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COMMENTARY

THINGS FALL APART, BUT THE CENTER HOLDS: THE SUPREME COURT AND THE DEATH PENALTY

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“Things fall apart; the center cannot hold.”

—*The Second Coming*, by William Butler Yeats

Last June, in the course of a week, the Supreme Court issued two death penalty decisions—*Atkins v. Virginia*¹ and *Ring v. Arizona*²—which together invalidated, at least in part, the administration of capital punishment in roughly two-thirds of the American states that currently retain the death penalty on their books.³ *Atkins* prohibited the application of the death penalty to defendants with mental retardation in the twenty states without statutes already precluding such application, and *Ring* precluded judges (as opposed to juries) from making factual determinations that render a defendant eligible for capital punishment in the five states where judges alone make capital-sentencing determinations. In addition, *Ring* is likely to affect four states with hybrid sentencing schemes that mandate shared responsibility between judges and juries.⁴

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¹ 122 S. Ct. 2242 (2002) (issued on June 20).

² 122 S. Ct. 2428 (2002) (issued on June 24).

³ Thirty-eight states still retain the death penalty.

⁴ Because four states are affected by both *Atkins* and *Ring* (Alabama, Delaware, Idaho, and Montana), the total number of states directly affected by the two rulings is twenty-five rather than twenty-nine. The number of affected jurisdictions may, in the long

The claims upon which the defendants prevailed in these two cases were not new ones; they had been made—and rejected by the Court—not very long ago, in 1989 and 1990, respectively.⁵ The Supreme Court's double about-face was greeted, appropriately, as big news.⁶ Such a significant shift is unprecedented in the “modern era” of the death penalty.⁷ Instead of “tinker[ing] with the machinery of death,”⁸ the Court has done something that looks, at first glance, more like an overhaul—one designed to appeal to a new generation of death penalty consumers. If the Court had a public relations team for its death penalty jurisprudence, their message might be something like, “This is not your father's death penalty.”

There is both more and less here than meets the eye. While an about-face generally signals on its surface only the rethinking of par-

run, turn out to be higher. The Court in *Atkins* left undecided whether there are constitutional constraints on the definition of and procedures for determining mental retardation in capital cases, and resolution of those issues ultimately may call into question some of the statutes that currently exist. See, e.g., Traci Shurley, *Death Penalty Law Needs to Be Fixed*, *Legislators Told*, *Ark. Democrat-Gazette*, Sept. 21, 2002, at A11 (describing expert testimony to Arkansas state legislature that current Arkansas statute exempting people with mental retardation from capital punishment needs to be reconsidered in light of *Atkins* because it uses presumptive I.Q. threshold of 65, rather than 70). Moreover, one federal judge already has held that *Ring* invalidates the federal death penalty statute. *United States v. Fell*, No. 2:01-CR-12-01, 2002 U.S. Dist. LEXIS 17932 (D. Vt. Sept. 24, 2002). The court found a constitutional violation not because judges make any key factual determinations in federal capital sentencing, but because the federal statute, like those of many states, specifically suspends the application of the ordinary rules of evidence in capital sentencing, even those rules of constitutional significance like the rule against hearsay testimony. *Id.* at *54 (“[T]he FDP, which bases a finding of eligibility for imposition of the death penalty on information that is not subject to the Sixth Amendment's guarantees of confrontation and cross-examination, nor to rules of evidentiary admissibility guaranteed by the Due Process Clause to fact-finding involving offense elements, is unconstitutional.”).

⁵ *Atkins* overruled *Penry v. Lynaugh*, 492 U.S. 302 (1989), which was authored by Justice O'Connor and joined by Justice Kennedy, both of whom were members of the *Atkins* majority. *Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990), which was authored by Justice White (who no longer sits on the Court) and joined by Justices Scalia and Kennedy, both of whom were members of the *Ring* majority.

⁶ See, e.g., Linda Greenhouse, *Citing 'National Consensus,' Justices Bar Death Penalty for Retarded Defendants*, *N.Y. Times*, June 21, 2002, at A1; Linda Greenhouse, *Justices Say Death Penalty Is up to Juries, Not Judges*, *N.Y. Times*, June 25, 2002, at A1.

⁷ The so-called “modern era” encompasses the period of constitutional regulation since 1976, when the Court reinstated the death penalty after its temporary abolition four years earlier. *Furman v. Georgia*, 408 U.S. 238 (1972), abolished capital punishment as it was then administered throughout the United States. Four years later, *Gregg v. Georgia*, 428 U.S. 153 (1976), approved one of several new capital punishment statutes providing guided discretion to capital sentencers. See also *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding Texas's new guided-discretion scheme); *Proffitt v. Florida*, 428 U.S. 242 (1976) (affirming Florida's new guided-discretion scheme).

