historic procedures of federal appellate courts,' and 'a power as old as the judicial system of the nation.'" (quoting *Scripps-Howard Radio*, 316 U.S. at 13, 17)).

59. *Id.* (quoting *Scripps-Howard Radio*, 316 U.S. at 10).

60. 139 S. Ct. 1112 (2019).

61. *Id.* at 1146 (Sotomayor, J., dissenting) ("Given the majority's ominous words about late-arising death penalty litigation, . . . one might assume there is some legal question before us concerning delay. Make no mistake: There is not." (citation omitted)).

62. *See id.* at 1133–34 (majority opinion).

63. Kovarsky, *supra* note 24, at 1321.

> the Eighth Circuit, two 11th-hour stays of execution, and plenary consideration in this Court. And despite all this, his suit in the end amounts to little more than an attack on settled precedent, lacking enough evidence even to survive summary judgment—and on not just one but many essential legal elements set forth in our case law and required by the Constitution's original meaning.
>
> The people of Missouri, the surviving victims of Mr. Bucklew's crimes, and others like them deserve better. Even the principal dissent acknowledges that "the long delays that now typically occur between the time an offender is sentenced to death and his execution" are "excessive."[64]

Cementing a jurisprudential change already in progress and presaging the vacaturs that were to follow, Justice Gorsuch also relied on the shadow docket case *Dunn v. Ray*.[65] Not only did *Ray* endorse the vacatur of a Fifth Circuit stay,[66] it also characterized the incarcerated man's actions as manipulative and dilatory despite evidence that the prison itself caused the delay.[67]

Bucklew's dicta promulgated a balancing test that treated finality and expediency as weightier than the ultimate determination of the merits of the lawfulness of an execution itself. Though, as a formal matter, *Bucklew* had no effect on the stay standard, the case made clear that the Court intended to make stays "the extreme exception."[68] This negative equity—the flexibility to deny stays in cases in which the underlying legal claim has merit—mirrors the negative equity the Court exercises across

---

64. *Bucklew*, 139 S. Ct. at 1133–34 (citations omitted) (first quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006); and then quoting *Bucklew*, 139 S. Ct. at 1144 (Breyer, J., dissenting)).

65. 139 S. Ct. 661 (2019) (mem.). *See infra* Sections II.A, III.D.2. The Court relied on *Ray* as precedent despite issuing the order in the case after the *Bucklew* argument. Green, *supra* note 13, at 632.

66. *See Ray*, 139 S. Ct. at 661.

67. *See id.*; *id.* at 662 (Kagan, J., dissenting). The prison informed Ray of the challenged policy only fifteen days before the execution. Ray filed his claim five days later. *See id.* at 661 (majority opinion); *id.* at 662 (Kagan, J., dissenting). For more on the distortion of the record in capital stays cases, see *infra* Section III.D.2.

68. *Bucklew*, 139 S. Ct. at 1134; *id.* at 1146 (Sotomayor, J., dissenting) ("Were [the comments about last-minute stays] to be mistaken for a new governing standard, they would effect a radical reinvention of established law and the judicial role."). For the ways courts have inferred precedent from the Supreme Court's shadow docket and dicta in the absence of other applicable precedent, see *infra* Section III.C.

its habeas corpus jurisprudence.[69] In the succeeding years, the Court's shadow docket cases—and lower court's implementation of their signals—would bear that out. Moreover, some of the lower federal courts' rules began to reflect concerns over delay. The next Section discusses the landscape of court rules governing capital stays.

C. Stays by the Rules

Federal court rules vary in the extent to which they set forth distinct procedures for capital stays. The Supreme Court's rules do not address the substantive standards of review for stays or require that the Court (or any individual justice) issue an explanation for a decision.[70] Instead, they simply delineate the procedures one must follow to file a motion seeking a stay or vacatur thereof.[71] The Supreme Court lacks specialized rules for stays of execution.[72]

By contrast, among the U.S. Courts of Appeals, only the Eleventh and D.C. Circuit lack specialized stay of execution rules, suggesting they follow the same filing procedures for stays of execution as other civil case stays.[73] In most circuits, specialized stay rules apply to all cases bearing on a capital conviction, death sentence, or execution,[74] while a

69. Lee Kovarsky, *The New Negative Habeas Equity*, HARV. L. REV. (forthcoming 2024) (manuscript at 5–7), https://hat.capdefnet.org/sites/cdn_hat/files/Assets/public/news/the_new_negative_habeas_equity.pdf [https://perma.cc/6SUZ-XAA9].

70. *See* SUP. CT. R. 21 ("Motions to the Court"); SUP. CT. R. 22 ("Applications to Individual Justices"); SUP. CT. R. 23 ("Stays").

71. *See* rules cited *supra* note 70.

72. *See* SUP. CT. RS. (lacking any rules dedicated only to death penalty cases or stays of execution).

73. *See* D.C. CIR. RS. (lacking any rules dedicated only to death penalty cases or stays of execution); 11TH CIR. RS. (same). While some circuits lack death penalty states, all circuits may hear death penalty cases due to the federal death penalty. The Seventh Circuit hears many more federal execution-related claims because federal death row is located at the federal prison in Terre Haute, Indiana. *See Background on the Federal Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/background-on-the-federal-death-penalty [https://perma.cc/6V3V-2HKZ].

74. *See* 1ST CIR. LOC. R. 48.0(a) (governing criminal appeals, habeas applications, and "any related civil proceedings challenging the conviction or sentence of death, or the time, place or manner of execution, as being in violation of federal law"); 2D CIR. LOC. RS. 47.1(a), (c)(8) (applying to proceedings "to which the person under sentence of death is a party, and which challenges, defends, or otherwise relates to the validity or execution of a decreed death sentence"); 3D CIR. L.A.R. MISC. 111.1 ("This rule, in conjunction with all other applicable rules, governs all cases in which this court is required to rule on the imposition of the death penalty."); 4TH CIR. LOC. R. 22(b) (not

minority of circuits apply such rules either to all cases in which someone under sentence of death is a party[75] or only to cases brought under 28 U.S.C. § 2254 and 28 U.S.C. § 2255.[76]

While most circuits have rules that specify how a party must file a motion for a stay of execution, some circuits' rules also describe when a court must grant a stay and when it must explain its reasons for deciding as it did. The Fourth, Eighth, and Tenth Circuit rules address only procedural issues and do not address substantive standards or the requirements to which panels must adhere when ruling on stays.[77]

The First, Second, Seventh, and Ninth Circuit rules all require stays in some circumstances. The First Circuit grants stays "automatically" once a notice of appeal is filed or when the court of appeals approves the filing of a second or successive application.[78] The Second Circuit, by contrast, issues an automatic stay when a case is on direct appeal or when a first habeas petition has been filed.[79] The Seventh Circuit also automatically grants stays on direct appeal in federal cases and relies on 28 U.S.C. § 2262 to define the circumstances in which stays must be granted in state cases.[80] It is also the only circuit to require panels to issue stays of execution in cases in which the government does not object.[81] Finally, the Ninth Circuit requires the panel to grant a stay only when the court has granted leave to file a second or successive application in the district court.[82]

Expediency also plays a role in some courts' rules. For instance, the Sixth Circuit allows a panel to "conclude it can appropriately address the

---

specifying scope of applicability but implying by its terms application to all motions for stay of execution); 8TH CIR. LOC. RS. 22A(d), (f) (containing rules that apply both to applications for second or successive petitions and to civil cases related to executions); 9TH CIR. RS. 22-2(b)–(c), 22-3 (governing direct criminal appeals, first petitions, second or successive petitions, and "related civil proceedings challenging an execution as being in violation of federal law"); 10TH CIR. R. 22.2(A)(1) (applying general procedures to "capital cases arising under 28 U.S.C. § 2254 or any federal criminal statute").

75. *See, e.g.*, 7TH CIR. R. 22(a)(1) (applying to "all cases involving persons under sentence of capital punishment").

76. *See* 5TH CIR. R. 8.1 (confining applicability to "cases arising from actions brought under 28 U.S.C. §§ 2254 and 2255"); 6TH CIR. R. 22(c)(1) (confining applicability to "applications under 28 U.S.C. § 2254 or § 2255 by a person under a sentence of death").

77. *See* 4TH CIR. LOC. R. 22(b); 8TH CIR. R. 22A; 10TH CIR. R. 22.2.

78. 1ST CIR. R. 48.0(c)(2)(A).

79. 2D CIR. LOC. R. 47.1(c)(1).

80. 7TH CIR. R. 22(h)(1). *See also* 28 U.S.C. § 2262 ("Mandatory stay of execution; duration; limits on stays of execution; successive petitions").

81. *See* 7TH CIR. R. 22(h)(5).

82. 9TH CIR. R. 22-3(f).

merits of the case on a motion for a stay."[83] Other courts require a panel to consider the merits in some circumstances. The Third Circuit requires a panel to "consider and expressly rule on the merits before vacating or denying a stay of execution."[84] The Fifth Circuit's rules appear broader, requiring consideration and ruling on the merits of an appeal before denying a stay if a certificate of appealability is granted and before vacating a stay granted by the district court "unless the panel rules the appeal is frivolous and entirely without merit."[85] Despite the requirement of merits review, the Fifth Circuit's rules evince the most concern about attorney delay and manipulation. The rules require "reasonable diligence" and filing seven or more days before the execution under threat of sanctions.[86]

Unlike the Federal Rules of Civil Procedure, the Seventh Circuit's rules require the panel deciding a motion to issue or vacate a stay to enunciate its reasoning.[87] The Ninth Circuit, on the other hand, requires the panel to explain itself only when the motion comes on a direct appeal or first petition and the panel has denied the motion.[88] These procedures formally apply to stays. Understanding their interplay with injunctions in capital cases is a source of confusion to courts, litigants, and observers, which the next Section explores.

D. To Stay or Enjoin?

The landscape of late-stage capital litigation is further complicated by the coexistence of requests for stays and injunctions that may be filed at the same time to the same end. Perhaps it is the similarity of purpose that causes courts to treat capital stays and injunctions preventing execution as identical, despite the differences of law that govern the two forms of relief.

Professor Portia Pedro, in her defining work on stays, writes that while stays and injunctions have "comparable effects"[89] and "similar

83. 6TH CIR. RS. 8(a)(2), 22(c)(3)(B).

84. 3D CIR. L.A.R. MISC. 111.6.

85. 5TH CIR. RS. 8.6, 8.7.

86. 5TH CIR. R. 8.10.

87. *See* 7TH CIR. R. 22(h)(7).

88. 9TH CIR. R. 22-2(e) ("If a majority of the panel votes to deny the stay, it shall enter an order to that effect and, unless impracticable, state the issues presented and the reasons for the denial.").

89. Pedro, *supra* note 14, at 890.

standards,"[90] they differ in meaningful ways. Pedro points to four important differences: stays (1) differ functionally;[91] (2) require a higher justification;[92] (3) do not require courts to articulate their reasoning;[93] and (4) occur in a procedural posture that reduces the likelihood of error.[94]

Pedro's taxonomy of the differences between injunctions, temporary restraining orders, and stays clarifies what can be a murky procedural milieu. Yet the distinctions Pedro draws underscore the distinct nature of stays of execution,[95] which in some instances makes them much more like injunctions and temporary restraining orders than stays in other contexts. For instance, stay jurisprudence in other contexts presumes that there has already been a complete record created below and that the claims on appeal have been subject to adversarial testing.[96]

Stays of execution often lack those characteristics. A prisoner may request a stay in order to challenge their competency to be executed. Such a claim does not ripen until an execution date is imminent. By its nature, the evidence for a competency to be executed claim, also known as a *Ford*[97] claim, must be gathered close in time to the execution date. Therefore, at the time the petition for a stay is filed, the underlying facts are either unknown or in dispute.

---

90. *Id.* at 890 & n.121. *See also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

91. Pedro, *supra* note 14, at 890. The Court articulated the functional difference between stays and injunctions in *Nken v. Holder*, explaining that while injunctions tell a party "what to do or not to do," stays suspend the enforceability of an order. 556 U.S. 418, 428 (2009).

92. Pedro, *supra* note 14, at 890–91, 891 n.126.

93. *Id.* at 891 & n.128. Unlike with injunctions or temporary restraining orders, a court need not state the reasons it granted or denied a motion for a stay. *Id.*

94. *Id.* at 891–92 ("[T]he procedural posture of stays differs significantly from that of preliminary injunctions and temporary restraining orders. Once a non-interlocutory appeal is pending, 'the merits of the underlying case [to the extent that they are relevant to a final order or judgment] have already been decided upon by a court, unlike when a party is seeking a preliminary injunction' or temporary restraining order. '[T]here is a reduced probability of error, at least with respect to a court's findings of fact, because the district court had the benefit of a complete record . . . .'" (footnotes omitted) (first quoting *Ohio Valley Env't Coal., Inc. v. U.S. Army Corps of Eng'rs*, 890 F. Supp. 2d 688, 691 (S.D. W. Va. 2012); and then quoting *Mich. Coal. of Radio-Active Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)).

95. Pedro herself leaves stays of execution for further exploration. *See id.* at 873 n.11.

96. *See id.* at 891–92.

97. *Ford v. Wainwright*, 477 U.S. 399, 412 (1986).

Ford claims are not the only ones that must be litigated on the eve of execution. A panoply of death penalty–related rights may only be litigated as execution nears. Two categories of "intrinsically delayed claims"[98] must almost always be raised close in time to execution: (1) "claims asserting non-trial rights bearing only on subsequent steps of the capital punishment sequence;"[99] and (2) "claims based on new evidence of innocence discovered at some point after direct review of the conviction and the sentence concludes."[100] While sometimes resolved earlier, two other categories of such claims may also remain unresolved decades after a conviction becomes final: (3) "claims asserting extant trial rights that are practically incapable of being enforced in the direct review chain;" and (4) "claims asserting trial rights that are announced or established after a conviction becomes final."[101]

As non-trial rights, methods of execution claims must often, though not always, be litigated at the last minute as well.[102] The posture of stays in these cases is further complicated by parallel preliminary injunction litigation that likewise seeks to forestall an execution until determination of an execution method's constitutionality or compliance with statutory requirements. Though the preliminary injunction rises and falls on many of the same facts, the rules of civil procedure state that they must be

98. Kovarsky, *supra* note 24, at 1356.

99. *Id.*

100. *Id.* In addition to the two types of claims that may be most likely to arise pending execution, Kovarsky also identifies two other categories of intrinsically delayed claims: "(1) claims asserting extant trial rights that are practically incapable of being enforced in the direct review chain; [and] (2) claims asserting trial rights that are announced or established after a conviction becomes final." *Id.*

101. *Id.*

102. Claims can languish for long periods even when filed timely. The federal methods of execution litigation at the center of the Trump executions had been pending since 2005 in large part due to the federal government's failure to develop execution protocols. *See* Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 621, 631–34 (2022). Willie James Pye's case also illuminates how cases linger in the court process. Pye was sentenced to death in Georgia in 1996. His direct appeal was filed and denied in 1998, and the U.S. Supreme Court denied certiorari in 1999. Pye then filed his state habeas petition on February 4, 2000. Not until January 2012 did the state habeas court rule on his petition, and his appeal of that order was denied in 2013. Pye then filed his writ of habeas corpus in July 2013. Again, there was a long delay before the petition was resolved. The district court denied relief on January 22, 2018, and the Eleventh Circuit reversed in April 2021. The Eleventh Circuit reheard the case en banc and reversed, vacating the panel opinion in October 2022. The U.S. Supreme Court denied his petition for certiorari in October 2023. Press Release, Ga. Off. of the Att'y Gen., Execution Date Set for Willie James Pye (Feb. 29, 2024), https://law.georgia.gov/press-releases/2024-02-29/execution-date-set-willie-james-pye [https://perma.cc/WUT2-U9TB].

granted using a particular procedure, under narrower circumstances, and with explicit reasoning.[103]

These two vehicles to prevent or delay an execution can become muddied because they tend to seek the same outcome and often occur in parallel motions in the same litigation.[104] Some circuits even break with their standards in other civil cases and treat stay and injunction standards as coterminous in the death penalty context.[105]

The Supreme Court's orientation toward capital stays and injunctions diverges not because of the doctrinal differences between the two mechanisms but because of their substantive effects in particular cases. In *Ramirez v. Collier*,[106] the Court favorably contrasted the requested "tailored injunction" with other "open-ended stays" when it granted an injunction pursuant to the Religious Land Use and Institutionalized Persons Act (RLUIPA).[107] The Court's analysis conveys the central difference between the granted injunction and other death penalty stays or injunctions. The Court found that "Ramirez is likely to suffer irreparable harm . . . because he will be unable to engage in protected religious exercise in the final moments of his life."[108]

While others have noted that the religious exercise rights that Ramirez asserted are favored by the current Court,[109] it seems likely that timing, too, influenced the Court to act. Irreparable harm is a common feature of capital stays and injunctions. The harm of execution while incompetent and the harm of suffering cruel and unusual punishment because of torturous execution methods are both irreparable. Execution cannot be undone.

Yet the Court found that the balance of equities was different in this case not because of the unique harm but because the right Ramirez asserted could be accommodated "without delaying or impeding his execution."[110] Therefore, while the bar for an injunction should, in

---

103. *See* Pedro, *supra* note 14, at 890–92.

104. *See, e.g.*, *Smith v. Hamm*, No. 22-CV-497, 2022 WL 17067498, at *1–3 (M.D. Ala. Nov. 17, 2022) (denying Smith's emergency motion to stay execution and motion for a preliminary injunction to enjoin defendant from executing him by lethal injection).

105. *See Long v. Sec'y, Dep't of Corr.*, 924 F.3d 1171, 1176 (11th Cir. 2019).

106. 142 S. Ct. 1264 (2022).

107. *Id.* at 1282.

108. *Id.* at 1271.

109. *See, e.g.*, *U.S. Supreme Court Takes Broad View of Religious Rights in Key Cases*, REUTERS (June 27, 2022, 10:17 AM), https://www.reuters.com/legal/government/us-supreme-court-takes-broad-view-religious-rights-key-cases-2022-06-27/.

