

“How do I kill thee? Let me count the ways . . .”: lethal injection as a means of execution in the United States

Ⓛ Constitutional; Death penalty; United States

The legal defensibility under the US Constitution of execution as a punishment for murder has never been seriously in doubt. Capital punishment was imposed for many crimes by all American States when the (second) Constitution was adopted in 1787 and then amended by the Bill of Rights in 1791.¹ The text of the Constitution makes several references to governmental power to take life,² and it is evident that the Framers of the Constitution presumed that national and State governments would enjoy considerable discretion to retain execution as a criminal sanction.³

While some Supreme Court Justices⁴ have indicated that they consider execution as impermissible per se under the Eighth Amendment,⁵ that perspective has never commanded majority support on the Court. Nor has there ever been a moment in US history when there has been any likelihood that capital punishment might be abolished through constitutional amendment. The level of support among the public—and their politicians—remains consistently high. Like abortion however, capital punishment remains a fiercely and frequently contested area of constitutional law.

In the 1970s, legal battles were fought primarily over the question of the procedural rigour attached to the trial process. The Court's conclusion in *Furman v Georgia*⁶ was that most trial regimes then used in the States breached standards of procedural due process. *Furman* led to a temporary moratorium in the implementation of executions while those States which wished to retain capital punishment sought to meet the Court's standards. That 35 States did so potentially illustrates the extent of political support for capital punishment.⁷

A second line of argument as to the constitutionality of the death penalty had distinctly biblical (“eye for an eye”) undertones. The issue in *Coker v Georgia*⁸ was whether it was “cruel and unusual” to impose execution as a punishment for raping an adult woman on the basis that such punishment would be a

¹ See the splendid study by S. Banner, *The Death Penalty: an American History* (London: Harvard University Press, 2002), Ch.1.

² cf. the Fifth Amendment: “No person shall be held to answer for a capital . . . crime unless on a presentment or indictment of a grand jury . . . nor shall any person be . . . deprived of life liberty or property without due process of law”. The reference to “life liberty and property” was repeated in the Fourteenth Amendment, adopted in 1868.

³ Banner, *The Death Penalty: an American History* (2002).

⁴ Notably William Brennan and Thurgood Marshall.

⁵ “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

⁶ *Furman v Georgia* 408 U.S. 238 (1972).

⁷ See *Gregg v Georgia* 428 U.S. 153 (1976); *Woodson v North Carolina* 428 U.S. 280 (1976). For an overview of the immediate post-*Furman* resumption of executions see V. Streib, “Executions Under the Post-*Furman* Capital Punishment Statutes” (1984) 15 *Rutgers Law Journal* 443.

⁸ *Coker v Georgia* 433 U.S. 584 (1977).