⁸ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

ticular doctrines by particular justices, these decisions will have widespread impact, both doctrinally and atmospherically, in ways that reach far beyond the particular issues at stake in the two cases. Moreover, the Court's own shift reflects a recent and more widespread cultural and political shift in popular attitudes and concerns about the death penalty. Even so, there is less of a change in the fundamental dynamics of the Supreme Court's constitutional regulation of capital punishment than the foregoing might suggest. Since 1976, most of the major innovations in the Supreme Court's death penalty jurisprudence have both dissipated popular discomfort with the retention of capital punishment and insulated death penalty practices from more sweeping constitutional challenges by ameliorating or appearing to ameliorate some of the more obviously problematic features of capital punishment administration. This result has been the consistent product of the internal political dynamics of the Court, with two absolutist poles competing for an essentially meliorist middle. There is ample reason to believe that the two landmark decisions of last Term will play a similar role, and that they reflect a political dynamic that has not changed despite substantial changes in the membership of the Court. Things may be falling apart within the narrow world of death penalty doctrine, but the center looks like it will probably hold—both in terms of the central role of constitutional regulation in preserving capital punishment through amelioration, as well as the power and vision of the Court's political center.

I THINGS FALL APART

There is no question that *Atkins* and *Ring* will have some significant repercussions on the administration of capital punishment. In the most immediate sense, the decisions will affect some number—quite possibly a large number—of death row inmates either by exempting them from execution altogether or by giving them new sentencing hearings.⁹ Although the precise number of inmates with mental retardation among the more than 3700 people currently on death row is at present unknown, it may well be substantial—more appropriately

⁹ Neither Daryl Atkins nor Timothy Ring, however, will necessarily gain relief. The Supreme Court remanded Atkins's case to the Virginia courts, where a determination will have to be made on his claim of mental retardation, about which experts disagreed at his trial. *Atkins*, 122 S. Ct. at 2245-46. Ring's case was likewise remanded with an invitation to the Arizona courts to consider whether there was "harmless error." *Ring*, 122 S. Ct. at 2443 n.7. The jury was not asked to determine whether Ring committed his murder for pecuniary gain, but the Arizona courts might decide that such a finding was implicit in the verdict: guilty of felony murder occurring during the course of armed robbery. *Id.*

measured in hundreds rather than dozens.¹⁰ The number of those defendants with mental retardation who will be able to prove their condition in court, and thus be categorically exempted from capital punishment, will depend crucially on the definition of mental retardation and the procedures created for making such determinations in the jurisdiction in question. States will have to decide, among other things, whether to require proof of onset of mental retardation before the age of eighteen, what I.Q. score to choose as the threshold number (below 75? 70? 65?), whether to give the decision to the judge or the jury, whether to have the decision made before or after trial and/or sentencing, which party has the burden of proof on the issue, and what the standard of proof is. These determinations will tremendously affect the ultimate impact, in number of executions, of the ruling in *Atkins*.¹¹

The number of inmates who, as a result of the Court's decision in *Ring*, will be entitled to new capital sentencing hearings is also in question, though for reasons different from those relating to the *Atkins* case. All of those sentenced to death in the five states that provided for wholly judicial capital sentencing were sentenced in violation of the current rule of *Ring*, because judges made determinations of fact that now must be made by juries. But the *Ring* Court was silent on the issue of the retroactivity of its holding, and it is not at all clear that the ruling in *Ring* falls within either what might be termed the "substantive law" or the "bedrock procedural rule" exception to the Court's current nonretroactivity doctrine.¹² The single federal circuit court that has ruled so far did not apply *Ring* retroactively, noting that the Supreme Court has not announced the retroactivity of *Ring*

¹⁰ Some experts suggest that forty-four of the 783 people executed between 1976 and the Court's decision in *Atkins* were mentally retarded. Tom Zeller, Tweaking Death Row, N.Y. Times, June 30, 2002, § 4, at 16 (citing Denis Keyes et al., People with Mental Retardation Are Dying—Legally, J. Mental Retardation, June 2002). Other experts propose that ten percent of those currently on death rows around the country are mentally retarded. Raymond Bonner & Sara Rimer, Executing the Mentally Retarded Even as Laws Begin to Shift, N.Y. Times, Aug. 7, 2000, at A1, cited in *Atkins*, 122 S. Ct. at 2254 n.* (Rehnquist, C.J., dissenting).

¹¹ Courts will also need to determine whether defendants on death row waived any claim of mental retardation by failing to raise or preserve it properly. See, e.g., *Murphy v. State*, 54 P.3d 556, 566-69 (Okla. Crim. App. 2002) (providing guidance for determining whether *Atkins* claims should be deemed waived on state post-conviction review).

¹² In *Teague v. Lane*, 489 U.S. 288 (1989), the Court held that new rules of constitutional law will not be given retroactive effect to criminal cases on collateral review unless (1) they place activity beyond the reach of substantive criminal lawmaking authority, or (2) they are the sort of procedural rules "implicit in the concept of ordered liberty." *Id.* at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971)).

and that *Apprendi v. New Jersey*,¹³ the case of which *Ring* is but an application, does not itself fall within an exception to the Court's non-retroactivity doctrine.¹⁴ If *Ring* is not applied retroactively, it will affect only those whose convictions are not yet final. Thus, in Arizona, the state at issue in the *Ring* case, only thirty of the 130 people on death row in that state would be in a position to receive new sentencing hearings.¹⁵

The application of *Ring* to the four states in which juries and judges share responsibility for capital sentencing is even murkier. Will *Ring* be applied to all cases in which the judge issued a death sentence when the jury recommended life? Or only when the jury's recommendation of life depended on the jury's failure to find any aggravating factor? Will it apply to any cases when the judge and jury agree on the death penalty, but for different reasons? Will the fact that juries are told of the "advisory" nature of their task in these hybrid schemes cast any question on the constitutionality, under the Sixth Amendment, of their factual findings? Is the weighing of aggravating circumstances against mitigating circumstances a "factual" finding that must be made by the jury? Or is it a sentencing determination which appropriately may be performed by a judge? These issues will be decided preliminarily in the state courts and legislatures of the affected states,¹⁶ but ultimately, no doubt, they will be litigated in federal courts as well.

