debtor.[69] That representative is "appointed by, subject to removal by, and supervised by" the U.S. Trustee, who is appointed by the U.S. Attorney General.[70] As amici pointed out, "[u]nlike the tax, commerce and other Article I powers resolved in the Court's recent [sovereign immunity cases cited by the dissent,] bankruptcy causes of actions . . . are enforceable *only* by the estate representative designated by the [federal bankruptcy] court."[71] If sovereign immunity does not limit the federal government's power to sue the states, neither should it limit proceedings by federally empowered trustees against states to recover preferential transfers.

The majority's commendable decision saved bankruptcy, at least temporarily, from the Eleventh Amendment: *Katz* forbids states from behaving like bankruptcy freeloaders, benefiting when trustees collect preferences from other creditors but refusing to disgorge their own improperly acquired payments. But with the recent changes in the Court's composition, *Katz* will likely face close scrutiny and resistance in the future. Congress has already shown a predilection for chipping away at bankruptcy's debtor protections, recently making it significantly more difficult for debtors to file under chapter 7.[72] By failing to define "ancillary" or to buttress its reasoning more fully, the *Katz* majority left the issue open to further assault by the courts, to the detriment of not only debtors, but also many creditors.

B. Criminal Law and Procedure

1. Eighth Amendment — Death Penalty — Consideration of Invalid Sentencing Factors. — The practice of judging may be a pursuit of legal predictability,[1] but it is not only that. It is also a quest for coherence. Judges must undergird any doctrine with a coherent idea that binds varying situations in reasoned, expected, and therefore accepted, treatment before the law.[2] Such an idea has eluded capital punish-

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[69] *See id.* at 14.

[70] *Id.* at 13–14 (citing 11 U.S.C.A. § 1104 (West 1999 & Supp. 2006); 28 U.S.C.A. §§ 582, 586(a)(3) (West 2006)).

[71] *Id.* at 16 (emphasis added).

[72] *See* Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 457–59 (2005) (summarizing shortcomings of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (to be codified in scattered sections of 11 U.S.C.)).

[1] *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) ("The object of our study . . . is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.").

[2] *See* CHARLES FRIED, SAYING WHAT THE LAW IS 2 (2004) ("[E]ach legal decision should be referable to a rule or principle; it should be justifiable not just by the good that it does but as part of the fabric of the law."); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1094 (1975) ("[A judge] must construct a scheme of . . . principles that provides a coherent justification for all common law precedents and . . . constitutional and statutory provisions as well.").

ment doctrine for a generation. Ever since the Supreme Court's enigmatic per curiam opinion in *Furman v. Georgia*[3] — with its multiple concurrences presenting competing rationales for greater procedural strictures on capital sentencing[4] — the doctrine has advanced in fits, starts, and diverging theoretical directions.[5] This incoherence has been especially apparent in the doctrine's distinction between states with "weighing" and those with "nonweighing" capital sentencing statutes.[6] Last Term, in *Brown v. Sanders*,[7] the Court brought a level of predictability to the weighing-nonweighing distinction by redefining it, holding that a sentencer's consideration of an invalid sentencing factor will not render a capital sentence unconstitutional if the facts and circumstances supporting that factor can be swept in under another valid

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[3] 408 U.S. 238 (1972) (per curiam).

[4] *Furman*'s operative one-paragraph decision is surrounded by 232 pages containing no fewer than five concurrences and four dissents. Two of the Justices in the five-Justice per curiam majority thought the death penalty to be a per se Eighth Amendment violation. *See id.* at 305 (Brennan, J., concurring); *id.* at 369 (Marshall, J., concurring). The three other concurring Justices, using different rationales, argued that open-ended discretion in capital sentencing violated the Eighth and Fourteenth Amendments. Justice Douglas thought that the application of the death penalty was discriminatory and that it represented both an Eighth Amendment and an Equal Protection violation. *See id.* at 257 (Douglas, J., concurring) ("[Open-ended capital sentencing laws] are pregnant with discrimination . . . [and are therefore] not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."). Justice Stewart believed that open-ended discretion led the death penalty to be "wantonly and . . . freakishly imposed," rendering such sentences "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309–10 (Stewart, J., concurring). Justice White agreed with Justice Stewart, adding that the death penalty was especially cruel and unusual under the statutes in question, as it had been so infrequently imposed as to have lost its deterrent value. *See id.* at 312–13 (White, J., concurring).

[5] *See, e.g.*, Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) ("For more than 20 years I have endeavored — indeed, I have struggled — along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty . . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."); Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 103 (1992) ("It is the Court's own fault that the death penalty dilemma has been misunderstood. The Court has never undertaken any systematic review of the legitimate constitutional rationale justifying the death penalty.").