110. *Ramirez*, 142 S. Ct. at 1282.

theory, be higher than for a stay, the Court has weighted its balancing test so heavily in favor of expediency that injunctions—at least when narrow and time limited—are more likely to succeed than stays. The next Part turns to the Court's consideration of emergency relief in death penalty cases as the composition of the Court has changed.

II. SHADOWS OVER THE DEATH CHAMBER

Since the confirmation of Justice Brett Kavanaugh to the Court,[111] capital stays have grown elusive. A mechanism meant to preserve capital prisoners' lives pending the adjudication of the legality of their convictions, sentences, and executions, capital stays slow the machinery of death to make time for justice. Faced with this tradeoff, the Court has prioritized execution dates. Since October 2018,[112] the Supreme Court has removed the final obstacle to execution in twelve cases,[113] granted only four stays,[114] and denied two motions to vacate a final barrier to execution that applied to five cases.[115]

The period since 2019 has presented a marked shift in how the Court treats death penalty cases on its shadow docket. Viewed by scholars as fact-bound and affecting only individual prisoners,[116] the Court has increasingly treated all end-stage death penalty cases as presenting a single issue: delay. The consolidation of this view amongst a majority of

---

111. *See* Adam Liptak & Noah Weiland, *Justice Kavanaugh Takes the Bench on the Supreme Court*, N.Y. TIMES (Oct. 9, 2018), https://www.nytimes.com/2018/10/09/us/politics/justice-brett-kavanaugh-supreme-court.html.

112. This Article accounts for stay decisions through April 1, 2024.

113. *See Hamm v. Smith*, 143 S. Ct. 440, 440 (2022); *Hamm v. Miller*, 143 S. Ct. 50, 50 (2022) (mem.); *Hamm v. Reeves*, 142 S. Ct. 743, 743 (2022) (mem.); *Crow v. Jones*, 142 S. Ct. 417, 417 (2021) (vacating stays of execution of John Marion Grant and Julius Jones); *United States v. Higgs*, 141 S. Ct. 645, 645 (2021) (mem.); *Rosen v. Montgomery*, 141 S. Ct. 1232, 1232 (2021) (mem.); *United States v. Montgomery*, 141 S. Ct. 1233, 1233 (2021); *Barr v. Hall*, 141 S. Ct. 869, 869 (2020); *Barr v. Purkey*, 140 S. Ct. 2594, 2594–95 (2020) (mem.); *United States v. Purkey*, 141 S. Ct. 195, 195–96 (2020); *Bourgeois v. Watson*, 141 S. Ct. 507, 507 (2020) (mem.); *Barr v. Lee*, 140 S. Ct. 2590, 2591–92 (2020) (per curiam); *Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019) (mem.); *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019) (mem.).

114. *See Murphy v. Collier*, 139 S. Ct. 1475 (2019) (mem.); *Ramirez v. Collier*, 142 S. Ct. 50, 50 (2021) (mem.); *Gutierrez v. Saenz*, 141 S. Ct. 127, 127–28 (2020); *Glossip v. Oklahoma*, 143 S. Ct. 2453, 2453 (2023).

115. *See Barr v. Roane*, 140 S. Ct. 353, 353 (2019) (mem.) (denying application for stay or vacatur in the federal execution protocol cases of four prisoners); *Dunn v. Smith*, 141 S. Ct. 1290 (2021) (vacating stay on ADA claim and denying motion to vacate injunction on religion claim).

116. *See, e.g.*, McFadden & Kapoor, *supra* note 14, at 828, 831–32, 882.

the Court came only after the Trump executions, and only after considerable contestation caused by a set of religious liberty claims embedded in capital stay litigation.[117]

Just as troubling as the substantive effects of stay denials and vacaturs is the manner in which the Court has dealt these blows to the Eighth Amendment and the rule of law. Since *Barr v. Lee*[118] in 2020, the Court has not explained a single one of its capital shadow docket decisions.[119] This Part traces the trajectory of capital stay litigation over the past several terms, demonstrating the damage to the Eighth Amendment, the rights of vulnerable, disfavored litigants, and the rule of law more broadly.

A. 2019: Clash of Conservatives

Justice Kavanaugh's first execution case on the Court came just days after he was sworn in, as the Court summarily vacated the Sixth Circuit's stay of execution in Edmund Zagorski's case, with Justice Stephen Breyer and Justice Sotomayor in dissent.[120] The Court's summary vacatur of Zagorski's stay had no immediate consequence, however, because other execution barriers remained in place.[121] The remaining stays and vacaturs in the 2018 term revealed a conservative bloc contesting the weight to afford meritorious late-stage claims. The divides were especially sharp as the conservative majority faced substantive religion claims to which they were generally sympathetic, even if they were not sympathetic either to the vehicle (a capital stay) or the litigant (a person convicted of a capital crime).

---

117. *See* Kovarsky, *supra* note 102, at 642–44, 661 & n.324.

118. 140 S. Ct. 2590 (2020) (per curiam).

119. *See infra* Sections II.B–C.

120. *Mays v. Zagorski*, 139 S. Ct. 360, 360 (2018) (mem.). The stay had been predicated on Zagorski's timely exercise of his rights to appeal a denial of habeas corpus in the district court. *Zagorski v. Mays*, 906 F.3d 414, 415–16 (6th Cir. 2018). The Sixth Circuit later denied Zagorski's appeal. *Zagorski v. Mays*, 907 F.3d 901, 903 (6th Cir. 2018).

121. His execution did not proceed until November 1, 2018. *Outcomes of Death Warrants in 2018*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/outcomes-of-death-warrants-in-2018 [https://perma.cc/6298-Z2DE]. A reprieve had been granted by Tennessee governor Bill Haslam until October 21, 2023, and the U.S. District Court for the Middle District of Tennessee had issued a temporary restraining order as well. TENN. EXEC. CHAMBER, REPRIEVE (2018), https://dpic-cdn.org/production/legacy/EdmundZagorskiReprieve.pdf [https://perma.cc/W7HY-RQJE]; *Zagorski v. Haslam*, No. 18-cv-01035, 2018 WL 4931939, at *4 (M.D. Tenn. Oct. 11, 2018).

First, on February 7, 2019, the Court vacated the Eleventh Circuit's stay in *Dunn v. Ray*.[122] Justice Elena Kagan, Justice Ruth Bader Ginsburg, Justice Breyer, and Justice Sotomayor dissented.[123] The majority reasoned that the "last-minute nature" of the application gave it authority to vacate the Eleventh Circuit's reasoned decision.[124] The dissent contested the majority's characterization of the motion's timeliness. As Justice Kagan's dissent explains, Holman Correctional Facility refused Domineque Ray's request to have an imam present for his execution on January 23, 2019, despite the Alabama Code's provision that a person's "spiritual advisor" may be present at the execution.[125] He then filed his complaint on January 28—only five days later.[126]

Even accepting the majority's characterization of Ray's claim as delayed, it is worth considering the basis for its power to reject a meritorious, legally timely claim. The Court grounded such power in equity, relying on *Gomez v. United States District Court for the Northern District of California*.[127] *Gomez* raised a challenge to execution by cyanide gas in California.[128] The litigant, Robert Alton Harris, had joined a class action challenging the method of execution under 42 U.S.C. § 1983.[129] The *Gomez* Court held that the Section 1983 claim was an end-run around the successive habeas petition rules of *McCleskey v. Zant*.[130] Even if it was not, the Court wrote, Harris provided no excuse for why the claim was not brought sooner.[131] Since a stay is an equitable remedy, the Court could consider "the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation."[132]

---

122. 139 S. Ct. 661, 661 (2019) (mem.).

123. *Id.* (Kagan, J., dissenting).

124. *Id.* (majority opinion) (quoting *Gomez v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam)).

125. *Id.* at 661–62 (Kagan, J., dissenting); ALA. CODE § 15-18-83(a)(4) (2024).

126. *Ray*, 139 S. Ct. at 662 (Kagan, J., dissenting).

127. 503 U.S. 653 (1992) (per curiam).

128. *Id.* at 653.

129. *See id.*; *Gomez v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 966 F.2d 463, 463–64 (9th Cir. 1992). This challenge ultimately succeeded. *See Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996).

130. *Gomez*, 503 U.S. at 653 (citing *McCleskey v. Zant*, 499 U.S. 467 (1991)).

131. *Id.* at 654 ("This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process.").

132. *Id.*

Since *Gomez*, however, the Court had held that a Section 1983 claim was the appropriate vehicle for such a challenge,[133] and Ray explained the timing of his claim. Despite the obvious differences and change in the law, the Court relied on *Gomez* to reject Ray's claim because of delay without assessing the merits of his claim or explaining the balance between Ray's interests and those of the state.[134] Nor did the Court address the important rule of law interests raised by the *Gomez* dissent: "delay, even if unjustified, cannot endow the State with the authority to violate the Constitution."[135] Alabama executed Domineque Hakim Marcelle Ray on February 7, 2019.[136]

The next major death penalty shadow docket decision of 2019 came on March 28 in *Murphy v. Collier*.[137] In *Murphy*, the Court, over Justices Clarence Thomas and Gorsuch's dissent, granted a stay of Patrick Murphy's execution because of Texas's refusal to allow his Buddhist spiritual advisor in the execution chamber.[138] Widely seen as contradicting the Court's previous decision in *Dunn v. Ray*,[139] the Supreme Court made no mention of delay when pausing to consider Murphy's First Amendment rights during his execution.[140]

The divergent treatment of Murphy's case likely indicates cross-pressure because of the Court's solicitude for religious liberty

---

133. In *Nelson*, the Court held that methods of execution are properly brought under Section 1983 rather than as second or subsequent habeas petitions. *Nelson v. Campbell*, 541 U.S. 637, 641–43 (2004).

134. *Id.* at 649–50.

135. *Gomez*, 503 U.S. at 659 (Stevens, J., dissenting).

136. *See* Ivana Hrynkiw, *Alabama Executes Domineque Ray for 1995 Killing of Selma Teen*, AL.COM, https://www.al.com/news/montgomery/2019/02/courts-weigh-mans-religious-rights-in-holding-up-alabama-execution.html [https://perma.cc/XZP6-9425] (Feb. 8, 2019, 10:09 AM).

137. 139 S. Ct. 1475 (2019) (mem.).

138. *Id.* at 1476–77; *id.* at 1478 (Alito, J., dissenting).

139. *See* Nina Totenberg, *Supreme Court Sees 2 Similar Death Penalty Questions Very Differently*, NPR (Mar. 30, 2019, 12:17 PM), https://www.npr.org/2019/03/30/708238203/supreme-court-sees-2-similar-death-penalty-questions-very-differently [https://perma.cc/KHJ3-LUXC]; Linda Greenhouse, *A Supreme Court Do-Over*, N.Y. TIMES (Apr. 11, 2019), https://www.nytimes.com/2019/04/11/opinion/supreme-court-death-penalty.html; Ian Millhiser, *The Supreme Court Must Decide if It Loves Religious Liberty More than the Death Penalty*, VOX (Nov. 7, 2021, 8:30 AM), https://www.vox.com/22763939/supreme-court-death-penalty-religious-liberty-ramirez-collier-execution-pastor [https://perma.cc/4TT3-HBAS]; Leah Litman, *Relitigating Dunn v. Ray*, TAKE CARE (Apr. 17, 2019), https://takecareblog.com/blog/relitigating-dunn-v-ray [https://perma.cc/CQ5P-FBX5].

140. *See Murphy*, 139 S. Ct. at 1475.

claims.[141] The underlying claim—and the blowback from the conservative majority's usual supporters in *Ray*[142]—sharply divided the right wing of the Court.

Once again, late opinions followed. First, Justice Samuel Alito published a dissent, joined by Justice Thomas and Justice Gorsuch, on May 13, 2019.[143] Justice Alito's dissent noted that unlike in *Ray*, the lower courts in *Murphy* had rejected the request for a stay of execution.[144] Justice Alito also accused Murphy of the same "dilatory litigation tactics" of which the majority had accused *Ray*[145] and argued that last-minute stays undermine states' interests in timely enforcement of their orders, impair the interests of the federal courts, harm the interests of applicants with valid claims, and traumatize victims' family members and communities.[146]

In response, Justice Kavanaugh filed a "statement" distinguishing *Murphy* from *Ray*.[147] First, Kavanaugh wrote, Ray had brought a RLUIPA claim, rather than an equal treatment claim, as Murphy had done.[148] He reasoned that this meant the Eleventh Circuit's reliance on an equal treatment violation was improper and that the RLUIPA claim had been unlikely to succeed.[149] Second, Kavanaugh reasoned that

---

141. *See, e.g.*, René Reyes, *Religious Liberty, Racial Justice, and Discriminatory Impacts: Why the Equal Protection Clause Should Be Applied at Least as Strictly as the Free Exercise Clause*, 55 IND. L. REV. 275, 317 (2022) (describing the Court's heightened concern for religious liberty claims); Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 VA. L. REV. 1759, 1761 (2022) (explaining the Court's expansion of religious exemptions from generally applicable laws); Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 960–61 (2020) (identifying the Court's unsettling of the "midcentury settlement" through its freedom of religious jurisprudence).

142. *See, e.g.*, Richard Lempert, *Why Kavanaugh and a Conservative Supreme Court Punted a Religious Liberty Case on Procedure*, BROOKINGS (Feb. 15, 2019), https://www.brookings.edu/articles/dunn-v-ray-religious-liberty/ [https://perma.cc/NP3N-BDTB]; David French, *The Supreme Court Upholds a Grave Violation of the First Amendment*, NAT'L REV. (Feb. 8, 2019, 2:30 PM), https://www.nationalreview.com/corner/the-supreme-court-upholds-a-grave-violation-of-the-first-amendment/ [https://perma.cc/EUE3-3LZ3].

143. *Murphy*, 139 S. Ct. at 1478 (Alito, J., dissenting).

144. *Id.* at 1478, 1480 (Alito, J., dissenting).

145. *See id.* at 1478 (Alito, J., dissenting).

146. *Id.* at 1481 (Alito, J., dissenting).

147. *Id.* at 1476 (Kavanaugh, J., statement respecting grant of application for stay).

148. *Id.* at 1476–77 (Kavanaugh, J., statement respecting grant of application for stay).

149. *Id.* at 1477 (Kavanaugh, J., statement respecting grant of application for stay).

Alabama would have solved Ray's objections regarding equal treatment, had he brought them, by removing all ministers from the execution chamber.[150] Third, he asserted that Murphy made his request to the state a month before execution, giving time for Texas to reply, though it never did.[151] Justice Kavanaugh did not mention, as Justice Alito did, that Murphy ultimately filed in federal court only two days before his execution, nor did he address why the Court should treat a filing two days before an execution more favorably than one five days before an execution.[152]

Alito and Kavanaugh's dispute over the litigant's delay in *Murphy* reveals the arbitrariness of the Court's shadow docket decisionmaking. No litigant can be sure when a claim is timely, how much deference will be shown to lower courts' decisions, or the effect of the strength of the substantive claim on the exercise of the Court's equity.

Next, on April 12, 2019, the Court vacated Christopher Price's stay of execution.[153] By the time the decision was issued, Price's execution date of April 11 had already passed, and the department of corrections had already postponed the execution.[154] The majority again relied on the assertion that Price had delayed in bringing his claim and also contended he had missed the deadline to elect to be executed by nitrogen hypoxia rather than lethal injection.[155] Justice Breyer, in a dissent joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan, rejected the majority's assertion, underscoring that the district court judge who granted the preliminary injunction in the case had found that Price had been "proceeding *as quickly as possible* on this issue *since before the execution date was set*."[156]

Seemingly discontent with allowing the dissenters to have the last word, Justice Thomas issued a concurrence on May 13, 2019, joined by Justice Alito and Justice Gorsuch, purporting to "set the record straight."[157] The opinion, per Justice Thomas's custom in death penalty

150. *Id.* (Kavanaugh, J., statement respecting grant of application for stay).

151. *Id.* (Kavanaugh, J., statement respecting grant of application for stay).

152. *Compare id.* at 1476–78 (Kavanaugh, J., statement respecting grant of application for stay), *with id.* at 1481 (Alito, J., dissenting).

153. *Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019) (mem.).

154. Adam Liptak, *Over 3 A.M. Dissent, Supreme Court Says Alabama Execution May Proceed*, N.Y. TIMES (Apr. 12, 2019), https://www.nytimes.com/2019/04/12/us/politics/supreme-court-alabama-execution-.html.

155. *Price*, 139 S. Ct. at 1312.

156. *Id.* at 1314 (Breyer, J., dissenting) (quoting *Price v. Dunn*, No. 19-00057, 2019 WL 1578277, at *8 (S.D. Ala. Apr. 11, 2019)).

157. *Price v. Dunn*, 139 S. Ct. 1533, 1533 (2019) (mem.) (Thomas, J., concurring).

cases, gave a detailed accounting of the facts of the murder Price committed.[158] He also accused Price and his "well-heeled Boston" legal team of "gamesmanship."[159] Justice Breyer reprised his 3:00 a.m. dissent on May 30, 2019, when he once again disagreed with the majority's characterization of Price's delays in asserting his Eighth Amendment claims and lamented the arbitrariness of U.S. execution procedures.[160] Alabama executed Christopher Price on May 30, 2019.[161]

In the latter half of 2019, federal executions also featured on the Court's shadow docket. After Attorney General William Barr instructed the acting director of the Bureau of Prisons (BOP) to adopt a pentobarbital-only lethal injection protocol on July 24, 2019, federal executions could resume for the first time since 2003.[162]

Three men on federal death row had execution dates set in December[163] and two in January 2020.[164] Of those men, four were parties to lethal injection litigation that had been proceeding in the D.C. District Court since 2005.[165] Based on that litigation, the D.C. District Court enjoined those four executions on November 20, 2019,[166] and the D.C. Circuit affirmed.[167]

---

158. *Id.* at 1534 (Thomas, J., concurring).

159. *Id.* at 1535, 1540 (Thomas, J., concurring).