It should be clear from the foregoing that while the effect of *Atkins* and *Ring* will be measured in part by the number of inmates who escape the death penalty or get a second chance at a sentencing hearing, perhaps a larger part of the impact of the two cases will be in the uncertainty and massive litigation they will spawn, which will temporarily halt the administration of capital punishment in some places, and certainly slow it down everywhere. The *Atkins* litigation un-

¹³ 530 U.S. 466 (2000) (requiring facts, other than prior conviction, that increase penalty for crime beyond statutory maximum to be submitted to jury and proved beyond reasonable doubt).

¹⁴ *Cannon v. Mullin*, 297 F.3d 989 (10th Cir. 2002), first ruled that *Ring* cannot be applied retroactively in the absence of a Supreme Court holding to that effect. *Id.* at 992-93. Second, applying Tenth Circuit precedent, the court found that *Apprendi*, the case upon which *Ring* is based, is procedural rather than substantive and thus does not fall within the "substantive law" exception to the Supreme Court's nonretroactivity doctrine. *Id.* at 994.

¹⁵ Adam Liptak, Fewer Death Sentences Likely If Juries Make Ultimate Decision, Experts Say, *N.Y. Times*, June 25, 2002, at A21 (including information provided by chief counsel of death penalty appeals unit in the Arizona Attorney General's Office).

¹⁶ Two of these four states, Delaware and Indiana, have already passed legislation changing hybrid capital sentencing to jury capital sentencing. See Del. Code Ann. tit. 11, § 4209 (2001); Ind. Code Ann. § 35-50-2-9(d), (e) (Michie 1998 & Supp. 2002).

doubtedly will involve the definition of and procedures for determining mental retardation, and it may continue for years until the Supreme Court clarifies whether there are any constitutional requirements for such definitions and procedures. Less obviously, *Atkins* will reinvigorate claims of ineffective assistance of counsel in cases in which defense counsel fails to investigate or present evidence relating to the defendant's childhood, educational difficulties, or mental infirmity.¹⁷ Indeed, one of the perhaps unforeseen consequences of *Atkins* will likely be to raise the bar on what is considered adequate investigation by capital defense lawyers, given the fact that some evidence that used to be relevant only to mitigation will now exempt the defendant entirely from the ambit of the death penalty, no matter how overwhelming the aggravating facts might be.

Atkins also opens the door to litigation beyond the scope of mental retardation. For example, the holding in *Atkins* immediately began to generate interest in extending its reasoning, by analogy, to exempt juveniles and those with serious mental illness from the death penalty. Indeed, four of the Justices from the *Atkins* majority have already expressed their view that *Atkins* should be extended to exempt juveniles from the death penalty.¹⁸ In addition, not merely the holding, but the reasoning of the *Atkins* Court will provide much fodder for future Eighth Amendment litigation. In determining that the execution of mentally retarded offenders violated "evolving standards of decency," the *Atkins* Court relied, in a tantalizingly vague and imprecise footnote, upon a "social and professional consensus" derived from the views expressed by professional organizations, representatives of religious communities, representatives of the world community, and polling data.¹⁹ While provoking strong expressions of scorn and derision from the dissenters,²⁰ this controversial footnote opens a

¹⁷ See, e.g., *Brownlee v. Haley*, No. 00-15858, 2002 U.S. App. LEXIS 19069 (11th Cir. Sept. 16, 2002) (vacating death sentence on ground that defense counsel was ineffective during penalty phase for failing to investigate evidence of potential borderline mental retardation).

¹⁸ See *In re Stanford*, No. 01-10009, 2002 U.S. LEXIS 8056 (Oct. 21, 2002) (Stevens, J., joined by Souter, Ginsberg, & Breyer, JJ., dissenting from denial of certiorari) (calling for end to "shameful practice" of executing juvenile offenders); see also Linda Greenhouse, Justices Seek Federal Guidance on Jury in Sentencing That Uses Prior Offenses as Factor, *N.Y. Times*, Oct. 22, 2002, at A23. This summer, three Justices dissented from the denial of certiorari in a case on the execution of juveniles, urging the full Court to take up the issue in light of its decision in *Atkins*. *Patterson v. Texas*, No. 02-6010 (02A164), 2002 U.S. LEXIS 5341 (Aug. 28, 2002) (Stevens, Ginsburg & Breyer, JJ., dissenting from denial of certiorari).

¹⁹ 122 S. Ct. at 2249 n.21.