[6] The parameters of the weighing-nonweighing distinction have been controversial, but they turn on the fact that most states bifurcate their capital sentencing procedures into an eligibility phase and a penalty phase. In the eligibility phase, the sentencer determines whether the convict meets one or more criteria that make him eligible for the death penalty. If he does, the sentencer then weighs a series of factors in the penalty phase to determine whether to impose the death penalty. The majority in *Brown v. Sanders*, 126 S. Ct. 884 (2006), defined a weighing state as one in which the eligibility and penalty factors are the same. Thus, if one eligibility factor was later deemed invalid, it "necessarily skewed" the penalty phase balancing. *Id.* at 890. Nonweighing states are those that specify penalty phase factors different from or in addition to the eligibility factors. *Id.* The two *Sanders* dissents, in contrast, viewed weighing states as those that enumerate by statute the penalty phase factors, regardless of whether they are the same as those in the eligibility phase. Nonweighing states are those that allow the jury to weigh any and all factors in the penalty phase. *See id.* at 895–96 (Stevens, J., dissenting); *id.* at 897 (Breyer, J., dissenting).

[7] 126 S. Ct. 884.

sentencing factor.[8] But while the Court laid down a clear and predictable rule, it neglected to support it with a coherent and stabilizing theory.

In 1981, Ronald Sanders and an accomplice, John Cebreros, murdered Janice Allen.[9] Allen was the girlfriend of Dale Boender, a drug dealer.[10] Sanders and Cebreros had planned to attack Boender at his home to prevent him from identifying Sanders as the assailant who had assaulted Boender in a previous drug-related robbery attempt.[11] When Sanders and Cebreros invaded Boender's home and found him and Allen, they forced them to the floor, bound and blindfolded them, struck them both on the head, and stole drugs before fleeing.[12] Boender survived the attack.[13] Allen did not.[14]

A California jury found Sanders guilty of robbery, burglary, attempted murder of Boender, and first-degree murder of Allen, and it also found four "special circumstances" that rendered Sanders eligible for the death penalty[15] under California's capital punishment eligibility statute.[16] The jury then moved to the penalty phase of the proceeding.[17] Upon weighing a series of statutorily enunciated sentencing factors — including an "omnibus" evidentiary factor that encompassed "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true [in the eligibility phase]"[18] — the jury sentenced Sanders to death.[19]

On automatic appeal, the California Supreme Court invalidated two of the four special circumstances that rendered Sanders eligible for death.[20] It invalidated a factor labeling the crime "heinous, atrocious

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[8] *Id.* at 892.

[9] Sanders v. Woodford, 373 F.3d 1054, 1058 (9th Cir. 2004).

[10] *Id.* at 1056.

[11] *Id.* at 1057.

[12] *Id.*

[13] *Id.* Boender suffered a skull fracture, but was conscious when police arrived at the scene and was able to testify at trial. *Id.*

[14] *Id.* Allen suffered a fatal skull fracture that lacerated her brain. *Id.*

[15] *Id.* at 1058.

[16] CAL. PENAL CODE § 190.2 (West 1999 & Supp. 2006). Specifically, the jury found that Sanders murdered Allen: (1) in the course of a robbery, *see id.* § 190.2(a)(17)(A); (2) in the course of a burglary, *see id.* § 190.2(a)(17)(G); (3) to prevent her from testifying against him, *see id.* § 190.2(a)(10); and (4) in a manner that was heinous, atrocious, and cruel, *see id.* § 190.2(a)(14). *Sanders*, 373 F.3d at 1062.

[17] *Sanders*, 373 F.3d at 1058. California's capital sentencing procedure is bifurcated: at the eligibility phase, the jury finds whether at least one factor makes the defendant eligible for death; at the penalty phase, it weighs aggravating and mitigating factors to determine whether to impose the death penalty. *See* CAL. PENAL CODE §§ 190.2, 190.3; *Sanders*, 373 F.3d at 1060–62.

[18] CAL. PENAL CODE § 190.3(a).

[19] *Sanders*, 373 F.3d at 1058.