160. *Price v. Dunn*, 139 S. Ct. 1794, 1794–95 (2019) (mem.) (Breyer, J., dissenting).

161. *See* Adam Liptak, *Supreme Court Won't Stay Alabama Execution After Bitter Clash*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/us/politics/supreme-court-alabama-death-penalty.html.

162. Kovarksy, *supra* note 102, at 633–34; *Executions Under the Federal Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty [https://perma.cc/C8S5-H7Z6].

163. *Outcomes of Death Warrants in 2019*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/outcomes-of-death-warrants-in-2019 [https://perma.cc/JXT8-S3G5] (Dec. 11, 2019). These men were Daniel Lewis Lee, Lezmond Mitchell, and Wesley Ira Purkey. *Id.*

164. *Outcomes of Death Warrants in 2020*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/outcomes-of-death-warrants-in-2020 [https://perma.cc/7NEG-EL6E]. These men were Alfred Bourgeois and Dustin Lee Honken. *Id.*

165. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145, 2019 WL 6691814, at *3 (D.D.C. Nov. 20, 2019); Kovarsky, *supra* note 102, at 631. For a further history of how the case, originally captioned *Roane v. Gonzalez*, stalled in the federal courts, see *id.* at 631–33.

166. *Execution Protocol Cases*, 2019 WL 6691814, at *8.

167. *Roane v. Barr*, No. 19-5322, 2019 U.S. App. LEXIS 39259, at *3 (D.C. Cir. Dec. 2, 2019) (per curiam) (denying application for a stay or vacatur of the D.C. District Court's preliminary injunction).

Despite the Court's clear antipathy to lethal injection challenges,[168] it initially refused to disturb the stay, with the admonition that the majority "expect[ed] that the Court of Appeals [would] render its decision with appropriate dispatch."[169] Justice Alito, joined by Justice Gorsuch and Justice Kavanaugh, appended a "statement" opining that the government was "very likely to prevail" on the issue and that the justices saw "no reason why the Court of Appeals should not be able to decide this case, one way or the other, within the next 60 days."[170]

Of course, it would have been difficult for any of the justices to assert the prisoners had slept on their rights—litigation on the federal death penalty protocol had been pending for over a decade.[171] Why, then, should the litigation wrap within two months? Simply put, the administration officials and the Court (rightly) believed that if President Donald Trump did not win another term, the federal death penalty would return to dormancy.[172] As the next year would show, the drop-dead date for federal executions—January 20, 2021—would drive a dramatic turn in the Court's willingness to entertain emergency relief and explain the reasons for its decisions. That change would have lasting effects.

B. 2020 through January 2021: The Trump Executions

The Court put its skepticism of last-minute death penalty challenges, and its dicta in *Bucklew*, on full display during the Trump executions. After seventeen years without a federal execution,[173] the Trump Administration sought to execute as many people as possible before President Joe Biden's inauguration in January 2021, which would usher in another period without active federal executions. To do so, the Supreme Court cleared away lower court stays in eight of the thirteen cases that proceeded to execution.[174] The only stay the Supreme Court

168. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1118–19, 1124 (2019).

169. *Barr v. Roane*, 140 S. Ct. 353, 353 (2019) (mem.) (denying application for stay or vacatur).

170. *Id.* (Alito, J., statement respecting the denial of stay or vacatur). Indeed, Justice Alito's statement invited a renewed application if the injunction were still in place sixty days later. *Id.* at 353–54 (Alito, J., statement respecting the denial of stay or vacatur) ("I would state expressly in the order issued today that the denial of the application to vacate is without prejudice to the filing of a renewed application if the injunction is still in place 60 days from now.").

171. *See* Kovarsky, *supra* note 102, at 631–32.

172. *See id.* at 660.

173. *Id.* at 662. There had been only three federal executions over the course of the prior fifty-seven years. *Id.*

174. Green, *supra* note 13, at 625.

granted from January 2020 to January 2021 was a stay pending disposition of the petition for certiorari in *Gutierrez v. Saenz*,[175] another religious liberty case.[176]

The lack of federal executions over the preceding decades left important legal questions unresolved as federal death row barreled toward the death chamber.[177] And as the Supreme Court batted away challenges to allow executions to proceed, they allowed those legal issues to remain unresolved. The only guidance the Court offered throughout the Trump executions came in the first of its shadow docket decisions clearing the way for an execution: *Barr v. Lee*[178] on July 14, 2020.[179]

After dividing in the 2019 cases, *Lee* united the conservative bloc, with Justice Breyer and Justice Sotomayor each penning dissents joined by Justice Ginsburg, with Justice Sotomayor's dissent also joined by Justice Kagan.[180] In a per curiam decision, the majority vacated the district court's preliminary injunction, stating that the prisoners had not established a likelihood of success on the merits of the Eighth Amendment claim.[181] In describing the challenged single-dose pentobarbital protocol as the "mainstay of state executions," the Court elided the difference between the intent of evolving execution protocols (increasing humanity) and the effect of those protocols (recent botched executions).[182]

The Court also sought to bolster evidence for the constitutionality of pentobarbital-only executions. In doing so, it both overstated the holding of *Bucklew* and suggested an additional limiting factor on execution methods challenges: that experts must agree that the method inflicts a torturous death.[183] Finally, the Court invoked democratic principles to justify its order: "It is our responsibility 'to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously' so that 'the question of capital punishment' can

175. 141 S. Ct. 127 (2020).

176. *See id.* at 127–28.

177. *See* Kovarsky, *supra* note 102, at 622.

178. 140 S. Ct. 2590 (2020) (per curiam).

179. *See id.* at 2590.

180. *See id.* at 2592–93 (Breyer, J., dissenting); *id.* at 2593–94 (Sotomayor, J., dissenting).

181. *Id.* at 2591 (majority opinion).

182. *Id.* at 2591 ("'[F]ar from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite,' developing new methods, such as lethal injection, thought to be less painful and more humane than traditional methods, like hanging, that have been uniformly regarded as constitutional for centuries." (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019))).

183. *See id.*; Kovarsky, *supra* note 102, at 642–44.

remain with 'the people and their representatives, not the courts, to resolve.'"[184]

The per curiam opinion was also notable for the reasoning it did not invoke. While the Court mentioned that the crimes took place "decades ago" and noted the timing of the district court preliminary injunctions, it did not rest its reasoning on the dilatory filing of claims, as it had in *Ray* and *Price*.[185] Nor did *Lee* portray the Court as the champion of victims, as other execution methods opinions authored by conservative justices had.[186] It seems likely that the Court neglected the voice of victims in Lee's case because Daniel Lewis Lee's victims' mother had campaigned for clemency for her children's killer for years.[187]

Justice Breyer's dissent, joined by Justice Ginsburg, highlighted problems with the death penalty including arbitrariness, delay, and painful execution methods, which he argued merited the Court's reconsideration of the penalty's constitutionality.[188] Taking a different tack, Justice Sotomayor, joined by Justices Ginsburg and Kagan, homed in on the majority's about-face from its December 2019 decision and "just how grave the consequence of such accelerated decisionmaking can be."[189]

The short *Lee* opinion would be the conservative justices' last word on both the matter of the Trump executions and capital stays. The federal government executed Daniel Lewis Lee on July 14, 2020.[190]

Wesley Ira Purkey's execution would soon follow. To allow it to proceed, the Supreme Court vacated four separate injunctions and

184. *Lee*, 140 S. Ct. at 2591 (quoting *Bucklew*, 139 S. Ct. at 1134).

185. *See id.* at 2590–91; *Dunn v. Ray*, 139 S. Ct 661, 661 (2019) (mem.); *Dunn v. Price*, 139 S. Ct. 1794, 1795 (2019) (mem.) (Breyer, J., dissenting).

186. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) ("The people of Missouri, the surviving victims of Mr. Bucklew's crimes, and others like them deserve better."); *Glossip v. Gross*, 576 U.S. 863, 902 (2015) (Thomas, J., concurring) ("[T]hey do not . . . feel the impact of the crime on the victim's family . . . and they are not drawn from the community whose sense of security and justice may have been torn asunder by an act of callous disregard for human life.").

187. *Victims' Family Opposes Federal Execution of Daniel Lee*, EQUAL JUST. INITIATIVE (Nov. 7, 2019), https://eji.org/news/victims-family-opposes-federal-execution-of-daniel-lee/ [https://perma.cc/GQ9E-3K6W]. The family member most supportive of Lee' execution said, "It don't really matter to me whether they kill him or not." *Id.*

188. *Lee*, 140 S. Ct. at 2592–93 (Breyer, J., dissenting).

189. *Id.* at 2593–94 (Sotomayor, J., dissenting).

190. *See* Mark Berman, *Trump Administration Carries out First Federal Execution Since 2003 After Late-Night Supreme Court Intervention*, WASH. POST (July 14, 2020, 8:16 PM), https://www.washingtonpost.com/national/daniel-lewis-lee-execution-terre-haute-supreme-court/2020/07/14/18e3bf20-c5c7-11ea-b037-f9711f89ee46_story.html [https://perma.cc/JH94-YTF6].

stays,[191] and the BOP executed Purkey without notifying his lawyer while an application for a stay remained pending before the Seventh Circuit on a *Ford* claim.[192] Once again, the Court's liberal wing dissented. Justice Breyer's dissent reiterated his beliefs in the inadequacy of the American capital punishment system.[193]

Justice Sotomayor's dissent called attention to the majority's disregard for the deference owed to lower court preliminary injunctions. Addressing Purkey's *Ford* claims, she wrote that the government had not met the "especially heavy" burden or demonstrated "extraordinary circumstances" required to overturn a preliminary injunction.[194] The federal government executed Wesley Ira Purkey on July 16, 2020.[195]

In the lead up to Dustin Honken's July 17, 2020, execution date, little remained to be decided. The Supreme Court's vacatur of the preliminary injunction in Purkey's case had also applied to Honken,[196] and the district court refused to stay Honken's execution to allow him to appeal the court's ruling on his Administrative Procedure Act claim, as well as "numerous other claims," ruling that he did not demonstrate a strong likelihood of success on the merits.[197] The D.C. Circuit, per curiam, agreed.[198] This time, the Supreme Court had no reason to

191. *Lee*, 140 S. Ct. at 2590–91 (vacating preliminary injunction granted by the district court on July 13, 2020, on the basis of a challenge to the federal execution protocol); *Barr v. Purkey*, 140 S. Ct. 2594, 2594–95 (2020) (mem.) (vacating preliminary injunction granted by the district court on July 15, 2020); *United States v. Purkey*, 141 S. Ct. 195, 195–96 (2020) (vacating stay of execution entered by the Seventh Circuit on July 2, 2020). *See also In re Fed. Bureau of Prisons' Execution Protocol Cases*, 474 F. Supp. 3d 171, 176 (D.D.C. 2020), *vacated sub nom. Purkey*, 140 S. Ct. 2594.

192. Kovarsky, *supra* note 102, at 660 n.318.

193. *See Purkey*, 140 S. Ct. at 2595–97 (Breyer, J., dissenting).

194. *Id.* at 2597 (Sotomayor, J., dissenting) (first quoting *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, J., in chambers); and then quoting *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers)).

195. *See* Hailey Fuchs, *Government Executes Second Federal Death Row Prisoner in a Week*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2020/07/16/us/politics/wesley-ira-purkey-executed.html.

196. *See Execution Protocol Cases*, 474 F. Supp. 3d at 176.

197. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145, 2020 WL 4034240, at *1 (D.D.C. July 16, 2020).

198. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 20-5206 (D.C. Cir. July 17, 2020) (per curiam).

intervene at the last second. The federal government executed Dustin Lee Honken on his scheduled execution date.[199]

For the rest of 2020, the Supreme Court rarely had to act. The lower federal courts had gotten the message.[200] First, the Ninth Circuit rejected a request for a stay based on the Federal Death Penalty Act from Lezmond Mitchell.[201] The United States executed him on August 26, 2020, with issues of tribal sovereignty casting a shadow over his execution.[202] Next, the D.C. Circuit vacated Judge Tanya S. Chutkan's stay in Keith Nelson's case, clearing the way for his execution on August 28, 2020.[203]

The next Supreme Court intervention would come in Orlando Hall's case, after Justice Amy Coney Barrett took the bench, creating a 6-3 conservative majority.[204] Hall petitioned the D.C. District Court for a stay, which was denied,[205] likely based on Judge Chutkan's reading of *Lee*, which she believed "indicate[d] that absent particular medical circumstances, the use of pentobarbital will withstand Eighth Amendment scrutiny, no matter the evidence of excruciating pain."[206]

The D.C. Circuit reversed Judge Chutkan's decision, holding that she should not have dismissed Hall's Eighth Amendment challenge and that she should have set aside the lethal injection protocol "to the extent that it permits the use of unprescribed pentobarbital in a manner that

---

199. *See* Hailey Fuchs, *For the Third Time This Week, the Federal Government Carries out an Execution*, N.Y. TIMES (July 17, 2020), https://www.nytimes.com/2020/07/17/us/dustin-honken-federal-execution.html.

200. *See* Kovarsky, *supra* note 102, at 645–46.

201. *Mitchell v. United States*, 971 F.3d 1081, 1084 (9th Cir. 2020).

202. Hailey Fuchs, *Justice Dept. Executes Native American Man Convicted of Murder*, N.Y. TIMES (Aug. 26, 2020), https://www.nytimes.com/2020/08/26/us/politics/lezmond-mitchell-executed.html.

203. *See In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 20-5260, 2020 U.S. App. LEXIS 27495 (D.C. Cir. Aug. 27, 2020) (mem.) (per curiam). Nelson's other stays had been vacated on July 14 and 16. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145, 2020 WL 5594118, at *3 (D.C. Cir. Sept. 20, 2020), *aff'd in part, rev'd in part*, 980 F.3d 123 (D.C. Cir. 2020) (per curiam); *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 474 F. Supp. 3d 171, 176 (D.D.C. 2020), *vacated sub. nom. Barr v. Purkey*, 141 S. Ct. 196 (2020) (mem.).

204. *See The Current Court: Justice Amy Coney Barrett*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/supreme-court-justices/associate-justice-amy-coney-barrett/ [https://perma.cc/92LV-F3RY] (documenting that Justice Barrett took her seat on October 27, 2020).

205. *Hall v. Barr*, No. 20-cv-3184, 2020 WL 6743080, at *10 (D.D.C. Nov. 16, 2020).

206. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145, 2020 WL 4915563, at *2 (D.D.C. Aug. 15, 2020).

violates the Federal Food, Drug, and Cosmetic Act (FDCA)."[207] The appeals court detailed how *Bucklew*'s stringent test for an Eighth Amendment challenge to a lethal injection protocol was met for purposes of the pleadings stage and noted that prior cases had not been litigated based on evidence of flash pulmonary edema.[208] The court also decided that binding circuit precedent held that the FDCA did apply to controlled substances used in executions, and thus the execution protocol had to be set aside.[209] Nevertheless, the court ruled that the district court had correctly denied a stay on the Eighth Amendment claim and a permanent injunction on the FDCA claim.[210]

On remand, the district court granted a stay, ruling that the plaintiffs were likely to succeed on the merits of their challenge to the court's factual findings on the FDCA claims.[211] The Supreme Court jumped the line to vacate the preliminary injunction, without any reasoning, before the D.C. Circuit could weigh in.[212] The federal government executed Orlando Hall on November 19, 2020.[213]

Brandon Bernard and Alfred Bourgeois had execution dates set for December 2020.[214] Both had requested stays of execution from the D.C. District Court. Despite finding that their executions would violate the Federal Death Penalty Act's parity provision, the court decided that Bernard and Bourgeois could not demonstrate irreparable harm because "[t]he Supreme Court . . . made clear that the prospect of an inmate

---

207. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 126 (D.C. Cir. 2020) (per curiam).

208. *Id.* at 134–35 (noting that the "extraordinary remedy" at issue in *Lee*—a preliminary injunction—was not applicable at the motion to dismiss stage, which applies the Rule 12(b)(6) standard of plausibility, as opposed to a likelihood of success on the merits).

209. *Id.* at 137.

210. *Id.* at 135, 137.

211. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145, 2020 WL 6799129, at *1 (D.D.C. Nov. 19, 2020), *vacated sub nom. Barr v. Hall*, 141 S. Ct. 869, 869 (2020).

212. *See Barr v. Hall*, 141 S. Ct. 869, 869 (2020). Justice Breyer, Justice Sotomayor, and Justice Kagan wrote that they would deny the application but added no reasoning in dissent. *Id.*

213. *See* Hailey Fuchs, *Justice Dept. Executes Man for 1994 Kidnapping and Murder*, N.Y. TIMES (Nov. 20, 2020), https://www.nytimes.com/2020/11/20/us/orlando-cordia-hall-execution.html.

214. Hailey Fuchs, *Justice Department Executes Man for Murder Committed When He Was 18*, N.Y. TIMES (Dec. 10, 2020), https://www.nytimes.com/2020/12/10/us/brandon-bernard-execution-death-penalty.html; Elizabeth Bruenig, *The Man I Saw Them Kill*, N.Y. TIMES (Dec. 17, 2020), https://www.nytimes.com/2020/12/17/opinion/federal-executions-trump-alfred-bourgeois.html.

being executed prior to their claims being fully litigated [could] not serve as a basis for injunctive relief."[215] The district court's ruling amounted to recognition that the Supreme Court would not require the government to follow its own laws when it came to men condemned to die nor would it allow other federal courts to so require.