²⁰ As Chief Justice Rehnquist indignantly noted in his dissent in *Atkins*, 122 S. Ct. at 2254, the Court flatly rejected the relevance of international opinion and practice to "evolving standards of decency" in its most recent Eighth Amendment opinion prior to

new path in Eighth Amendment litigation, one that has at least some potential to lead to extensions of *Atkins* or even to judicial abolition.

In a similar fashion, though probably to a lesser degree, the decision in *Ring* will also create uncertainty, litigation, and calls for extension. As noted above, most of the uncertainty will be in the four states with hybrid sentencing schemes rather than in the five states with judicial sentencing schemes that know they must rewrite their procedures. However, in all of the affected states, as the Court intimated in *Ring* itself, future litigation will be necessary to determine when and to what extent formal failures to have jury determinations of key facts may be deemed “harmless error.” Moreover, one additional question that is sure to arise is whether judges may make factual determinations necessary for capital sentencing in the event of a jury’s deadlock.²¹

Litigation will arise not only around these uncertainties but also around logical extensions of *Ring*’s holding. If aggravating circumstances are elements of the crime rather than sentencing factors, must they be charged in the indictment (at least in federal court, where indictments are required by the Fifth Amendment)? If the Sixth Amendment right to a jury trial applies to aggravating circumstances, what about the Sixth Amendment’s Confrontation Clause? Already, one federal district judge has struck down the federal death penalty statute under *Ring* on the ground that the statute’s specific provision that the Federal Rules of Evidence do not apply to capital sentencing proceedings violates the defendant’s Sixth Amendment rights of confrontation and cross-examination of witnesses.²² Such an extension of *Ring* would require changes in the evidentiary rules that currently apply in a large number of death penalty states, which authorize informality similar to the federal statute.²³ Furthermore, if statutory

Atkins, where it concluded that “American conceptions of decency . . . are dispositive.” *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989). In a post-*Atkins* Eighth Amendment case, Justice Thomas articulated his continuing disdain for the consideration of foreign moods, fads, or fashions in Eighth Amendment jurisprudence. *Foster v. Florida*, No. 01-10868, 2002 U.S. LEXIS 8057 (Oct. 21, 2002) (Thomas, J., concurring in denial of certiorari) (excoriating Justice Breyer’s willingness to look abroad in considering whether capital defendant’s claim that his lengthy stay on death row awaiting execution constituted cruel and unusual punishment under Eighth Amendment).

²¹ A small handful of states provide for judge sentencing in cases of jury deadlock. E.g., Ind. Code Ann. § 35-50-2-9(f) (Michie 1998 & Supp. 2002); Mo. Ann. Stat. § 565.030.4 (West 1999); Nev. Rev. Stat. Ann. § 175.556(1) (Michie 1997).

²² *United States v. Fell*, No. 2:01-CR-12-01, 2002 U.S. Dist. LEXIS 17932 (D. Vt. Sept. 24, 2002).

²³ The capital statutes of ten states (Alabama, Florida, Montana, Nevada, New Hampshire, Oregon, Tennessee, Utah, Washington, and Wyoming) and the rules of evidence of four others (Nebraska, Mississippi, South Dakota, Ohio) specifically provide that state rules of evidence do not apply in capital sentencing proceedings. See Ala. Code § 13A-5-

aggravating factors are elements of the offense that must be found by a jury, what about constitutionally required “culpability” facts? For example, what about the *Enmund/Tison* requirement that a capital defendant convicted of felony murder must be a “major participant” in the underlying felony and have exhibited “indifference to human life”?²⁴ Or the new *Atkins* requirement that the defendant not be mentally retarded?

The above brief catalogue of both the disarray and the sense of new possibilities that characterize current capital litigation is good evidence of the significance of the Court’s recent decisions. But their greatest significance is probably not doctrinal. Rather, the decisions in *Ring* and especially *Atkins* are clearly reflections of a larger shift in cultural and political attitudes about capital punishment. As the Supreme Court’s turn-around from *Furman*’s abolition to *Gregg*’s reinstatement of capital punishment illustrated at an earlier time, truly substantial judicial limitations on the use of capital punishment are likely only in the absence of public backlash and resistance to limitations on the death penalty. Of course, this is partly an obvious result of an Eighth Amendment doctrine that the Court has explicitly moored to “evolving standards of decency.” But it is also a reflection of the cautious and moderate self-conception of the Supreme Court as an institution in this post-Warren Court era. *Atkins* was unthinkable even five years ago, not only because the number of states outlawing capital punishment for mentally retarded offenders had not yet accelerated quickly enough, but also because the last five years have seen a striking and unusual shift in public attitudes that both presaged and made possible the Court’s decisions.

This shift in public attitudes has its roots, as I have argued elsewhere,²⁵ in the erosion of public confidence in the existence of exten-

45(d) (2002); Fla Stat. Ann. § 921.141 (West 2001); Miss. Code Ann. § 99-19-101(1) (1999); Mont. Code Ann. § 46-18-302 (2002); Neb. Rev. Stat. Ann. § 27-1101(4)(b) (Michie 2002); Nev. Rev. Stat. § 175.552.1 (Michie 2002); N.H. Rev. Stat. Ann. § 630:5(III) (1996); Ohio Rev. Code Ann. § 2929.03(D)(1) (West 2002); Or. Rev. Stat. § 163.150(1)(a) (2001); S.D. Codified Laws § 19-9-14(4) (Michie 2002); Tenn. Code Ann. § 39-13-204(c) (2002); Utah Code Ann. § 76-3-207(2)(b) (2002); Wash. Rev. Code Ann. § 10.95.060(3) (West 2002); Wyo. Stat. Ann. § 6-2-102(c) (Michie 2002).

²⁴ In *Enmund v. Florida*, 458 U.S. 782 (1982), the Court held that the Eighth Amendment precluded capital punishment for a participant in a felony murder who did not himself kill, attempt to kill, or intend to kill. *Tison v. Arizona*, 481 U.S. 137 (1987), modified the rule in *Enmund* to permit the execution of those who are major participants in the underlying felony and who demonstrate the culpable mental state of reckless indifference to life. Cf. *Cabana v. Bullock*, 474 U.S. 376 (1986) (holding it constitutionally permissible for judges, rather than juries, to make the culpability findings required by *Enmund*).

²⁵ Carol S. Steiker & Jordan M. Steiker, *Judicial Developments in Capital Punishment Law, in America’s Experiment with the Death Penalty: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (J. Acker et al. eds., 2d ed. forthcoming 2002).

sive safeguards surrounding the use of capital punishment in our country. Highly visible legislation like the Anti-Terrorism and Effective Death Penalty Act of 1996,²⁶ which narrowed the availability of habeas corpus for death row inmates, combined with dramatic cases of death row exonerations, terrible capital defense lawyers, exculpatory evidence suppressed by the prosecution, and inculpatory evidence offered by unreliable jail-house snitches, resulted in nothing short of a sea change in public attitudes. The exoneration of thirteen death row inmates in Illinois alone—no doubt the most dramatic catalyst of change in the last five years—led to a state-wide moratorium imposed by Republican Governor George Ryan, who was even considering granting clemency to the entire death row population of the state before the end of his term.²⁷ Maryland's Governor Parris Glendening recently followed suit with a state-wide moratorium on capital punishment pending a study of racial bias within the state.²⁸

A wide variety of legislation reforming the capital process to better protect the innocent has been passed or is pending in Congress and in state legislatures around the country. Public opinion polling data has shown dramatic drops in public support for capital punishment, documenting a rapid descent from a high of 80% in favor in 1994 to a low of 65% in favor in 2001, the lowest level of support in nineteen years.²⁹ Moreover, while abolitionists still remain a distinct minority in the polls, substantial majorities report supporting a moratorium on executions until problems in the system can be studied and remedied.³⁰ Rather surprisingly, there is little evidence that these new concerns about the administration of capital punishment have been strongly diminished by the events of September 11 and the ensuing war on terrorism.³¹ Finally, the best evidence that we have turned some national corner regarding the meaning of the death penalty may be the fact that a potential presidential candidate in 2004 has declared

²⁶ Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.).

²⁷ Associated Press, *Illinois: Blanket Clemency Unlikely*, N.Y. Times, Oct. 23, 2002, at A20 (stating that Gov. Ryan has "pretty much ruled out" granting blanket clemency, but noting that Illinois State Prisoner Review Board was conducting clemency hearings for 142 out of 160 inmates on death row).

²⁸ Francis X. Clines, *Death Penalty Is Suspended in Maryland: Governor Waits on Study of Inequality*, N.Y. Times, May 10, 2002, at A20.

²⁹ See Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 Ohio St. L.J. 417, 417 n.3 (2002) (citing Gallup poll data).

³⁰ *Id.*

³¹ Perhaps the greater need for cooperation from our European allies has made us more susceptible to European pressure to join them in abolition.

his support for a moratorium on the use of capital punishment, something that was unheard of as recently as election year 2000.³²

The Court's decisions in *Atkins* and *Ring* do not merely reflect this trend in public attitudes toward skepticism about the administration of capital punishment; to some degree, of course, the Court's decisions reinforce this skepticism. While the Court's decisions create new headaches and costs for states that wish to continue to administer capital punishment, they also embolden abolitionist litigators to push further and encourage federal court judges to consider challenges they might otherwise dismiss out of hand. It is no coincidence that within a three-month period following the end of the Supreme Court's Term, two district court judges independently struck down the federal death penalty on quite different grounds.³³ Moreover, two Supreme Court Justices recently discussed the death penalty in fora outside of the Court,³⁴ and a federal court of appeals judge made public, nonjudicial remarks about his concerns about the administration of capital punishment in the United States.³⁵ Thus, in deciding *Atkins* and *Ring* in the way that it did, the Court not only acknowledges an ongoing national conversation about the death penalty but also participates in the dialogue and encourages continued debate.