The D.C. Circuit and the Supreme Court likewise denied both men relief.[216] Once again, the men would go to their deaths with legal issues left unresolved.[217] Justice Sotomayor, dissenting from the denial of certiorari and application for stay in Bernard's case, described how the government had "secured his death sentence by withholding exculpatory evidence and knowingly eliciting false testimony against him" and argued that he was likely to succeed on his claims, which he had never been able to litigate on the merits.[218] For his part, "Bourgeois had made a 'strong showing'" before the district court that he was intellectually disabled and therefore ineligible for the death penalty.[219] Justice Sotomayor, joined by Justice Kagan, wrote that she would have granted certiorari to hear his intellectual disability claim.[220] The federal government executed Brandon Bernard on December 10, 2020.[221] He was the youngest person[222] to be executed by the federal government in nearly seventy years.[223] The United States executed Alfred Bourgeois the next day.[224]

Amid the rush to execute people before President Trump left office, the COVID-19 pandemic raged. The only woman on federal death row, Lisa Montgomery, had her execution rescheduled due to a stay based on

---

215. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145, 2020 WL 7186766, at *7 (D.D.C. Dec. 6, 2020).

216. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 20-5361 (D.C. Cir. Dec. 10, 2020) (mem.) (per curiam) (order denying emergency motion for rehearing en banc); *Bernard v. United States*, 141 S. Ct. 504, 504 (2020) (mem.); *Bourgeois v. Watson*, 141 S. Ct. 507, 507 (2020) (mem.).

217. *See Bernard*, 141 S. Ct. at 505–06 (Sotomayor, J., dissenting) (arguing that the Fifth Circuit should have allowed Bernard to present his *Brady* and *Naupe* claims on the merits); *Bourgeois*, 141 S. Ct. at 508–09 (Sotomayor, J., dissenting) (arguing that the refusal to adjudicate Bourgeois's claims under the savings clause "may mean permitting the illegal execution of people with intellectual disabilities").

218. *Bernard*, 141 S. Ct. at 504, 507 (Sotomayor, J., dissenting).

219. *Bourgeois*, 141 S. Ct. at 507–08 (Sotomayor, J., dissenting) (quoting *Bourgeois v. Warden*, No. 19-cv-00392, 2020 WL 1154575, at *4 (S.D. Ind. Mar. 10, 2020)).

220. *Id.* at 509 (Sotomayor, J., dissenting).

221. *See* Fuchs, *supra* note 214.

222. In terms of age at the time of the offense.

223. Kovarsky, *supra* note 102, at 638.

224. Bruenig, *supra* note 214.

a denial of meaningful access to clemency and the abandonment of counsel resulting from the lawyer's COVID-19 infection.[225]

As the new date, January 12, 2021, approached, three stays had been granted. The first was granted by the D.C. Circuit, pending a "highly expedited" hearing on the meaning of the federal parity provision.[226] The District Court for the Southern District of Indiana granted the second on the basis of Montgomery's claim that she was incompetent to be executed, but the Seventh Circuit vacated that stay, citing first that Montgomery's delay in filing the claim "appear[ed] strategic" and second that she had not made a "'strong showing' of a likelihood of success on the merits."[227] The Eighth Circuit entered the third stay, permitting Montgomery to appeal the Western District of Missouri's ruling that the execution notice did not violate the terms of the trial court's sentencing order.[228] The Supreme Court wiped away the two remaining stays without opinions.[229] The United States executed Lisa Montgomery on January 13, 2021.[230]

COVID-19 directly affected the next two men facing execution. Before their scheduled executions on January 14 and January 15, Corey Johnson and Dustin Higgs contracted COVID-19. They raised as-applied challenges to the lethal injection protocol, claiming they would suffer flash pulmonary edema because of the lung damage they sustained due to their infections.[231] In response, the D.C. District Court granted a preliminary injunction to allow Johnson and Higgs time to recover from COVID-19.[232] The D.C. Circuit vacated two to one.[233] Johnson also had

225. *Montgomery v. Barr*, No. 20-3261, 2020 WL 6799140, at *1, *11 (D.D.C. Nov. 19, 2020) (order granting motion for stay of execution pending recovery by her lawyers).

226. *Montgomery v. Rosen*, No. 20-cv-03261 (D.C. Cir. Jan. 11, 2021) (en banc) (order reconsidering the court's prior denial and granting a stay), *vacated*, 141 S. Ct. 1232 (2021).

227. *Montgomery v. Watson*, No. 21-1052, slip op. at 2 (7th Cir. Jan. 12, 2021) (order vacating stay) (quoting in part *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

228. *See United States v. Montgomery*, No. 21-1074 (8th Cir. Jan. 12, 2021) (order granting stay), *vacated*, 141 S. Ct. 1233 (2021).

229. *Rosen v. Montgomery*, 141 S. Ct. 1232, 1232 (2021) (mem.); *United States v. Montgomery*, 141 S. Ct. 1233, 1233 (2021).

230. *See* Hailey Fuchs, *U.S. Executes Lisa Montgomery for 2004 Murder*, N.Y. TIMES (Jan. 13, 2021), https://www.nytimes.com/2021/01/13/us/politics/lisa-montgomery-execution.html.

231. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 514 F. Supp. 3d 136, 142 (D.D.C. 2021), *vacated*, No. 21-5004 (D.C. Cir. Jan. 13, 2021).

232. *Id.* at 143.

233. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 21-5004 (D.C. Cir. Jan. 13, 2021).

litigation pending in the Fourth Circuit, where he raised intellectual disability and First Step Act claims, but they were denied.[234] The Supreme Court had no need to take action. The federal government executed Corey Johnson on January 14, 2021.[235]

The most exceptional intervention of the Trump executions came in Dustin Higgs's case.[236] Higgs had been sentenced to death in Maryland when the state still allowed the punishment, but in 2013, it abolished the death penalty.[237] Federal courts imposing a death sentence in a state that lacks the punishment must designate a state for purposes of implementation of the sentence.[238] Since Maryland was a death penalty state at the time of sentencing, the federal court designated no other state, and the district court concluded it could not retroactively designate one.[239] Leapfrogging the court of appeals, the government sought certiorari before judgment, and the Supreme Court reversed the district court, remanded for the court to designate Indiana, and vacated the stay of execution.[240] The novel legal issue would remain undecided and the Court's disposal of the issue unsupported.[241] Justice Breyer and Justice Sotomayor each wrote dissents.[242] The United States executed Dustin Higgs on January 16, 2021.[243]

---

234. *See United States v. Johnson*, 838 F. App'x 765, 766 (4th Cir. 2021) (mem.); *id.* at 766–67 (Wilkinson, J., voting to deny motion for stay); *id.* at 768 (Motz, J., voting to grant motion for stay).

235. *See* Hailey Fuchs, *U.S. Executes Corey Johnson for 7 Murders in 1992*, N.Y. TIMES (Jan. 15, 2021), https://www.nytimes.com/2021/01/15/us/corey-johnson-execution.html.

236. According to Vladeck, the Court had never before granted a petition for certiorari before judgment and then summarily reversed the district court. *Case Selection and Review at the Supreme Court: Hearing Before the Presidential Comm'n on the Sup. Ct. of the U.S.*, 9, 16 (June 30, 2021) (statement of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law).

237. Ian Simpson, *Maryland Becomes Latest U.S. State To Abolish Death Penalty*, REUTERS, https://www.reuters.com/article/us-usa-maryland-deathpenalty/maryland-becomes-latest-u-s-state-to-abolish-death-penalty-idUSBRE9410TQ20130502 (May 2, 2013, 4:18 PM).

238. 18 U.S.C. § 3596(a).

239. *United States v. Higgs*, No. 98-520, 2020 WL 7707165, at *1 (D. Md. Dec. 29, 2020), *rev'd*, 141 S. Ct. 645 (2021).

240. *United States v. Higgs*, 141 S. Ct. 645, 645 (2021) (mem.).

241. *See* Kovarsky, *supra* note 102, at 650.

242. *Higgs*, 141 S. Ct. at 645 (Breyer, J., dissenting); *id.* at 647 (Sotomayor, J., dissenting).

243. *See* Hailey Fuchs, *U.S. Executes Dustin Higgs for Role in 3 1996 Murders*, N.Y. TIMES (Jan. 16, 2021), https://www.nytimes.com/2021/01/16/us/politics/dustin-higgs-executed.html.

As 2021 began, federal execution laws were no clearer. The Court had abdicated the judiciary's role in holding the government to the law in its role as executioner.

C. 2021 to 2022: Routine Emergency Executions

With President Biden's inauguration behind them, the Court returned to overseeing only state executions. A new normal prevailed. The Court's rejection of capital stays now presumed, only a small subset of preferred claims garnered enough support to obtain a merits resolution.

Willie B. Smith III faced execution in Alabama on February 11, 2021, and raised two separate claims, one under the Americans with Disabilities Act (ADA) and one under RLUIPA and the Alabama Religious Freedom Amendment (ARFA).[244] The Eleventh Circuit granted a stay of execution based on the ADA claim and a preliminary injunction based on the religious freedom claims.[245] The Supreme Court vacated the stay based on the ADA claim,[246] but Justice Barrett joined the liberal wing of the Court to leave the injunction on the religious freedom claims in place.[247] Justice Kavanaugh penned a dissent that suggested "States that want to avoid months or years of litigation delays . . . should figure out a way to allow spiritual advisors into the execution room."[248] After Alabama permitted Smith's pastor's presence in the execution chamber, he was executed October 21, 2021.[249]

The next execution that came down to the Court's exercise of emergency powers, too, demonstrated the Court's amenability to religious freedom claims. The Court granted a stay of execution alongside a petition for certiorari to John Ramirez, who was scheduled to be executed in Texas on September 9, 2021.[250] Though both the district

---

244. *Smith v. Comm'r, Ala. Dep't of Corr.* (*Smith ADA*), No. 21-10413-P (11th Cir. Feb. 10, 2021) (order granting motion for stay related to ADA claim), *vacated sub nom. Dunn. v. Smith*, 141 S. Ct. 1290 (2021); *Smith v. Comm'r, Ala. Dep't of Corr.* (*Smith ARFA*), 844 F. App'x 286, 287–88 (11th Cir. 2021).

245. *Smith ADA*, No. 21-10413-P; *Smith ARFA*, 844 F. App'x at 295.

246. *Dunn v. Smith*, 141 S. Ct. 1290, 1290–91 (2021).

247. *See Dunn v. Smith*, 141 S. Ct. 725, 725 (2021) (mem.) (Kagan, J., concurring).

248. *Id.* at 726–27 (Kavanaugh, J., dissenting).

249. *See Alabama Executes Willie Smith*, EQUAL JUST. INITIATIVE (Oct. 21, 2021), https://eji.org/news/willie-smith-alabama-execution/ [https://perma.cc/A6G4-PDWU].

250. *Ramirez v. Collier*, 142 S. Ct. 50 (2021) (mem.); *Ramirez v. Collier*, 142 S. Ct. 1264, 1273 (2022).

court and court of appeals denied Ramirez's request for a preliminary injunction under RLUIPA, the Court stayed the execution and granted certiorari, moving the case to the merits docket.[251] After the Court ruled in his favor, with his pastor present, Texas executed Ramirez on October 5, 2022.[252] For the remainder of the term, however, the Court resumed its practice of routinely and reflexively vacating stays of execution without explanation.

First, in John Marion Grant's case on October 28, 2021, the Supreme Court vacated the stay of execution previously entered by the Tenth Circuit pending the outcome of a February 2022 trial testing the constitutionality of the state's lethal injection protocol.[253] The same vacatur applied to Julius Jones, though Oklahoma Governor Kevin Stitt commuted Jones's sentence.[254] Oklahoma executed Grant, who died "convulsing and vomiting," on October 28, 2021.[255]

The Supreme Court continued to resist last-minute stays through 2022. In Matthew Reeves's case, a preliminary injunction had been granted by the Middle District of Alabama and affirmed by the Eleventh Circuit.[256] Reeves had brought an ADA claim. All death row prisoners in Alabama had been given the right to elect whether they would prefer to be executed by nitrogen hypoxia rather than lethal injection. The form given to prisoners was written at an eleventh grade level, but Reeves could only read at a first grade level.[257] Nevertheless, the Supreme Court voted five to four to vacate the stay, with Justice Kagan, Justice Breyer,

---

251. *Ramirez*, 142 S. Ct. at 1272.

252. *See* William Melhado, *Texas Executes John Ramirez for the 2004 Murder of a Corpus Christi Man*, TEX. TRIB., https://www.texastribune.org/2022/10/04/john-ramirez-texas-execution/ [https://perma.cc/NV3T-5QKC] (Oct. 5, 2022). Before the execution, the Nueces County district attorney tried to withdraw the death warrant, but a judge denied his motion. *Id.*

253. *Crow v. Jones*, 142 S. Ct. 417, 417 (2021); *Jones v. Crow*, No. 21-6139 (10th Cir. Oct. 27, 2021), *vacated*, 142 S. Ct. 417 (2021).

254. Okla. Exec. Order 2021-25 (Nov. 18, 2021), https://oklahoma.gov/content/dam/ok/en/governor/documents/Julius%20Jones.SNC.Final_November%2018%202021.pdf [https://perma.cc/ZB6B-NJWH].

255. *See* Sean Murphy, *Oklahoma Executes Inmate Who Dies Vomiting and Convulsing*, AP (Oct. 28, 2021, 8:36 PM), https://apnews.com/article/us-supreme-court-prisons-executions-oklahoma-oklahoma-attorney-generals-office-6e5eedd1956a38f83db96187651f145c [https://perma.cc/QM74-539H].

256. *Reeves v. Comm'r, Ala. Dep't of Corr.*, 23 F.4th 1308, 1313 (11th Cir. 2022), *vacated sub nom. Hamm v. Reeves*, 142 S. Ct. 743 (2022) (mem.).

257. *Hamm v. Reeves*, 142 S. Ct. 743, 743 (2022) (mem.) (Kagan, J., dissenting).

and Justice Sotomayor dissenting and Justice Barrett stating she would deny the application to vacate the stay.[258]

Justice Kagan's dissent reflected frustration with the Court's decision to reach beyond principles of judicial review to expedite executions. She accused the majority of "reweigh[ing] the evidence" rather than following the law that required deference to the district court and court of appeals.[259] Further, she noted that the stay would not impede Alabama from carrying out its sentence, as the state already had plans to prepare a nitrogen hypoxia protocol.[260] Alabama executed Matthew Reeves on January 27, 2022.[261]

Alabama's execution protocol dominated the Supreme Court's capital emergency docket for the rest of the year. Alabama executed Joe Nathan James on July 28, 2022, likely using an unauthorized cutdown procedure.[262] Despite this, Alabama insisted that James's execution went according to plan.[263] Then, on September 22, Alabama attempted another execution. At 9:15 p.m., the Supreme Court, in a summary order, vacated the Middle District of Alabama's injunction, with Justice Sotomayor, Justice Kagan, Justice Barrett, and Justice Ketanji Brown Jackson in dissent.[264] That cleared the way for the state to kill Alan Eugene Miller—but it had to do so before the death warrant expired at midnight. Corrections officials transported Miller from the holding cell

---

258. *Id.* (majority opinion); *id.* (Barrett, J., voting to deny the application to vacate the stay); *id.* (Kagan, J., dissenting).

259. *Id.* at 744 (Kagan, J., dissenting).

260. *Id.* (Kagan, J., dissenting).

261. *See* Tandra Smith, *Alabama Executes Matthew Reeves; No Final Words Before Lethal Injection*, AL.COM, https://www.al.com/news/2022/01/matthew-reeves-execution-tonights-execution-on-hold-while-us-supreme-court-decides-fate.html [https://perma.cc/2CHZ-9KR4] (Jan. 27, 2022, 10:50 PM).

262. Elizabeth Bruenig, *Dead to Rights*, ATLANTIC (Aug. 14, 2022), https://www.theatlantic.com/ideas/archive/2022/08/joe-nathan-james-execution-alabama/671127/ [https://perma.cc/4TK6-ZPPW]. While the specifics of cutdown procedures in executions is unknown because states have denied they used such procedures, a cutdown involves cutting into a person's limb so that the person attempting to place the IV can see the vein. *See* Brief for Petitioner at 8, *Bucklew v. Precythe*, 587 U.S. 119 (2019) (No. 17-8151), 2018 WL 3456065, at *8. For a harrowing and detailed description of the wounds that show what James went through prior to his death, see Bruenig, *supra*. For additional details about James's case, his execution, and its aftermath, see Alexandra L. Klein, *The 2022 Alabama Executions and the Crisis of American Capital Punishment*, 24 NEV. L.J. 1, 14–20 (2023).

263. Bruenig, *supra* note 262.

264. *Hamm v. Miller*, 143 S. Ct. 50, 50 (2022) (mem.); Elizabeth Bruenig, *Dead Man Living*, ATLANTIC (Oct. 2, 2022), https://www.theatlantic.com/ideas/archive/2022/10/alabama-inmate-execution-alan-miller/671620/ [https://perma.cc/UG69-6KMQ].

to the death chamber around 9:25 p.m.[265] As midnight came and went, Miller remained alive.[266]

With the state having failed twice to set IV lines for execution, Kenneth Eugene Smith's prospects seemed especially grim. The district court first rejected Smith's methods of execution claim as time barred,[267] then refused to allow him to amend based on the circumstances of James's and Miller's executions.[268] On the afternoon Smith was scheduled to be executed, the Eleventh Circuit reversed in a per curiam opinion, writing that "Smith [had] plausibly alleged that there [would] be extreme difficulty in accessing his veins"[269] and finding that the claim was not time barred because "[i]t is the emergence of ADOC's pattern of superadding pain through protracted efforts to establish IV access in the two previous execution attempts that caused Smith's claim to accrue."[270]

Almost as soon as the Eleventh Circuit issued its opinion, Smith filed for a stay of execution and for a preliminary injunction in the district court. The court denied both,[271] writing that Smith had "inexcusably delayed" by filing the motions less than four hours before his execution was set to commence at 6:00 p.m.[272] Just before 8:00 p.m., the Eleventh Circuit issued a short opinion that held that Smith had "continuously

---

265. Bruenig, *supra* note 262.

266. *See id.* According to Miller, the corrections officers spent sixty to ninety minutes "star[ing] at, strok[ing], and punctur[ing] his skin in hopes of finding a vein," only to fail at the task. *Id.* After a knock on the window, the IV team abandoned him in the death chamber, hanging upright with blood dripping from his foot because the gurney had been locked in a vertical position. Miller asked what was going on for about twenty minutes before someone answered that the execution had been postponed and the gurney dropped flat. *Id.*

267. *Smith v. Hamm*, No. 22-CV-497, 2022 WL 10198154, at *1 (M.D. Ala. Oct. 16, 2022), *rev'd sub nom. Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13781, 2022 WL 17069492 (11th Cir. Nov. 17, 2022) (per curiam).