II

THE CENTER HOLDS

Without denigrating the foregoing case for the significance of the Court's decisions in *Atkins* and *Ring*, it is important to recognize how those decisions fit into the larger, longer-term pattern of constitutional regulation of capital punishment. A bird's-eye view gives us reason to qualify the foregoing account of *Ring* and *Atkins* by al-

³² "Now, even presidential candidate John Kerry has announced his support for a moratorium, which would have been declared suicidal in the past—and which may well elevate capital punishment to serious visibility in the 2004 presidential race." Bruce Shapiro, *Rethinking the Death Penalty: Politicians and Courts Are Taking Their Cues from Growing Public Opposition*, *Nation*, July 22, 2002, at 14.

³³ See *United States v. Fell*, No. 2:01-CR-12-01, 2002 U.S. Dist. LEXIS 17932 (D. Vt. Sept. 24, 2002); *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002).

³⁴ See Sean Wilentz, *From Justice Scalia, a Chilling Vision of Religion's Authority in America*, *N.Y. Times*, July 8, 2002, at A19 (detailing, analyzing, and critiquing comments Justice Scalia made about death penalty at conference in Chicago); William F. Buckley, Jr., *Rumbles in Illinois*, *Nat'l Rev. Online*, Sept. 27, 2002, at <http://www.nationalreview.com/buckley/buckley092702.asp> (describing, analyzing, and critiquing comments Justice Stevens made about death penalty reform at awards ceremony in Chicago).

³⁵ See *Another Federal Judge Speaks Against the Death Penalty System*, *TalkLeft: The Politics of Crime*, Sept. 27, 2002, at <http://www.talkleft.com/archives/001028.html> (describing Sixth Circuit Judge Gilbert Merritt's criticisms of death penalty at federal-state judicial conference sponsored by Tennessee Bar Association).

lowing us to see them as more than just a reflection and an enactment of a fundamental shift in public attitudes. They are also, simultaneously, part of a continuous process of amelioration that is more likely to stabilize than to destabilize capital punishment in the long run. The Court's opinions may have ridden on a tide of public sentiment, and they may have even contributed their own rivulets to that tide. But ultimately and paradoxically, judicial regulation of capital punishment, as practiced by our Supreme Court over the past quarter-century, has been more likely to dissipate than to fortify such movements. Despite its changing membership, the Court has produced a repeating pattern and maintained a consistent political dynamic on the issue of capital punishment: Two absolutist poles compete for the middle, which then, of necessity, charts a course of cautious amelioration. *Ring* and *Atkins*, in different ways, fit both the pattern and the politics of this history and thus may constitute less of a break with the past than might initially appear.

As I have argued more extensively elsewhere,³⁶ the Supreme Court's project of constitutional regulation of capital punishment since 1976 has played a role in legitimating and thus stabilizing the practice of capital punishment, primarily by generating an appearance of intensive judicial scrutiny and regulation despite its virtual absence. The Court's cases, by continually refining the rules of capital sentencing procedures, have helped to perpetuate (though perhaps unintentionally) a demonstrably false sense that constitutional regulation actually rationalizes the capital sentencing process and thus protects against inaccurate, arbitrary, or discriminatory results. This false sense is conveyed, in different ways, to actors both within and outside of the actual legal process.

The Court's decision in *Ring* is entirely consistent with this account. While *Ring* made headlines because it overturned a recent prior ruling and cast doubt upon the sentencing schemes of at least nine states, at the level of legal doctrine, the decision was merely the application of a distinction—*Apprendi*'s new formulation of the difference between “elements” of a crime and “sentencing factors”—that had been developed over a number of years in the noncapital context. That it took several years and a deeply divided Court to apply *Apprendi*'s ordinary criminal sentencing rule to capital sentencing turns on its head the purported Eighth Amendment doctrine that

³⁶ See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355 (1995).

“heightened reliability” ought to be ensured in capital cases.³⁷ Moreover, while there is no good rationale for failing to apply *Apprendi* to capital cases,³⁸ there is also not much reason to think that the *Apprendi* rule will prove to be very significant in rationalizing the capital process. In some jurisdictions, most notably Alabama, increasing the jury’s role and decreasing the judge’s role in capital sentencing seems likely to help capital defendants, given that the overwhelming majority of judicial overrides of jury sentences in Alabama have been from life to death rather than from death to life (83-7).³⁹ In other jurisdictions, however, such as Delaware, reducing the judicial role might hurt capital defendants—all seven judicial overrides in that state went from death to life.⁴⁰

For the most part, experts seem to agree that the Alabama effect outweighs the Delaware effect and that judges are generally more likely to sentence to death than juries.⁴¹ Even so, the most that might be said about *Ring* is that, if the nine affected states all respond by enacting jury sentencing instead of judge sentencing, there probably will be somewhat fewer death sentences. But *Ring* quite explicitly does not require jury sentencing;⁴² it merely requires that a jury find any facts necessary to make a defendant eligible for the death penalty. After that point, *Ring*’s holding does not appear to prevent judicial sentencing or judicial overrides from life to death; thus, states will remain free to retain or enact judicial sentencing or overrides so long as the jury’s fact-finding role is assured, either at the trial itself or at the penalty phase. When all is said and done, *Ring*’s significance in the scheme of constitutional regulation of capital punishment is small—

³⁷ See Adam Thurschwell, Federal Court, the Death Penalty, and the Due Process Clause: The Original Understanding of the “Heightened Reliability” of Capital Trials, 14 Fed. Sentencing Rep. 14, 16 (2001) (remarking that Supreme Court’s initial unwillingness to extend *Apprendi* to capital cases is “further evidence for the proposition that the difference death makes in capital procedures under current law is not necessarily a benefit to the capital defendant”).

³⁸ The only rationale upon which the dissenters relied was that *Apprendi* itself was wrongly decided. *Ring*, 122 S. Ct. at 2448 (O’Connor, J., dissenting).

³⁹ Liptak, *supra* note 15 (quoting Stephen B. Bright of Southern Center for Human Rights).

⁴⁰ *Id.*

⁴¹ *Id.* (quoting James S. Liebman, law professor at Columbia University, as saying, “There is quite general agreement that over time and over geography, the likelihood of getting a death sentence is greater from a judge than from a jury.”).

⁴² Indeed, only Justice Breyer indicated that his support for the majority’s holding depended upon a belief that the Constitution requires jury sentencing, *Ring*, 122 S. Ct. at 2446 (Breyer, J., concurring), a position that Justice Scalia was quick to point out was inconsistent with the majority’s actual holding, *id.* at 2445 (Scalia, J., dissenting) (“Concisely put, Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.”).

and much smaller than its apparent significance as an overruling of recent precedent.

Atkins is a different story. Its categorical exemption of mentally retarded offenders is likely to have a much bigger impact on the present and future shape of death row, and it cannot fairly be characterized as mere procedural tinkering that falsely gives the impression of judicial scrutiny despite its absence. Rather, *Atkins* is precisely the kind of regulation that I argued lay along the “road not taken” in the Supreme Court’s overall project of constitutional regulation of capital punishment—the road of serious substantive limitations on the use of the penalty.⁴³ It turns out, however, that even real substantive limitations on the use of capital punishment can contribute to the stabilization of the death penalty in a different way—through what I have termed “entrenchment” rather than “legitimation.”⁴⁴ The threat of stabilization that entrenchment presents is the possibility that real progress toward eliminating or limiting real problems with the administration of capital punishment can sap the very critical scrutiny that gave rise to the reforming impulse.⁴⁵ This dynamic is no less real in the judicial arena than in the legislative one; indeed, the brief history of constitutional regulation of capital punishment since 1976 shows both the power and the limits of substantive exemptions from the ambit of the death penalty.

The most instructive past example of the possibility of entrenchment through substantive exemption is the Supreme Court’s decision in *Coker v. Georgia*,⁴⁶ ruling that capital punishment is always a disproportionate punishment for the rape of an adult woman. Because black men who raped white women were extraordinarily more likely to receive the death penalty than any other racial combination, *Coker*’s elimination of the death penalty for rape, although formally premised entirely on grounds of proportionality, managed to eliminate the most racially disproportionate use of capital punishment at the same time.⁴⁷ Thus, one decade after *Coker*, when the Court was faced, in *McCleskey v. Kemp*,⁴⁸ with a constitutional challenge to capital punishment based on its racially disproportionate use in murder cases, multiple regression analysis found only a weak “race-of-the-de-

⁴³ See Steiker & Steiker, *supra* note 36, at 414-25.

⁴⁴ Steiker & Steiker, *supra* note 29, at 421-24.

⁴⁵ *Id.* at 424.

⁴⁶ 433 U.S. 584 (1977).

⁴⁷ See generally Eric W. Rise, *The Martinsville Seven: Race, Rape, and Capital Punishment* (1995) (describing first major case to challenge disproportionate use of capital punishment to punish rape by black men).

⁴⁸ 481 U.S. 279 (1987).

fendant,” as compared to a “race-of-the-victim,” effect,⁴⁹ when both effects almost certainly would have been far more evident had rape cases been considered. *Coker’s* amelioration (though not elimination) of racial bias in the administration of capital punishment thus undercut both the degree of outrage such bias could continue to evoke and also the strength of legal claims based directly on such bias in the future.

The Court’s other categorical exemptions similarly have acted as double-edged swords both by ameliorating some of the more extreme applications of capital punishment and by undermining the power of abolitionists’ objections to the practice of capital punishment by exempting the most powerful “poster children” of the abolitionist movement.⁵⁰ Thus, even as *Atkins* is celebrated—as was *Coker*, *Edmund*, and *Thompson*—by those who seek to eliminate capital punishment, it nonetheless may contribute to the overall stabilizing effect of Supreme Court constitutional regulation.

Finally, both *Ring* and *Atkins* may contribute to the stabilization of capital punishment in one further way that demonstrates continuity with the overall impact of constitutional regulation since 1976. As in most, if not all, of the Supreme Court’s constitutional pronouncements, the decisions in *Atkins* and *Ring* leave numerous obvious subquestions undecided, even as state legislatures must begin redrafting their capital statutes and state courts must begin applying the preliminary rulings. Such a situation virtually ensures that some state legislatures and state courts will run afoul of what the lower federal courts or the Supreme Court itself will eventually determine that the preliminary rulings entail, contributing in large part to the huge number of reversals in capital cases that has been documented in the post-1976 era.⁵¹ This high rate of reversal of capital convictions and sentences might destabilize the practice of capital punishment, if one accepts—as authors of the study documenting the reversal rate contend—that it demonstrates that the capital justice system is “broken.”⁵² But the high rate of reversal also contributes both to the length of time that capital defendants spend on death row and the impression that their

⁴⁹ *Id.* at 286-87.