268. *Smith v. Hamm*, No. 22-CV-497, 2022 WL 16842050, at *1, *4 (M.D. Ala. Nov. 9, 2022), *rev'd sub nom. Smith*, 2022 WL 17069492.

269. *Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13781, 2022 WL 17069492, at *5 (11th Cir. Nov. 17, 2022) (per curiam).

270. *Id.*

271. The district court applied Eleventh Circuit precedent that "[t]he standard for granting a stay of execution to a death row inmate is the same as that for granting a temporary restraining order or preliminary injunction." *Smith v. Hamm*, No. 22-CV-497, 2022 WL 17067498, at *1–2 (M.D. Ala. Nov. 17, 2022) (citing *Long v. Sec'y, Dep't of Corr.*, 924 F.3d 1171, 1176 (11th Cir. 2019)).

272. *Id.* at *2.

sought to rectify [the district court's] dismissal . . . and [had] pursued his claims diligently through the district court and here."[273]

About two hours later, the Supreme Court vacated the stay without opinion and with three noted dissents, allowing Alabama to proceed with the execution.[274] Alabama then had difficulty accessing Smith's veins, just as he had feared. Around 10:00 p.m., the IV team entered, sticking him repeatedly with needles, attempting to gain access to veins in his arms and hands.[275] According to Smith, he "told them they were sticking the needle in his muscle, which was causing pain," but they rebuffed him.[276] Smith's gurney was then "tilted in an inverse crucifixion position" and he was left alone for several minutes.[277] The IV team returned and injected Smith with a substance he believed was an intramuscular sedative or anesthetic, which was not part of Alabama's execution protocol and, if true, violated the district court's orders.[278]

After the injection, a person attempted to start a central line, repeatedly "stabbing [Smith's] collarbone area with a large needle."[279] Smith could feel the needle going underneath his collarbone, and it felt like he was being "'stabbed' in the chest."[280] At some time before midnight, the executioners realized they would not be able to access Smith's veins, and they called off the execution.[281] Smith became the second man in a less than two-month period to have survived an Alabama execution attempt.[282]

The final divided exercise of the Supreme Court's emergency powers in 2022 came in Kevin Johnson's case in November. Unlike the Alabama, Texas, and Oklahoma cases, Johnson's case invoked the Court's power to remedy racial discrimination in the application of the death penalty. The case also implicated the federal courts' role in

---

273. *See Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13846-P, 2022 WL 19831029, at *1 (11th Cir. Nov. 17, 2022), *vacated sub nom. Hamm v. Smith*, 143 S. Ct. 440 (2022).

274. *Hamm v. Smith*, 143 S. Ct. 440, 440–41 (2022).

275. *See* Second Amended Complaint at 5, *Smith v. Hamm*, No. 22-CV-497 (M.D. Ala. July 5, 2023).

276. *Id.*

277. *Id.*

278. *See id.* at 5–6.

279. *Id.*

280. *Id.* at 6.

281. *Id.*

282. These are not Alabama's only two failed executions. In 2018, the state tried and failed to kill Doyle Hamm. Indeed, Hamm's failed execution was used as an example of notice in Judge Grant's dissent arguing that Smith's claim was time-barred. *Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13781, 2022 WL 17069492, at *7 (11th Cir. Nov. 17, 2022) (per curiam) (Grant, J., dissenting).

enforcing due process in state courts.[283] A special prosecutor for Kansas City, Missouri, had moved to vacate Johnson's conviction and sentence as tainted by the trial prosecutor's racial bias.[284] The trial court had denied the motion to vacate, and while the appeal was still pending in the Missouri Supreme Court, that court denied a stay of execution.[285] Justice Jackson wrote in dissent for herself and Justice Sotomayor, asserting that Johnson had been likely to succeed in establishing a Fourteenth Amendment violation, clearly suffered irreparable harm, and that the balance of the equities was in his favor.[286] Her citations invoke the role of the Court during the civil rights movement, relying on precedent that established that "unforeseeable and unsupported state-court decision[s] on . . . question[s] of state procedure do[] not constitute an adequate ground to preclude [the] Court's review of a federal question."[287] Despite the Missouri Supreme Court's refusal to comply with its own law, the state executed Johnson on November 29, 2022.[288]

D. 2023: The Vanishing Capital Stay

After a tumultuous 2022, the 2023 capital shadow docket appeared placid. Where the Court's new capital stay trajectory created turbulence at the top of the federal judiciary the previous year, all the churning now occurred below the surface. With the Supreme Court's directives clear, circuit courts granted only one stay all year and vacated it in short order.[289] For its own part, the Court granted one stay to Richard Glossip, pending disposition of his two petitions for certiorari.[290]

---

283. *Johnson v. Missouri*, 143 S. Ct. 417, 417 (2022) (mem.) (Jackson, J., dissenting).

284. *See* Special Prosecutor's Motion for a Stay of Execution & Suggestions in Support, *State v. Johnson*, 654 S.W.3d 883 (Mo. 2022) (No. SC99873).

285. Application for Stay of Execution Pending Appeal in the Supreme Court of Missouri at 2, *Johnson v. Missouri*, 143 S. Ct. 477 (2022) (No. 22A463).

286. *Johnson*, 143 S. Ct. at 417–18 (Jackson, J., dissenting).

287. *Bouie v. City of Columbia*, 378 U.S. 347, 355 (1964). *See also Johnson*, 143 S. Ct. at 417 (Jackson, J., dissenting).

288. *Missouri Executes Kevin Johnson Despite Special Prosecutor's Call To Vacate Death Sentence*, DEATH PENALTY INFO. CTR. (Nov. 28, 2022), https://deathpenaltyinfo.org/news/missouri-court-greenlights-execution-of-kevin-johnson-despite-special-prosecutors-call-to-vacate-death-sentence [https://perma.cc/A5NN-Z8KM].

289. *See Johnson v. Vandergriff*, No. 23-2664, 2023 WL 4851623 (July 29, 2023) (mem.).

290. *Glossip v. Oklahoma*, 143 S. Ct. 2453 (2023). One of the two petitions was granted on January 22, 2024. *Glossip v. Oklahoma*, 144 S. Ct. 691 (2024) (mem.).

While the frequency of Supreme Court stay denials and vacaturs is itself worth noting, the specific facts and circumstances of those orders illuminate the increasing precarity of the rights of those on death row. The Court's actions in the aftermath of the Trump executions also demonstrate that the procession of federal executions wore a path away from trans-substantivity and entrenched the exceptionality of capital stays. The next Part argues that the Court's reflexive denial of emergency relief to those facing execution distorts and stunts capital jurisprudence, warps stare decisis, bolsters local and state power to violate the rights of disfavored litigants, and permits the Court to exercise its will arbitrarily, without regard for law or facts.

III. VACATING RIGHTS ON DEATH ROW

The capital stay guarantees people on death row the opportunity to have courts adjudicate the lawfulness of their convictions, sentences, and executions. Unlawful executions can take many forms, among them, a state's failure to follow its own procedures for administering death, the killing of a person who cannot understand the reason for his death, or discriminatory application of the ultimate penalty.[291] By hollowing out the only mechanism that ensures adjudication on the merits of claims brought during warrant litigation, the Court guts the Eighth Amendment, withdraws itself as a bulwark against the racialized death penalty, and underscores its resistance to accountability.

Scholars have extensively described the Court's efforts, codified by Congress, to contract the remedies available to those on death row by restricting their access to the writ of habeas corpus.[292] At the same time, scholars have paid almost no attention to the narrowing of the capital stay

291. *See, e.g.*, *United States v. Higgs*, 141 S. Ct. 645, 647–52 (2021) (mem.) (Sotomayor, J., dissenting) (revisiting the wide range of claims brought by those facing execution during the Trump Administration that, if proven, would have made their executions unlawful).

292. *See, e.g.*, Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996); Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65; Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519 (2014); Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941 (2011) (reviewing PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010)); Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORNELL L. REV. 1739 (2022).

itself.[293] This Part argues that the vanishing capital stay undercuts the substantive rights and remedies of those on death row.

A. Devolving Standards of Decency

The Court's stay decisions from 2019 to 2022 reflect a central preoccupation with delay and manipulation in capital stay litigation. To appreciate how the Court has undermined death row detainees' rights through the evisceration of the capital stay, readers must first appreciate the panoply of rights held by those on death row and the mechanisms through which those rights are asserted.

Since 2019, the Court has allowed executions to proceed despite serious, unresolved legal issues regarding the constitutionality of execution protocols, competency to be executed, eligibility for execution, racial discrimination in the application of capital punishment, and innumerable statutory claims. This Section describes how refusal to entertain capital stays cuts back settled precedent and inhibits the development of death penalty jurisprudence.

1. MOOTING RIGHTS TO A LEGAL CONVICTION AND SENTENCE

Capital defendants are entitled to all the criminal procedure rights that apply outside capital cases, as well as additional protections that apply only when death is at stake. Unlawful convictions may stem from official misconduct, false testimony, mistaken eyewitness identifications, inadequate legal defenses, racial discrimination, or other violations of trial rights. Unlawful sentences may emerge from many of the same violations, but in capital cases, they also include death sentences of

293. Lee Kovarsky touches on the unusual nature of the Court's recent shadow docket practice in his discussion of the Trump executions. *See* Kovarsky, *supra* note 102, at 647 ("By the conclusion of the Trump Executions, the Supreme Court established that it would intervene aggressively against method-of-execution claims, using procedural vehicles ordinarily reserved for emergencies. Because the emergency intervention was so often unreasoned, however, the Court's collected work product reads more as a primal scream than as meaningful judicial guidance." (footnote omitted)); *id.* at 681 ("[T]he Supreme Court's aggressive use of its shadow docket to protectively grant emergency relief in the federal government's favor has normalized a formerly exotic practice. The result is that time-sensitive institutional behavior in socially contentious cases will be increasingly resolved through opaque Supreme Court process—process that is several degrees removed from the fact-finding that ordinarily dictates preliminary adjudication."). Stephen Vladeck has also surveyed the Court's capital stay behavior, though he views its reach as limited to the death penalty. *See* VLADECK, *supra* note 10, at 127.

people who are intellectually disabled,[294] those whose opportunities to prove mitigation were unduly limited,[295] or those who lacked the requisite mens rea to uphold a death sentence.[296]

The Court's ability to undercut rights to a lawful conviction and sentence can be illustrated through a look at the Court's treatment of intellectual disability and its intervention in a case arguing for access to DNA testing.

Atkins v. Virginia[297] held that people with intellectual disabilities are ineligible for the death penalty.[298] After *Atkins*, the Court left the definition of intellectual disability up to the states, leaving a patchwork of laws that took different—often unscientific—approaches to defining the condition.[299] In *Hall v. Florida*[300] and *Moore v. Texas*,[301] the Supreme Court held that courts could not make a legal determination of intellectual disability that disregards medical standards.[302] Yet the federal government executed both Alfred Bourgeois and Corey Johnson despite "substantial evidence that they were intellectually disabled under modern diagnostic standards."[303]

The Supreme Court also allowed Georgia to execute Willie Pye despite his arguably unlawful conviction and sentence.[304] Pye's conviction occurred when his lawyer, Johnny Mostiler, well-known for making racist remarks,[305] failed to investigate Pye's background or

---

294. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304 (2002).

295. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586 (1978).

296. *See, e.g.*, *Enmund v. Florida*, 458 U.S. 781 (1982). *See also* Guyora Binder, Brenner Fissell & Robert Weisberg, *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141 (2017).

297. 536 U.S. 304 (2002).

298. *Id.* at 321.

299. *See* Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1241 (2008); John H. Blume, Sheri Lynn Johnson, Paul Marcus & Emily Paavola, *A Tale of Two (and Possibly Three)* Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393, 399–400, 414 (2014).

300. 572 U.S. 701 (2014).

301. 581 U.S. 1 (2017).

302. *Hall*, 572 U.S. at 710; *Moore*, 581 U.S. at 5.

303. *United States v. Higgs*, 141 S. Ct. 645, 649 (2021) (Sotomayor, J., dissenting).

304. *Pye v. Oliver*, No. 23-7041 (23A855) (U.S. Mar. 20, 2024); *Pye v. Emmons*, No. 23-7042 (23A856) (U.S. Mar. 20, 2024).

305. Blume, Johnson, Marcus & Paavola, *supra* note 299, at 756–58 (recounting a previous case in which Mostiler's racist remarks formed part of the basis for an ineffective assistance of counsel claim).

cognitive impairments and rendered ineffective assistance of counsel.[306] And Pye was killed despite a prohibition on the execution of intellectually disabled defendants in large part because Georgia's beyond a reasonable doubt standard for adjudication of the issue lacks a medical basis.[307]

Without a mechanism in place to protect a person from execution pending the determination of their rights, those rights mean very little. Yet Pye's case, while vividly demonstrating how the Antiterrorism and Effective Death Penalty Act (AEDPA) undermines the rights afforded capital defendants, also paints a picture of a full opportunity to litigate those rights.

Conversely, Jedidiah Murphy's case illustrates the Supreme Court's current practice of intervening to end capital defendants' lives before their rights have had their day in court. In Murphy's case, the delay would have been limited and issues central to legality of his sentence would soon have been resolved. The Western District of Texas had issued an injunction to Murphy, whose execution was scheduled for October 10, 2023.[308] Murphy had argued that he was entitled to DNA testing that might exonerate him of another crime that was used as aggravating evidence at his sentencing hearing[309]—an issue that was already briefed, argued, and awaiting decision in another case, *Gutierrez v. Saenz*.[310] The Fifth Circuit declined to vacate the district court injunction,[311] but the Supreme Court did so without opinion, ensuring that Murphy could not benefit from any rights to DNA testing the Fifth Circuit might recognize.[312] If anything, late-arising claims that challenge how executions are carried out fare even worse under the vanishing capital stay.

2. MOOTING RIGHTS TO A LAWFUL EXECUTION

Unlike unlawful convictions and sentences, unlawful executions center not on what happens during trial and sentencing but what comes

306. *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1033 (11th Cir. 2022) (en banc). On rehearing, the state conceded the lawyer's ineffectiveness and challenged only prejudice. *Id.*

307. *See* Blume, Johnson, Marcus & Paavola, *supra* note 299, at 400 (arguing Georgia's beyond a reasonable doubt standard conflicts with *Hall v. Florida*).

308. *Murphy v. Nasser*, 84 F.4th 288, 289 (5th Cir. 2023).

309. *Id.* at 290.

310. 565 F. Supp. 3d 892 (S.D. Tex. 2021).

311. *Murphy*, 84 F.4th at 290.

312. *Nasser v. Murphy*, 144 S. Ct. 324 (2023). Justice Sotomayor, Justice Kagan, and Justice Jackson would have denied the stay application. *Id.* at 324.

after.[313] They may emanate from claims about the tortuousness of an execution protocol,[314] a government's failure to follow its own procedures for administering death,[315] the killing of a person who cannot understand the reason for his death,[316] or the prolonged period a person has spent on death row.[317]

The failure to grant stays and the vacatur of stays related to lawful execution claims are particularly concerning because these claims are often being litigated for the first time, have not yet been addressed on the merits, and remedies remain available. The Court's recent refusal to allow execution protocol claims to proceed provides a salient example of how its shadow docket rulings undermine the rights espoused in merits rulings.

On June 23, 2022, the Court issued its opinion in *Nance v. Ward*,[318] affirming that a death row prisoner could challenge their method of execution under Section 1983.[319] Though it simply preserved the status quo, *Nance* was an important procedural victory for those seeking to challenge methods of execution.[320] If, as the state argued, Michael Nance had to bring his methods claim through a habeas petition, the second or successive habeas limitations of AEDPA would bar almost all methods of execution challenges.[321] Still, *Nance* seems a hollow victory.

---

313. *See* Kovarsky, *supra* note 24, at 1362–69.

314. *See, e.g.*, *Glossip v. Gross*, 576 U.S. 863 (2015); *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).

315. *See, e.g.*, *United States v. Higgs*, 141 S. Ct. 645, 647–52 (2021) (mem.) (Sotomayor, J., dissenting) (revisiting the wide range of claims brought by those facing execution during the Trump Administration that, if proven, would have made their executions unlawful).

316. *See, e.g.*, *Panetti v. Lumpkin*, No. A-04-CA-042, 2023 WL 6348877, at *1 (W.D. Tex. Sept. 27, 2023).

317. *See, e.g.*, *Lackey v. Texas*, 514 U.S. 1045 (1995) (mem.) (describing the execution of a person who had already spent seventeen years on death row as cruel and unusual punishment because such an execution could no longer serve either retribution or deterrence). This type of claim is typically described as a "*Lackey* claim" for this case.

318. 142 S. Ct. 2214 (2022).

319. *Id.* at 2219. *See also Nelson v. Campbell*, 541 U.S. 637, 639 (2004); *Hill v. McDonough*, 547 U.S. 573, 576 (2006).

320. Of course, commentators recognized that after this decision most prisoners remained unlikely to succeed on their Section 1983 methods claims. *See, e.g.*, Lee Kovarsky, *A Small, Procedural Win for Prisoners Challenging a State's Method of Execution*, SCOTUSBLOG (June 23, 2022, 7:21 PM), https://www.scotusblog.com/2022/06/a-small-procedural-win-for-prisoners-challenging-a-states-method-of-execution/ [https://perma.cc/F69J-LJYB].

321. *See* 28 U.S.C. § 2244(b); Austin Sarat, *Is the Supreme Court About To Allow Virtually Any Method of Execution?*, SLATE (Mar. 28, 2022, 1:00 PM),

Since *Nance*, the Supreme Court has repeatedly dissolved lower court stays put in place to guard against execution methods that would "superadd terror, pain, or disgrace."[322] Most strikingly, the Supreme Court overruled reasoned stay opinions that would have halted executions in Alabama as the state evinced an inability to conduct them without tortuous results.[323] Indeed, the Court's actions ensured that the executions would proceed before any court heard the merits of those claims.

As the Court habitually denies and vacates stays of execution, those on death row, in effect, become dead to rights. Minimum constitutional standards for adjudication and execution become irrelevant. With capital stays disfavored, the "evolving standards of decency"[324] protected by the Eighth Amendment can only erode. Where questions are not yet settled, there may be additional ill effects.

B. The Precedential Cliff

A person's claims are mooted by their execution, and stay petitions have long been viewed as non-precedential. As a result, scholars have viewed capital stays as having little influence on doctrine, and virtually none outside the death penalty context.[325] Yet the vanishing capital stay creates what this Article calls a *precedential cliff*. A precedential cliff is a legal procedural mechanism that inhibits the enunciation of precedent with respect to contested legal claims.[326] A vacated stay of execution ends a case, mooting the claim, which falls out of consideration and has no chance to develop.[327] The same claim may arise time and again, reaching the same point in its journey, only to fall out again, unresolved.

---

https://slate.com/news-and-politics/2022/03/supreme-court-execution-method-cruel-unusual.html [https://perma.cc/87PP-7A57].

322. *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020) (per curiam). *See also supra* Part II.

323. *See supra* Part II.

324. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) ("The Court recognized . . . that the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark progress of a maturing society." (footnote omitted)).

325. *See, e.g.*, McFadden & Kapoor, *supra* note 14, at 828, 831–32, 882.

326. While the concept of a precedential cliff is explored here, it also merits future study.

327. At the same time, a shadow docket order may create precedent (or functional precedent) despite the absence of factual development or legal argument that occurs when a case receives full briefing and argument. State and lower federal courts' efforts to contend with the precedential value of these non-precedential orders is discussed further in Section III.C.

The precedential cliff heightened by the constriction of the capital stay standard serves as but one example of how procedure waylays the development of substantive rights. Other scholars have described how qualified immunity[328] and AEDPA[329] create impediments to the development and clarification of constitutional protections. In both instances, a two-step inquiry that leaves constitutional rights unresolved inhibits the development of substantive precedent. While a comprehensive framework for analysis of precedential cliffs is beyond the scope of this Article, more coherent analysis of this phenomenon provides fertile ground for future research.

Qualified immunity's precedential cliff originates with *Pearson v. Callahan*.[330] *Callahan* overturned *Saucier v. Katz*,[331] a case that had required courts to decide whether a government actor had violated a plaintiff's constitutional rights before turning to the question of whether

328. *See, e.g.*, John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115; Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 684–702 (2009) [hereinafter *The* Saucier *Qualified Immunity Experiment*]; Nancy Leong, *Rethinking the Order of Battle in Constitutional Torts: A Reply to John Jeffries*, 105 NW. U. L. REV. COLLOQUY 135 (2010), https://scholarlycommons.law.northwestern.edu/nulr/vol105/iss2/15/ [https://perma.cc/8256-KZB5] [hereinafter *Reply to Jeffries*]; Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of* Saucier v. Katz, 16 GEO. MASON L. REV. 53, 55, 59–60 (2008); Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 145 n.106 (1999); Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 545 (2010); Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 845 (2010); Jack M. Beerman, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 149; Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 428 (2009); Colin Rolfs, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468 (2011); Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 629 (2011); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 66 (2017); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 52–65 (2015); Karen M. Blum, *Qualified Immunity: Time To Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018).

329. *See, e.g.*, Marceau, *supra* note 299, at 1260; John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259 (2006); James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998); Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for "Reasonably Erroneous" Applications of Federal Law*, 63 OHIO ST. L.J. 731 (2002); Stephen I. Vladeck, *AEDPA,* Saucier*, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595 (2009).

330. 555 U.S. 223 (2009).

331. 533 U.S. 194 (2001).

that actor was immune from suit.[332] *Callahan* made the order a matter of the court's choosing, allowing judges to settle the immunity question and forgo the constitutional question.[333]

A similar precedential cliff emerges from the Court's application and interpretation of AEDPA. Under 28 U.S.C. § 2254(d)(1), the federal courts may only grant habeas relief when a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[334] Section 2254(d)(1) creates two precipices from which a claim may fall out of federal habeas consideration: First, claims fall out of consideration when they are decided by state courts in ways that are wrong but not unreasonably so.[335] Second, claims fall out of consideration when there is no Supreme Court holding that controls the outcome.[336]

As with a qualified immunity determination, the Section 2254 inquiry entails a two-step process that can leave the constitutional rights at stake ill-defined. In federal habeas, the Court permits a decision to rest on the reasonableness of a state court's decision without a determination of whether the state court committed error.[337]

The precedential cliff problem is the central critique of those who believe merits avoidance in qualified immunity and AEDPA cases is ill advised. In both types of cases, a similar set of facts can appear time and again, with judges declining to decide the merits and therefore subjecting future claimants, whether constitutional torts plaintiffs or federal habeas petitioners, to the same rights violation because the law is not "clearly established."[338]

The non-merits decisionmaking permitted by *Callahan* and *Andrade*[339] is meant to address five concerns that emerged from the

---

332. *Id.* at 201.

333. *Callahan*, 555 U.S. at 236.

334. 28 U.S.C. § 2254(d)(1).

335. Marceau, *supra* note 299, at 1240.

336. *See* Vladeck, *supra* note 329, at 605–06; Marceau, *supra* note 299, at 1240.

337. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

338. *See* Kamin, *supra* note 328, at 72; Michael L. Wells, *The Order-of-Battle in Constitutional Litigation*, 60 SMU L. REV. 1539, 1559 (2007); John M.M. Greabe, Mirabile Dictum!*: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 410 (1999); Blum, *supra* note 328, at 1893–905. This tends to presume that creation of new law will generally benefit civil rights claimants and habeas petitioners. For a contrary view, see *Reply to Jeffries*, *supra* note 328.

339. *Lockyer v. Andrade*, 538 U.S. 63 (2003).

Saucier merits-first rule: (1) that merits-first decisionmaking requires courts to reach constitutional questions that are unnecessary to decide the case before them; (2) that merits-first decisionmaking leads to merits judgments that are not appealable because the party that lost on the merits nevertheless prevailed on immunity; (3) that the merits rulings at issue are so fact-bound that they are not useful precedent; (4) that merits-first decisionmaking in qualified immunity cases required courts to decide complicated constitutional issues on sparse records; and (5) that merits-first decisionmaking squandered limited judicial resources by requiring courts to answer a question that was not central to resolution of the case.[340]

The costs and benefits of avoidance of a precedential cliff through merits-first decisionmaking depend on the legal context. As a general matter, Vladeck argues that the concerns that make merits avoidance beneficial in the qualified immunity context do not apply with equal force to federal habeas.[341]

The primary concern about a precedential cliff should be the degree to which it operates to eliminate surviving merits decisions. If few cases survive, strict constitutional avoidance should give way to greater concerns about constitutional stagnation and uncertainty. Studies of qualified immunity claims come to different conclusions about the effects of the merits-first decisionmaking rule on the scope of rights and the stagnation of precedent.[342] Observers of AEDPA, on the other hand, tend to conclude that it has seriously degraded federal court oversight of states' respect for constitutional rights.[343]

The availability of alternative remedies might also inform the level of danger precedential cliffs pose to constitutional rights. Plaintiffs who do not obtain monetary damages against government officers may yet obtain injunctive or declaratory relief, which is not subject to qualified

340. *See* Vladeck, *supra* note 329, at 612; *Reply to Jeffries*, *supra* note 328; Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 857 (2005).

341. *See* Vladeck, *supra* note 329, at 612–14.

342. *See The* Saucier *Qualified Immunity Experiment*, *supra* note 328, at 684–702 (finding that merits-first adjudication led disproportionately to lawmaking that narrowed constitutional rights); Hughes, *supra* note 328, at 422–23 (finding that post-*Saucier* courts' constitutional rights articulations were more plaintiff-friendly); Sobolski & Steinberg, *supra* note 328, at 544–48 (finding that while post-*Saucier* courts were more likely to recognize a constitutional right, they were also more likely to grant qualified immunity); Nielson & Walker, *supra* note 328, at 52–65. Studies from 2011, just two years after *Pearson*, found that while circuit courts had begun to defer merits decisionmaking, many district courts continued to employ the *Saucier* sequence. *See* Rolfs, *supra* note 328, at 498–99; Sampsell-Jones & Yauch, *supra* note 328, at 629.

343. *See, e.g.*, Reinhardt, *supra* note 41.

immunity.[344] On the other hand, a petitioner denied relief under AEDPA has no alternative relief or remedy.[345]

The harms of qualified immunity's and AEDPA's precedential cliffs inform the analysis of stay vacaturs as the source of a similar outcome. The Trump executions exemplify the stunted development that occurs when a case cannot be adjudicated on the merits. The Court failed to clarify the role of the Federal Death Penalty Act; the Food, Drug, and Cosmetics Act; the Controlled Substances Act; and the Administrative Procedure Act to regulate lethal injection.[346] It also failed to settle the meaning of the Federal Death Penalty Act provisions that require "parity" with state execution law.[347] The failure to develop the law means that subsequent executions face the same uncertainty—and the same risk of last-minute litigation.

The vacaturs of the Eleventh Circuit stays during the string of botched Alabama executions in 2022 present an example of a precedential cliff that prevented the development of jurisprudence on a punishment clause claim. Despite lower federal courts' recognition of meritorious claims in those cases, and the impact precedent would have on future Alabama executions, the Supreme Court ensured those issues would not be resolved.

While Professor Sam Kamin has suggested that public officials might "err on the side of caution"[348] when faced with constitutional uncertainty, executing states have not taken that approach. Instead, these states deny that botches have occurred[349] and adopt policies that have led to gruesome deaths, knowing the Court will not stop them. This is particularly troubling as technological advances can lead to important constitutional lacunae.[350] At a time when states are experimenting with new technologies of death,[351] uncertainty will only proliferate, with grave consequences.

---

344. Jeffries, *supra* note 328, at 131–33.

345. Vladeck, *supra* note 329, at 614.

346. *See* Kovarsky, *supra* note 102, at 639.

347. *Id.* at 650.

348. Kamin, *supra* note 328, at 70.

349. *See* Bruenig, *supra* note 262.

350. *See* Schwartz, *supra* note 328, at 66.

351. *Three Largest Nitrogen Gas Manufacturers in the U.S. Prohibit Products from Use in Executions*, DEATH PENALTY INFO. CTR. (Mar. 12, 2024), https://deathpenaltyinfo.org/news/three-largest-nitrogen-gas-manufacturers-in-the-u-s-prohibit-products-from-use-in-executions [https://perma.cc/ASL5-M5TF] (noting that Oklahoma, Mississippi, and Louisiana joined Alabama in authorizing nitrogen hypoxia as an execution method after Kenneth Smith's death, and that four states authorize "lethal

The precedential cliff created by vacated capital stays generates uncertainty, spawns future last-minute litigation, and lacks many of the doctrinal justifications that structure other precedential cliffs. Vacaturs inhibit the resolution of legal claims that would resolve future cases, occur at a stage when the record may yet be developed, and leave petitioners on death row with no remaining remedies.

When capital cases fall victim to the precedential cliff, capital defendants are not the only ones who suffer. Federal habeas corpus is an important mechanism for the development of constitutional criminal procedure.[352] A federal forum represents the key bulwark against state indifference to criminal defendants' rights.[353] State defendants have little opportunity to be heard by a federal decisionmaker before habeas, since they neither have a right to counsel to prepare a petition for certiorari on direct review,[354] nor will the Supreme Court grant certiorari simply to error correct, even in egregious cases.[355] Therefore, federal habeas is the primary mechanism for enforcement of federal constitutional rights against the states. Where vacaturs of stays moot meritorious claims in federal courts, subsequent litigants have no additional clarity about how those claims should be resolved, and states remain free to ignore or misapply federal law.

In most instances, it seems that rights-first litigation of capital cases would be beneficial, if for no other reason than to give a person who will otherwise be executed the opportunity to have an answer about the extent of his legal rights. During the time those rights are finally litigated, he will be allowed to live—an outcome that the current Court majority would likely see as gamesmanship.

Professor Nancy Leong's insights about qualified immunity may counsel against such an approach.[356] First, even if lower federal courts were to recognize a capital defendant's rights, the Supreme Court could grant certiorari to reverse that decision.[357] As a result, the precedential cliff may simply prevent the creation of law narrowing capital

---

gas"). Professor Joanna Schwartz has pointed to technology. *See* Schwartz, *supra* note 328, at 66.

352. Marceau, *supra* note 299, at 1260 (highlighting that constitutional rights, like the right to counsel, have been announced on federal habeas review).

353. *Id.* at 1259; Anthony G. Amsterdam, *In Favorem Mortis: The Supreme Court and Capital Punishment*, HUM. RTS., Winter 1987, at 14, 54–56.

354. *See Austin v. United States*, 513 U.S. 5, 8–9 (1994) (per curiam).

355. Amsterdam, *supra* note 353, at 56–57 (collecting examples of refusal to error correct in capital cases).

356. *See Reply to Jeffries*, *supra* note 328; Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 465 (2012).

357. Reinhardt, *supra* note 41, at 1242–43.

defendants' constitutional rights. Second, just as the context of qualified immunity may distort judges' decisionmaking about the scope of constitutional rights,[358] so too may litigation under warrant. Unfortunately, given the lack of alternative settings for adjudication of these rights, this may indeed be a scenario where any clarity will, for the foreseeable future, limit rights rather than expand them. Thus far, the Court has sought to achieve a similar outcome through the shadow docket.

C. Unprecedented Lawmaking

The precedential cliff stunts the development of precedent, which leaves both courts and litigants hungry to determine the prospective meaning of the Court's shadow docket orders disposing of capital cases. While scholars debate how to interpret the precedential value of merits decisions, with respect to shadow docket orders, precedential value is even cloudier. Federal courts had once viewed such orders as non-precedential, but the Court increasingly seems to intend that they create law.[359] This Section applies one prominent theory of shadow docket precedent[360] and analyzes it in light of its application to capital cases. It concludes that capital shadow docket cases should be deemed precedential only insofar as they state explicit rules and are decided in a procedural posture that makes it clear what must have been decided for the Court to rule as it did.

Judge Trevor McFadden and Vetan Kapoor have proposed three factors to guide courts' assessment of stays' precedential value: "(1) whether the stay was issued by a single Justice or by the full Court; (2) the type of underlying merits dispute; and (3) whether the stay decision explains the Court's reasoning or provides a clear indication of the Court's

358. *See* Leong, *supra* note 356, at 462–65.

359. *See, e.g.*, *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 229 (4th Cir. 2020) (noting that the Supreme Court stayed a preliminary injunction and interpreting that as a sign that the government had made "a strong showing that it was likely to succeed on the merits" (citations omitted)). The Fourth Circuit wrote that given that determination, "every maxim of prudence suggests that we should decline to take the aggressive step of ruling that the plaintiffs here are in fact likely to succeed on the merits right upon the heels of the Supreme Court's stay order necessarily concluding that they were unlikely to do so." *Id.* at 230.

360. This Section treats the precedential value of stays and preliminary injunctions as equivalent. Other authors have likewise treated them interchangeably, *see, e.g.*, McFadden & Kapoor, *supra* note 14, at 848–49, and courts' tendency to do the same makes it the most practical way to address this issue.

view of the merits."[361] These three questions, according to McFadden and Kapoor, help a judge identify whether "a majority of the Supreme Court has expressed a view on the merits" of the case.[362] If such a view has been expressed, the logic goes, a lower court should either defer to that view or explain its lack of deference.[363]

While putting forth this framework, McFadden and Kapoor acknowledge that the precedential value of capital stays may require a different calculus because of the "unique nature of capital punishment jurisprudence" and the Court's "long espoused" assertion that "death is different."[364] A further analysis of capital stay cases suggests that procedural posture should also influence how a lower court treats stays.

For instance, when Justice Antonin Scalia was circuit justice for the Fifth Circuit, he maintained a practice of granting a stay pending disposition of the petition for certiorari in all capital cases on direct review.[365] Such a stay was put in place to maintain jurisdiction and did not express any view on the merits—a conclusion which would make it non-precedential under the McFadden-Kapoor framework.

The legal analytical problems of treating all capital stay grants as having no bearing on lower court decisionmaking, however, is reflected in the Fifth Circuit's opinion in *Wicker v. McCotter*.[366] McFadden and Kapoor cite *Wicker* for the proposition that Supreme Court capital stays lack precedential value—a reversal of the circuit's previous position. [367]

In *Wicker*, a White man had raised an equal protection challenge based on the higher likelihood that Texas would pursue the death penalty when the victim was White.[368] While Wicker's case was pending, the Supreme Court granted certiorari to Warren McCleskey and James Ernest Hitchcock, both Black men, who had raised issues of disparate and arbitrary application of the death penalty against Black people, especially those who killed White victims, in Georgia and Florida,

361. *Id.* at 849.

362. *Id.* at 832.

363. *Id.*

364. *Id.* at 863.

365. *Cole v. Texas*, 499 U.S. 1301, 1301 (1991) (Scalia, J., in chambers).

366. 798 F.2d 155 (5th Cir. 1986).

367. *See* McFadden & Kapoor, *supra* note 14, at 862–63. The Fifth Circuit wrote in *Wicker v. McCotter* that the grant of certiorari and stays in *McCleskey v. Kemp* and *Hitchcock v. Wainwright* did not "alter the authority of [its] prior decisions" nor did it require the court to issue a stay because Wicker had raised related issues. *Wicker*, 798 F.2d at 157–58.