⁵⁰ The Court has restricted the scope of capital punishment by disallowing, under certain circumstances, the execution of felons whose co-felons kill without their assistance or assent. *Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982). It has also disallowed the execution of juveniles under the age of sixteen in the absence of explicit legislative authorization. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

⁵¹ James Liebman et al., *A Broken System*, (pt. 2): Why There Is So Much Error in Capital Cases, and What Can Be Done About It (Feb. 11, 2002), <http://www.law.columbia.edu/brokensystem2/index2.html>.

⁵² *Id.*

cases are, indeed, getting a thorough and searching review. Moreover, the length of time that the average capital defendant spends on death row not only promotes the view that review is adequately (or more than adequately) rigorous, it has thus far allowed every death row inmate authoritatively exonerated by DNA evidence to be released prior to execution, leaving abolitionists and journalists to continue to scramble for the “proven” executed innocent—the holy grail of the abolitionist movement.

The more the Supreme Court slows down, muddies up, and nibbles around the edges of the administration of capital punishment, the harder it becomes to sharpen the focus of the debate in a way that is necessary for abolition to occur. In short, the course of slow amelioration that the Supreme Court has charted with regard to capital punishment since 1976 may well have impeded the movement toward abolition, and the cases of the last Term may prove no exception to this ongoing dynamic.

Atkins and *Ring* are the predictable products⁵³ of a long-term meliorist approach to capital punishment, which itself is the product of a consistent struggle between two political poles on the Court. From the time of *Furman*, the Court has always had its wing of judicial abolitionists—originally Justices Brennan and Marshall, with Justice Blackmun joining them only at the end of his career. Also from the time of *Furman*, the Court has had its share of constitutional skeptics—led, in *Furman*, by Chief Justice Burger, and in the previous year, by Justice Harlan in *McGautha v. California*.⁵⁴ The skeptics and their followers doubted that the Constitution imposed substantial limitations on the administration of state (or federal) death penalty schemes. The meliorist middle, among them Justice Stevens, appeared in 1976—seizing the helm in *Gregg* and the quartet of accompanying cases that reinstated the death penalty in America.⁵⁵ From 1976 on, the struggle between the poles has persisted, despite changing membership, and the meliorist middle has continued to dominate.

What *Atkins* and *Ring* demonstrate is that the same struggle, with the same probable outcome, is likely to continue on the Court for some time to come. *Atkins* itself was authored by the same Justice who first voted on the death penalty as part of the plurality in

⁵³ I, along with many other death penalty scholars and Supreme Court watchers, in fact predicted (though not in print) both outcomes before the decisions were issued.

⁵⁴ 402 U.S. 183 (1971) (rejecting due process challenge to standardless capital sentencing regimes).

⁵⁵ See *Gregg v. Georgia*, 428 U.S. 153 (1976); see also *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

Gregg—Justice Stevens, a long-time proponent of amelioration. Surprisingly, Justice Breyer, whose concurring opinion in *Ring* has received remarkably little attention, appears to be approaching the abolitionist pole, which has been vacant since the retirement of Justice Blackmun. Justice Breyer's concurrence, in a fashion reminiscent of Justice Blackmun's well-known dissent from denial of certiorari in *Collins v. Collins*,⁵⁶ catalogues the many flaws in the administration of capital punishment in the United States today.⁵⁷ While he does not go so far as to call for constitutional abolition of capital punishment, his critique provides much of the justification for such a move in the future. Nevertheless, despite recent changes in the Court's death penalty jurisprudence, the abolitionist pole is still clearly the weaker pole on the Court; Justice Breyer wrote for himself alone in *Ring*. On the opposite end of the spectrum, Justice Scalia is the most vocal heir to Justices Harlan and Burger, and his concurrence in *Ring* is the clearest statement yet of his disdain for the Court's Eighth Amendment jurisprudence, perhaps because he reluctantly agreed to swallow that disdain in order to apply and underscore the rule of *Apprendi*, which he has championed for a number of years. Unlike Justice Breyer, Justice Scalia is not alone: He stands in agreement with both Justice Thomas (who joined his *Ring* concurrence) and Chief Justice Rehnquist (who was always a solid companion to Chief Justice Burger in the early days of death penalty litigation).

In sum, support for neither judicial abolition of the death penalty nor abolition of the Supreme Court's Eighth Amendment jurisprudence currently commands a majority of the Court. Thus, although the cases of last Term may have given the impression, in some respects, that the Court's death penalty law was falling apart, in fact, the cautious and slowly reforming middle has held—and seems likely to hold—the reins of the Court's capital jurisprudence for the foreseeable future.

⁵⁶ 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of certiorari).

⁵⁷ *Ring*, 122 S. Ct. at 2446 (Breyer, J., concurring).