368. *Wicker*, 798 F.2d at 157.

respectively.[369] While the Court resolved *McCleskey v. Kemp*[370] in the state's favor, had it decided otherwise, the holding might have inured to Wicker's benefit. The Fifth Circuit's refusal to stay Wicker's case meant that no outcome in *McCleskey* could spare Wicker.[371]

There may be good reason to treat capital stay grants pending disposition by the Supreme Court as different for purposes of precedent than capital shadow docket orders in other procedural postures. After all, one can simply rely on the eventual merits determination in cases in which the Supreme Court hears the case. Yet the Fifth Circuit's opinion also argues that a stay should be denied when the Supreme Court has granted certiorari on a case that presents similar issues.

That position is untenable because a Supreme Court stay pending disposition of a case on its merits docket alters the ordinary stay analysis for other cases with similar issues. The application of the trans-substantive stay standard to *Wicker* demonstrates why this is so. First, while circuit precedent may not have supported relief at that time, the grant of certiorari, and a stay in *McCleskey*, which the government had won below, suggests a reasonable likelihood of success on the merits based on the Supreme Court's own stay standards.[372] Second, if the Court denies a stay, the movant will be executed, and therefore suffer irreparable harm. Third, there will be a less-than-one-year delay in execution if the stay is granted awaiting the Supreme Court's decision, but there is no opportunity to repair the harm if it does not, so the balance of hardships is in the movant's favor. Fourth, while the public has an interest in the timely carrying out of a lawfully imposed sentence, it has no interest in carrying out an unlawful sentence, and a one-year delay does not seem to overcome the permanent harm that would be done to the movant.[373]

Importantly, this analysis depends not on interpretation of a particular set of facts but instead on the application of the Court's legal rule explicitly set out in *Hollingsworth v. Perry*.[374] Under *Hollingsworth*, the Supreme Court will only grant a stay if there is "(1) a reasonable

369. *Id.*

370. 481 U.S. 279, 319 (1987).

371. *Inmate Is Executed by Injection, the Third To Die in Texas This Week*, N.Y. TIMES, Aug. 26, 1986, at 42. It is notable that, despite the Supreme Court's grant of certiorari, the Fifth Circuit held that Wicker presented "no issue that jurists of reason would consider debatable." *Wicker*, 798 F.2d at 156.

372. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

373. *Cf. Bucklew v. Precythe*, 139 S. Ct. 1112, 1146 (2019) (Sotomayor, J., dissenting) (writing that "the equities in a death penalty case will almost always favor the prisoner so long as he or she can show a reasonable probability of success on the merits").

374. 58 U.S. 183 (2010) (per curiam).

probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; *and* (3) a likelihood that irreparable harm will result from the denial of a stay."[375] The effects when a capital stay is granted, then, depend not only on the McFadden-Kapoor factors but also on the case's procedural posture.

McFadden and Kapoor consider stay denials non-precedential.[376] The addition of procedural posture to the analysis supports that conclusion. A denial of a capital stay can occur in two ways. First, a stay petition can come before the Court when the case has been resolved in all other courts and the only remaining step is possible Supreme Court review. In that context, the stay petition would arrive in conjunction with a writ of certiorari. Under that set of circumstances, the *Hollingsworth* stay factors could result in the Court declining to issue a stay solely because the Court believes that fewer than four justices will grant certiorari.[377] Since a denial of certiorari does not reflect a view on the merits of a case, a denial in that posture would not be precedential.[378] In the alternative, a capital stay petition could arrive at the Court when lower courts have refused to enter stays but litigation is still pending below. In that instance, the Court has said that the considered judgment of the lower court is "presumptively correct,"[379] to be afforded "great[] respect,"[380] and to be reversed "only in extraordinary circumstances."[381] As a result, a denial of a stay that affirms the lower courts' denials cannot be said to represent a view on the merits.

By contrast, McFadden and Kapoor treat vacaturs differently than denials.[382] Indeed, the pair uses *Lee* as an example of a precedential shadow docket order.[383] In *Lee,* the Court summarily vacated a district

375. *Id.* at 190 (emphasis added).

376. *See* McFadden & Kapoor, *supra* note 14, at 831–32, 849–50.

377. *See Hollingsworth*, 558 U.S. at 190.

378. *United States v. Carver*, 260 U.S. 482, 490 (1923). *See also* 18 MOORE'S FEDERAL PRACTICE § 134.05, Lexis (database updated 2024).

379. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers).

380. *Bateman v. Arizona*, 429 U.S. 1302, 1304 (1976) (Rehnquist, J., in chambers).

381. *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers).

382. McFadden & Kapoor, *supra* note 14, at 868 (arguing that the D.C. District Court appropriately considered itself bound by the summary vacatur of a stay of execution in *Barr v. Lee* because the district court interpreted the Supreme Court's holding as saying that the risk of experiencing a pulmonary edema from the pentobarbital "does not justify last-minute judicial intervention" (quoting *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 474 F. Supp. 3d 171, 180 (D.D.C. 2020), *vacated sub nom. Barr v. Purkey*, 141 S. Ct. 196 (2020))).

383. *Id.* at 867–68.

court injunction that the court of appeals had declined to stay because "among other reasons, the plaintiffs have not established that they are likely to succeed on the merits of their Eighth Amendment claim."[384]

The district court then cited *Lee* as holding that all pentobarbital challenges were foreclosed.[385] McFadden and Kapoor view this as the correct analysis,[386] yet the D.C. Circuit disagreed.[387] Ultimately, the Supreme Court vacated the subsequently issued injunction without an opinion that clarified where either the district or circuit court had strayed.[388] Later, the D.C. Circuit denied a stay, interpreting *Lee* as holding that to obtain a stay of execution, "the prisoner must show more than 'competing expert testimony' on the question whether the government's chosen method is very likely to cause needless suffering."[389]

The D.C. District Court and the D.C. Circuit's attempts to apply the holding of *Lee* promulgated two separate rules, both broader than the rule statement set forth by the Court. If, as some scholars suggest, rulings on death penalty stays are best understood as limited to the case at hand,[390] such interpretations reflect extension of precedent.[391] Another way to describe these courts' uncertainty is as an illustration of the dangers of relying on result-based stare decisis as opposed to rule-based stare decisis, especially when dealing with the shadow docket. Professor Adam Steinman describes rule-based stare decisis as a regime in which the explicit rule stated by the Court, and nothing more, comprises binding precedent.[392] Result-based stare decisis, on the other hand, "impose[s]

384. *Id.* at 867 (quoting *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020) (per curiam)).

385. *In re Fed. Bureau of Prisons' Execution Protocol Cases,* No. 19-mc-145, 2020 WL 4915563, at *2 (D.D.C. Aug. 15, 2020).

386. *See* McFadden & Kapoor, *supra* note 14, at 868.

387. *See In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 135, 137 (D.C. Cir. 2020) (per curiam).

388. *Barr v. Hall*, 141 S. Ct. 869 (2020).

389. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 21-5004, 2021 WL 164918, at *1 (D.C. Cir. Jan. 13, 2021) (mem.) (per curiam) (Katsas, J., concurring) (quoting *Lee*, 140 S. Ct. at 2591).

390. *See* McFadden & Kapoor, *supra* note 14, at 828, 831–32, 882.

391. *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 928 (2016) (explaining that "extending" means "interpreting a precedent to apply where it is best read not to apply").

392. Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1747 (2013). Rule-based stare decisis is also sometimes described as reliance on a "legislative holding" or as "explicit or textual" stare decisis. *Id.* at 1746–47 (quoting in part Lawrence B. Solum,

implicit or inferential obligations on future courts, rather than obligations that are explicitly stated as generalizable rules."[393] A rule-based stare decisis for the capital shadow docket achieves three goals. First, it promotes legal clarity. Second, it diminishes the likelihood of legal stagnation. Third, it promotes public accountability.

A rule-based stare decisis for the orders docket lessens the risk of uncertainty. Capital cases have the highest possible stakes, yet after Supreme Court vacaturs, lower federal courts have struggled to make meaning of summary decisions. The district and circuit courts took very different lessons from *Lee*.[394] Likewise, Justice Sotomayor has argued that the Eleventh Circuit's attempts at divining meaning from the Court's unreasoned vacaturs have resulted in "both factual and legal errors."[395]

The lower courts' responses to summary vacaturs also demonstrate the legal stagnation that could inadvertently occur if shadow docket decisions require result-based stare decisis application. Both the D.C. District Court's interpretation of *Lee* and the Eleventh Circuit's interpretation of *Smith*[396] would exempt entire categories of execution procedures from Eighth Amendment scrutiny. Yet punishment clause jurisprudence requires individual assessments of particular protocols, petitioners, and potential alternatives.[397] Such a broad reading of *Lee* and *Smith* would have the effect of precluding methods of execution claim development unless and until the Supreme Court decided to affirmatively correct the problem.

By contrast, the D.C. Circuit's interpretation of *Lee* would undermine not just Eighth Amendment law but also judges' roles in evaluating competing expert testimony.[398] Given the adversarial process, it is hard to imagine an execution methods challenge being brought

---

The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 U. PA. J. CONST. L. 155, 188 (2006)).

393. *Id.* at 1747. Results-based stare decisis is also described as "'material facts,' '*ratio decidendi*,' 'facts-plus-outcome,' and 'reconciliation.'" *Id.* (footnotes omitted) (first quoting Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 169, 179 (1930); then quoting Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2012 (1994); and then quoting Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1045 (2005)).

394. *See In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 133–35, 137 (D.C. Cir. 2020) (per curiam).

395. *Barber v. Ivey*, No. 23-5145, slip op. at 8–9 (U.S. July 21, 2023) (mem.) (Sotomayor, J., dissenting)

396. *Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13846, 2022 WL 19831029 (11th Cir. Nov. 17, 2022).

397. *Id.* at 10 (Sotomayor, J., dissenting).

398. *Cf.* Michael Stokes Paulsen, *Killing Terri Schiavo*, 22 CONST. COMMENT. 585, 594–95 (2005).

without competing expert testimony. The treatment of *Lee* as binding on all such cases would prevent any such cases with looming execution dates from reaching the merits. This situation imposes suffering on those who are subjected to states' serial botched executions because the protocols have eluded adversarial testing.[399] These outcomes should not be permitted to continue without the Supreme Court's explicit endorsement.

Finally, rule-based stare decisis holds the Court accountable for its decisions and prevents it from shunting critique onto lower federal courts. Particularly on the shadow docket—where there has been limited development of the record, no oral argument, and less public debate than for a case on the merits docket—a rule that forces the Court to say what the law is in explicit terms is preferable to a regime that requires courts and the public to infer the Court's intentions. Rule-based stare decisis ensures lower courts and the public do not have to engage in a precedent guessing game.

The Court's current stay practice undermines the application and development of the law. As the next Section shows, when combined with the Court's consolidation of power, the stakes for capital punishment law are grave.

D. The Court above the Law

The death penalty shadow docket provides an exemplar of the ways the Court now operates outside and above the law. Scholars have variously characterized the current Court as engaged in a "judicial power grab,"[400] imperialism,[401] and judicial self-aggrandizement.[402] The capital shadow docket sheds light on ways the Court consolidates its power: by jettisoning legal standards that limit its power and ignoring or obfuscating facts that stand in the way of its preferred results. While scholars have argued the Court engages in similar behavior on the merits docket, emergency rulings shield sharp doctrinal shifts from vigorous vetting and public oversight because they empower the Court to evade reason-giving, a core judicial tenet.

---

399. *Barber*, slip op. at 11 (Sotomayor, J., dissenting).

400. Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635 (2023).

401. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).

402. Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24, 26–28 (2023), https://scholarship.law.upenn.edu/penn_law_review_online/vol172/iss1/3/ [https://perma.cc/D5A9-K3NS]; Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125 (2021).

1. LEGAL STANDARDS

Shadow docket death penalty cases shed light on the Supreme Court's concentration of power in itself to the exclusion not only of other branches of government but also to the exclusion of other federal courts. As Professor Mark Lemley has pointed out, the Supreme Court has amassed power by disregarding lower court factfinding and equitable principles both on and off the shadow docket.[403] Numerous capital shadow docket dissents sound in this register. The Court refused to defer to lower federal courts' detailed fact findings in *Dunn v. Ray*,[404] *Dunn v. Price*,[405] *Hamm v. Reeves*,[406] and *Barr v. Purkey*.[407]

Ray's and Price's executions denoted not just an assertion of negative equity in capital stays but also a rejection of traditional standards of review in appellate cases.[408] Though no majority opinion of the Court has ever explained the standard for vacating a stay, a concurring opinion from Justice Scalia, Justice Thomas, and Justice Alito in *Planned Parenthood v. Abbott*[409] stated that the Court could not vacate a circuit court stay "unless that court clearly and demonstrably erred in its application of accepted standards."[410] The "accepted standards" the *Planned Parenthood v. Abbott* opinion applied are those of *Nken v.*

---

403. Lemley, *supra* note 401, at 104–08.

404. 139 S. Ct. 661, 662 (2019) (mem.) (Kagan, J., dissenting) ("This Court is ordinarily reluctant to interfere with the substantial discretion Courts of Appeals have to issue stays when needed.").

405. 139 S. Ct. 1312, 1314 (2019) (mem.) (Breyer, J., dissenting) ("In doing so, [the Court] overrides the discretionary judgment of not one, but two lower courts.").

406. 142 S. Ct. 743, 743–44 (2022) (mem.) (Kagan, J., dissenting) ("[T]he Court today disregards the well-supported findings made below . . . .").

407. 140 S. Ct. 2594, 2597 (2020) (mem.) (Sotomayor, J., dissenting) ("Such a stay is available 'only under extraordinary circumstances.' Accordingly, '[w]hen a matter is pending before a court of appeals, it long has been the practice of Members of this Court to grant stay applications only "upon the weightiest considerations."' Given the District Court's thorough analysis, and the serious questions that court raised, I do not believe the Government has carried its 'especially heavy' burden here." (citations omitted) (first quoting *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers); then quoting *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (mem.) (miscellaneous order) (O'Connor, J., concurring); and then quoting *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers)).

408. *See Ray*, 139 S. Ct. at 661–62 (Kagan, J., dissenting).

409. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 1061 (2013) (mem.) (miscellaneous order).

410. *Id.* at 1061 (internal quotation marks omitted) (quoting *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers)).

Holder[411]: "(1) whether the State made a strong showing that it was likely to succeed on the merits, (2) whether the State would have been irreparably injured absent a stay, (3) whether issuance of a stay would substantially injure other parties, and (4) where the public interest lay."[412] In *Ray* and *Price*, the Eleventh Circuit had considered and made rulings on each of the four criteria required by *Nken*.[413] The Court upset these findings without a single reference to the *Nken* factors.[414]

In warrant litigation, the Court has used its skepticism of end-stage litigation not just as a presumption against the merits of the underlying claims, leading to their own denials of applications from prisoners, but also as a presumption against the merits of court of appeals rulings that embrace those claims. Worse still, the Court has generally taken these actions without justifying them. This leaves lower courts to wonder how to interpret the Court's actions and leaves a host of rights without available forums.[415] This parallels the Court's treatment of election cases, in which it has applied the *Purcell*[416] principle to invalidate lower courts' reasoned opinions on the merits of voting rights cases without justifying its interventions.[417]

By their very nature, these situations occur when there are meritorious claims below—and not only (or even mostly) from courts that diverge from the Supreme Court's ideological priors. While the Eleventh Circuit is considered a relatively conservative court of appeals,[418] its stays have been struck down again and again without explanation.[419]

---

411. 556 U.S. 418 (2009).

412. *Abbott*, 571 U.S. at 1061 (citing *Nken*, 556 U.S. at 434).

413. *See Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 695–702 (11th Cir. 2019); *Price v. Dunn*, No. 19-00057, 2019 WL 1578277, at *4–8 (S.D. Ala. Apr. 11, 2019).

414. *See Dunn v. Ray*, 139 S. Ct. 661 (2019) (mem.); *Dunn v. Price*, 139 S. Ct. 1312 (2019) (mem.).

415. *See supra* Section III.A.

416. *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). The *Purcell* principle is a judicial presumption against last-minute changes to election procedures due to the likelihood of such changes causing voter confusion. *See id.*

417. Hasen, *supra* note 57, at 428, 462–63.

418. *Circuit Status*, BALLS & STRIKES, https://ballsandstrikes.org/circuit-status/#11 [https://perma.cc/4499-PDCC] (Mar. 21, 2024, 1:31 PM) (showing the breakdown of circuit judges appointed by Republican and Democratic presidents in the Eleventh Circuit); Bill Rankin, *Trump Packs Influential Atlanta Court with Conservative Judges*, ATLANTA J.-CONST. (July 6, 2018), https://www.ajc.com/news/local/trump-packs-influential-atlanta-court-with-conservative-judges/Yhbacu8m1stN9gwTEXcgwK/ (describing the rightward shift of the Eleventh Circuit based on President Trump's appointments to the court).

419. *See, e.g.*, *Hamm v. Miller*, 143 S. Ct. 50 (2022) (mem.); *Hamm v. Smith*, 143 S. Ct. 440 (2022) (mem.).

The continued lack of explanation evinces the Court's belief that it owes no explanation when overriding other courts' considered views. To the extent that the Court wishes to influence lower courts' future behavior, this seems unproductive.[420]

McFadden and Kapoor would allow the justices to substitute their own findings without articulating them, assuming the Court is appropriately deferring to lower courts' factual findings.[421] A Court with cratering public trust should think twice before continuing down this road.[422]

The judiciary only commands legitimacy insofar as the public sees it as honest and credible.[423] Giving persuasive reasons for its judgments, then, is core to the Supreme Court's role.[424] Decisions made without reasoning give the impression of pure partisanship.[425] Doing so while making appeals to democratic principles is simply patronizing.

Dispensing with articulation of legal standards in capital cases undermines the purpose of a reasoned opinion, detracts from the development of law, reduces the guidance of precedent for future courts, and demonstrates a further consolidation of power in the Supreme Court. It also detracts from the proper functioning of the Court, taking a "just trust us" approach to justice. Therefore, the persistent use of summary vacaturs to reject considered opinions below can only be a worthwhile exercise if the Court's primary objective is to render relief unavailable in meritorious warrant-stage cases.

2. FACTUAL ANALYSIS

The Court's imprecision and inconsistency with facts also undermines the rule of law. For example, the Court denied relief in *Ray* because Domineque Ray had delayed in bringing his claim.[426] The facts

---

420. For a similar critique of silence in election law cases, see Hasen, *supra* note 57, at 461–63.

421. *See* McFadden & Kapoor, *supra* note 14, at 846, 864.

422. *See Public Confidence in the U.S. Supreme Court Is at Its Lowest Since 1973*, AP (May 17, 2023), https://apnorc.org/projects/public-confidence-in-the-u-s-supreme-court-is-at-its-lowest-since-1973 [https://perma.cc/8P9W-NR6P].

423. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 299–300 (2020); RONALD DWORKIN, LAW'S EMPIRE 190 (1986).

424. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 635 (1995).

425. *See* Ronald J. Krotoszynski, Jr., *On the Importance of Being Earnest: Contrasting the Dangers of Makeweights with the Virtues of Judicial Candor in Constitutional Adjudication*, 74 ALA. L. REV. 243, 294–99 (2022).

426. *Dunn v. Ray*, 139 S. Ct. 661 (2019) (mem.).

show that Ray had not heard back from the prison about his request until January 23—only fifteen days before his execution date.[427] He then filed for relief five days later, on January 28.[428] By contrast, Patrick Murphy filed his claim only two days before his execution, and his stay was granted.[429]

In these two cases, the Court did not explain the doctrinal significance of particular time cutoffs, establish a method for adjudicating whether there was delay and who was responsible for it, or even consistently recount the facts as they appeared on the record. Instead, the Court's recitation of the facts recalled those in *Kennedy v. Bremerton School District*,[430] where photographic evidence and other facts on the record undermined the basis for the Court's decision.[431]

When the Court gives reasons that do not stand up to scrutiny or appear to misrepresent the record, the public loses faith in its credibility.[432] It is hard to believe that the delay in *Ray* served as anything more than "a verbal cellophane wrapper,"[433] covering the real reasons the Court denied relief.

Similar fanciful factual determinations abound in execution methods cases. The Court has consistently vacated stays based on claims that lethal injection, as administered in Oklahoma and Alabama, is cruel and unusual, even after the states have serially botched executions.[434] After Joe Nathan James's prolonged and torturous death and Alan Eugene Miller's failed execution, the Court vacated the Eleventh Circuit's reasoned stays in Kenneth Eugene Smith's case.[435] While no reasoning was given, it is hard to see how the facts alleged would not be enough to establish a substantial risk of superaddition of pain to the usual pain of execution.

---

427. *Id.* at 661; *id.* at 662 (Kagan, J., dissenting).

428. *Id.* at 662 (Kagan, J., dissenting).

429. *Murphy v. Collier*, 139 S. Ct. 1475, 1478 (2019) (mem.) (Alito, J., dissenting). *See also id.* at 1475 (majority decision) (granting Murphy's stay application).

430. 142 S. Ct 2407 (2022).

431. *Id.* at 2434–39 (Sotomayor, J., dissenting).

432. *See* Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2297–99 (2017).

433. Krotoszynski, *supra* note 425, at 246.

434. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2022: YEAR END REPORT 4 (2022), https://dpic-cdn.org/production/documents/reports/year-end/Year-End-Report-2022.pdf?dm=1683576592 [https://perma.cc/HB4R-2SU3] ("[The year] 2022 could be called 'The Year of the Botched Execution' because of the high number of states with failed or bungled executions.").

435. *See Hamm v. Smith*, 143 S. Ct. 440 (2022) (mem.).

When no facts can be enough to establish a legal claim, and the Court need not explain the facts that led to its decision, the Court cannot be bound by law. By failing to constrain itself through law or facts, the Court has rendered its capital shadow docket lawless. In the end, the harms of the Court's lawlessness accrue disproportionately to disfavored groups.

E. Reinforcing the Radicalized Death Penalty

In a democracy, the judicial enforcement of rights stands in tension with democratic majoritarianism. Let the tension loosen in one direction, and courts, through judicial supremacy, can undermine the democratic will; let it loosen in the other, and courts rubber stamp the tyranny of the majority at the expense of "discrete and insular minorities."[436] In its recent vacatur jurisprudence, the Court has declared a restrained role for the judiciary: a principle of non-interference in the state criminal process in the name of the democratic will. In *Barr v. Lee*, the Court asserted that vacating a preliminary injunction prior to a trial on the merits of a method of execution claim leaves "'the question of capital punishment' . . . with 'the people and their representatives, not the courts, to resolve.'"[437]

The Court's purported intent to leave execution methods and the question of capital punishment to the people conveys indifference to the racialized history of capital punishment in the U.S.[438] While all abstention in death penalty cases contributes to such a result, the Supreme Court's eagerness to intervene to limit relief to capital defendants both speeds this devolution and signals to states that they can be more aggressive in pursuit of convictions, death sentences, and executions.[439]

The modern era of death penalty jurisprudence arose in the context of racially disparate penalties across the South. Decades before the Court incorporated the Eighth Amendment against the states and created other restrictions on the bounds of lawful capital punishment, the Supreme Court ventured into the regulation of state criminal punishment systems due to lack of process afforded to Black people accused of capital crimes

436. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

437. *Barr v. Lee*, 140 S. Ct. 2590, 2591–92 (2020) (per curiam) (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019)).

438. I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 5–6 (2011).

439. *See* Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 542, 546, 551–52 (2008).

in the region.[440] Race loomed over capital cases even when the Court formally avoided its invocation, as in *Coker v. Georgia*,[441] and it continues to exert a powerful influence on capital cases today.[442]

More pointedly, Section 1983, the vehicle for most methods-of-execution litigation, expressly provides a federal cause of action for local and state officials' violations of constitutional rights.[443] Enacted as part of the Civil Rights Act of 1871, the Supreme Court has recognized that the role of the Civil Rights Act was "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."[444] By eliminating the opportunity for federal courts to hear what district and appeals courts have found are viable claims, the Court undercuts an important mechanism through which federal rights may be enforced regardless of one's state of residence.

The contemporary Court's current jurisprudence reflects the belief that federal court safeguards constitute a federal power grab. In *Shelby*

---

440. *See, e.g.*, *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

441. 433 U.S. 584 (1977). *See also* Sheri Lynn Johnson, Coker v. Georgia: *Of Rape, Race, and Burying the Past*, *in* DEATH PENALTY STORIES 171, 190–201 (John H. Blume & Jordan M. Steiker eds., 2009); Catherine M. Grosso & Barbara O'Brien, *Commentary on* Coker v. Georgia, *in* FEMINIST JUDGMENTS: REWRITTEN CRIMINAL LAW OPINIONS 50, 55 (2023) (Bennett Capers, Sarah Deer & Corey Rayburn Yung eds., 2023); Madalyn K. Wasilczuk, *Coker v. Georgia, 433 U.S. 584 (1977)*, *in* FEMINIST JUDGMENTS: REWRITTEN CRIMINAL LAW OPINIONS, *supra*, at 50, 56; Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 244 (2015).

442. *See, e.g.*, Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 100 OR. L. REV. 437, 449–54 (2022); Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2114–25 (2010); Jeffrey Fagan, Garth Davies & Raymond Paternoster, *Getting to Death: Race and the Paths of Capital Cases After* Furman, 107 CORNELL L. REV. 1565, 1612–13 (2022); Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 983, 994–95 (2020); Daniel S. Harawa, *Sacrificing Secrecy*, 55 GA. L. REV. 593, 628–29 (2021); Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 86–109 (2022); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 514 (1994); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 436 (1995).

443. ERWIN CHEMERINKSY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS 132 (2021).

444. *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

County v. Holder,[445] the Court eliminated preclearance provisions that prevented new voting restrictions from going into effect without prior approval in states where there was a history of racially discriminatory voting restrictions.[446] The *Shelby County* Court ruled that conditions had changed in the covered jurisdictions such that preclearance could no longer be justified.[447] In response, Justice Ginsburg dissented, arguing "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[448]

The Court's refusal to enforce death penalty law reflects a similar presumption that state officials will scrupulously honor federal constitutional rights without oversight. Decades ago, Professor Anthony Amsterdam observed that "abdication of the role of primary interpreter will, in some circumstances, constitute abandonment by the federal judiciary. It has been acknowledged that some states are 'so intractably hostile to federal constitutional rights and locally unpopular criminal defendants that . . . state post-conviction remedies [are] a foregone fool's errand.'"[449] Recent Supreme Court cases demonstrate that states' obstinacy when it comes to federal constitutional rights for criminal defendants remains a problem. Equal application of substantive constitutional rights across the country necessitates federal intervention. *Cruz v. Arizona*[450] reveals why.

Cruz held that Arizona had been flouting the Court's precedent for decades.[451] In *Simmons v. South Carolina*[452] in 1994, the Court held that prisoners at capital sentencing hearings had the right to inform the jury that the alternative to a death sentence was life without parole.[453] Nevertheless, Arizona courts continued to deny defendants such an instruction until 2016 when the Court held in a per curiam opinion that *Simmons* entitled convicted people in Arizona to the same instruction as in South Carolina.[454]

---

445. 570 U.S. 529 (2013).
446. *Id.* at 547–50.
447. *Id.* at 535.
448. *Id.* at 590 (Ginsburg, J., dissenting).
449. Marceau, *supra* note 299, at 1239 n.39 (quoting Amsterdam, *supra* note 353, at 17).
450. 143 S. Ct. 650 (2023).
451. *See id.* at 654–55.
452. 512 U.S. 154 (1994).
453. *Id.* at 156.
454. *See Lynch v. Arizona*, 578 U.S. 613, 613–14 (2016) (per curiam).

Even then, Arizona courts resisted applying the law to successive petitions, leaving John Montenegro Cruz without relief. While the issue in *Cruz*—whether the Arizona Supreme Court's refusal to allow a successive post-conviction relief petition rested on independent and adequate state law grounds—seems arcane, the substantive issue was whether state courts could ignore protections for those facing the death penalty. *Cruz* relied on cases that emerged from novel and unsupportable procedural hurdles erected by Southern states during the civil rights movement to evade federal law.[455] That such cases would be applicable today demonstrates the grave danger of abandoning federal oversight of the application of constitutional protections for the criminally accused.

Justice Sotomayor's dissent from denial of certiorari in *Clark v. Mississippi*[456] likewise describes the stakes of the Supreme Court's retreat from enforcement of federal rights related to the death penalty—particularly for people of color.[457] In *Clark*, the Mississippi Supreme Court ignored the factors set out in *Flowers v. Mississippi*[458] that required the court to address statistical disparities in jury strikes, disparate investigations into Black jurors, and the prosecution's misrepresentations when defending the strikes.[459] Justice Sotomayor proposed that little was asked of the Court to defend its recent precedent. All it need do was summarily dispose of the case.[460] Instead, she wrote:

> Defendants like Clark will watch as they are condemned by juries that may have been racially gerrymandered. Prospective jurors like Kathy Luckett, a nursing aide and mother, will learn that the color of their skin might deprive them of the right to sit as jurors in judgment of their peers. Finally, courts throughout the State will take note and know that this Court does not always mean what it says.[461]

Justice Sotomayor's last point is particularly troubling for the rights of Black defendants across the South. State courts are unlikely to enforce rights that they believe the Supreme Court will not continue to enforce itself.[462]

Proponents of a limited role for the Court in policing state criminal prosecutions may argue that the Court's role is not to correct errors. The

---

455. *Cruz*, 143 S. Ct. at 658 (citing *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 457–58 (1958)).

456. 143 S. Ct. 2406 (2023) (mem.).

457. *Id.* at 2411 (Sotomayor, J., dissenting).

458. 139 S. Ct. 2228 (2019).

459. *Id.* at 2243; *Clark*, 143 S. Ct. at 2406 (Sotomayor, J., dissenting).

460. *Clark*, 143 S. Ct. at 2411 (Sotomayor, J., dissenting).

461. *Id.* (Sotomayor, J., dissenting).

462. *Id.* at 2407, 2411 (Sotomayor, J., dissenting).

justices themselves have taken this stance in dissent when they have believed the majority has overstepped its judicial role. At the same time, the Court's own practice provides evidence that while the Court does not view error correction as its principal function,[463] it does take cases in order to discipline lower courts. Reprimands in the form of reversals can have a powerful effect on inferior federal courts' subsequent behavior.[464] A similar function surfaces in the relationship between state supreme courts and the U.S. Supreme Court.[465] The Court's clear signals that it intends to step back from policing the enforcement of constitutional rights opens the door to uninterrupted racialized criminal punishment. Indeed, even as the death penalty has become more uncommon, racial disparities in its application have widened.[466]

The Court's laissez faire approach to states' rights to punish completes a decades-long campaign for federal courts to retreat from their role in incorporating the constitutional rights of the accused against the states.[467] Since the Rehnquist era, buttressed by Congress's passage of AEDPA, federal courts' role in ensuring fair process to capital defendants has receded. After the passage of AEDPA, grant rates in

---

463. *See, e.g.*, Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 517 (2003); Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 797–98 (1983).

464. *See* Tom S. Clark, *A Principal-Agent Theory of En Banc Review*, 25 J. L. ECON. & ORG. 55, 76 (2009); Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in U.S. District Courts*, 36 AM. POL. RSCH. 669, 670 (2008); Susan B. Haire, Stefanie A. Lindquist & Donald R. Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143, 162–64 (2003); Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court–Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 690–94 (1994); Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649, 670 (2000). *But see* Pauline T. Kim, *Beyond Principal–Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 556 (2011) (describing the limits of reversals as a disciplining tool).

465. *See* Sara C. Benesh & Wendy L. Martinek, *State Supreme Court Decision Making in Confession Cases*, 23 JUST. SYS. J. 109, 124–25 (2002); Keith Rollin Eakins & Karen Swenson, *An Analysis of the States' Responses to* Republican Party of Minnesota v. White, 28 JUST. SYS. J. 371, 373–74 (2007); Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1476–77 (2005); John C. Kilwein & Richard A. Brisbin, Jr., *Policy Convergence in a Federal Judicial System: The Application of Intensified Scrutiny Doctrines by State Supreme Courts*, 41 AM. J. POL. SCI. 122, 124–25 (1997); Marceau, *supra* note 299, at 1264–66.

466. Robert Dunham, *U.S. Death-Row Population Lowest in More than 32 Years but More Racially Disproportionate*, DP3 SUBSTACK (Aug. 7, 2023), https://dppolicy.substack.com/p/us-death-row-population-lowest-in [https://perma.cc/4DJ9-2BEQ].

467. *See* Marceau, *supra* note 299, at 1240–41.

federal habeas cases fell precipitously.[468] From 2000 to 2006, habeas petitioners prevailed only twelve percent of the time, compared to the one-half to two-thirds success rates before AEDPA.[469] Despite the decline in habeas relief, death penalty cases continue to have high reversal rates. Between 1972 and 2021, courts reversed 49.9 percent of death sentences.[470]

The Court's jurisprudence rejecting a federal role in rectifying miscarriages of justice continues to cause grave harm. The Court has yet to recognize a right to bring a freestanding actual innocence claim.[471] In *Jones v. Hendrix*,[472] the Court held that AEDPA's savings clause does not give prisoners litigating successive motions the right to access the courts when they have interpreted a statute such that the conduct supporting the conviction no longer meets the elements of the crime.[473] And the Court is extremely skeptical of litigation that occurs long after a conviction becomes final, despite extensive evidence that the "Strategic Delay Account" lacks merit[474] and that states' and courts' own actions contribute to the need for last-minute litigation. With most exonerations coming late in the capital litigation process, the Court's resistance to end-stage litigation, especially when filtered down through the lower federal courts, will cause racially disparate results. [475]

CONCLUSION

The death of the capital stay threatens to undermine hard-won safeguards in death penalty jurisprudence. Capital stays are the primary mechanisms through which courts ensure that the rights of those on death row are adjudicated on the merits. Despite this important role, scholars have paid much more attention to the curtailment of prisoners' rights

468. David R. Dow & Eric M. Freedman, *The Effects of AEDPA on Justice*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH 261, 261–62, 265–67 (Charles S. Lanier, William J. Bowers & James R. Acker eds., 2009). They did not fall at the Supreme Court level, however, in large part because the Supreme Court had already undertaken judicial reforms to habeas that reflected its preferences. *See* Blume, *supra* note 329, at 262, 265–70.

469. Dow & Freedman, *supra* note 468, at 266–67.

470. DEATH PENALTY INFO. CTR., *supra* note 434, at 4.

471. *Herrera v. Collins*, 506 U.S. 390, 401, 404–05 (1993). *See also House v. Bell*, 547 U.S. 518, 535 (2006) (reinforcing *Herrera v. Collins*).

472. 143 S. Ct. 1857 (2023).

473. *Id.* at 1863.

474. *See* Kovarsky, *supra* note 24, at 1385.

475. *See supra* notes 32–37 and accompanying text.

through habeas corpus rulings than to the winnowing of access to stays of execution. This Article demonstrates the serious consequences of the vanishing capital stay, but future work should consider lower federal courts' and state courts' application of these standards and assess the theoretical underpinnings of the standards themselves. For instance, the Court's merger of the governmental and public interests in countering stays of execution lacks sufficient support and precedes the ultimate question of the state's interest in carrying out lawless executions.

While routine, reflexive vacaturs of stays of execution will likely have disproportionate effects on "intrinsically delayed claims," all death penalty law faces underdevelopment if important and novel legal issues cannot reach merits adjudication. Further, the Court's willingness to set aside legal claims because of their timing threatens to roll back the fundamental tenets underlying modern death penalty jurisprudence. The earliest death penalty cases signaled the Court's entrée to regulating constitutional rights in state criminal processes to protect vulnerable groups. The Court's retreat from this arena signals a more general retreat from the federal role in ensuring that those tried in state courts receive at least minimal constitutional protections.

Ultimately, the availability of capital stays ensures that the final hours of a capital case and all the steps leading up to them take place pursuant to law. With the Court's decision to operate in the shadows, outside the constraints of law and fact, executions take place in a legal black hole.

* * *