[20] *Id.*

or cruel" because it was unconstitutionally vague, and a burglary-murder factor because it violated state merger law.[21] Nonetheless, finding that these invalid factors did not affect the sentencing outcome, the court upheld the conviction.[22] Sanders then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of California. The district court denied the petition.[23]

The Ninth Circuit reversed and remanded. Writing for the unanimous panel Judge Fisher found that the sentencing statute's inclusion of eligibility factors in the list of penalty-phase sentencing factors made it a weighing system, which obligated the reviewing court to remand Sanders's case for reweighing, to reweigh the factors itself, or to determine that the inclusion of the invalid factors was harmless beyond a reasonable doubt.[24]

The Supreme Court reversed, holding that because under California's omnibus sentencing factor the jury could have properly considered the facts and circumstances underlying the invalidated factors, there was no constitutional defect in the sentencing procedure.[25] Writing for the Court, Justice Scalia[26] began by considering how a court should treat an eligibility factor or a statutorily specified aggravating factor later held to be invalid. Reviewing the Court's doctrine on the subject, Justice Scalia explained that when a state is a weighing state[27] — one in which the only aggravating factors permitted to be considered are also the eligibility factors — an invalid eligibility factor necessarily affects the balancing equation and renders a sentence unconstitutional unless a court reweighs the evidence or determines that the error was harmless.[28] However, when a state is nonweighing — permitting the consideration of aggravating factors different from or in addition to the eligibility factors — skewing of the sentencing process is not automatic; the sentence is unconstitutional only if it authorizes a jury to consider as aggravating constitutionally protected conduct, constitutionally impermissible factors, or irrelevant information, or it allows a jury to consider evidence that otherwise would not have been before it.[29]

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[21] *Id.* at 1062–63.

[22] *Id.* at 1063.

[23] *Sanders*, 126 S. Ct. at 888–89.

[24] *Id.* at 1059–60.

[25] *Sanders*, 126 S. Ct. at 892, 894.

[26] Justice Scalia was joined by Chief Justice Roberts and Justices O'Connor, Kennedy, and Thomas. *Sanders*, 126 S. Ct. at 887–88.

[27] Justice Scalia lamented the misleading nature of the terms "weighing" and "nonweighing." *Sanders*, 126 S. Ct. at 889–90. States in both categories must require "weighing" of aggravating and mitigating factors, and the distinction lies rather in what is weighed at the penalty phase. *Id.*

[28] *Id.* at 890.

[29] *Id.* at 890–91.

Justice Scalia found this scheme, though "accurate as far as it goes," needlessly complex and unable to account for every situation in which an invalid factor may be found.[30] He therefore dispensed with the distinction and announced a new rule: an invalid factor, whether an eligibility or aggravating factor, will "render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances."[31] Applying this new rule, Justice Scalia found that California's omnibus penalty phase factor permitted the jury to consider all of the facts and circumstances underlying the invalid factor, resulting in no constitutional violation.[32]

Justice Stevens dissented,[33] writing that the majority's announcement of a new rule overstepped the bounds of the issue presented, which was whether California's sentencing scheme was weighing or nonweighing.[34] By disturbing the weighing-nonweighing precedent, he argued, the majority risked complicating rather than clarifying the doctrine. In addition, Justice Stevens criticized the majority's new rule for imprudently converting the focus of the weighing-nonweighing distinction from the influence of invalid factors on jurors to the evidence jurors may consider. He reasoned that jurors may be prejudiced in favor of a death sentence by the presence of an invalid factor regardless of whether that factor allowed the admission of evidence that otherwise would have been admitted.[35]

Justice Breyer dissented separately.[36] Like the majority, Justice Breyer began with an exposition of the weighing-nonweighing distinction[37] and proceeded to set it aside, finding it "unrealistic, impractical, and legally unnecessary."[38] In a close analysis of prior opinions, Justice Breyer determined that the weighing-nonweighing distinction arose from "errant language"[39] in *Stringer v. Black*[40] that led lower

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[30] *Id.* at 891. For instance, the weighing-nonweighing distinction provided no prescription when an aggravating factor that was not an eligibility factor was found to be invalid. *See id.*

[31] *Id.* at 892 (footnote omitted).

[32] *See id.* at 893.

[33] Justice Stevens was joined by Justice Souter.

[34] *Sanders*, 126 S. Ct. at 896 (Stevens, J., dissenting). Justice Stevens considered California a weighing state by virtue of its enumeration of the penalty phase's aggravating and mitigating factors. *Id.*

[35] *Id.* at 895–96.

[36] Justice Breyer was joined by Justice Ginsburg.

[37] *Sanders*, 126 S. Ct. at 896–97 (Breyer, J., dissenting). Unlike the majority, Justice Breyer identified nonweighing states as only those that weigh in the penalty phase any and all factors the sentencer may find aggravating.

[38] *Id.* at 898.

[39] *Id.* at 902.

[40] 503 U.S. 222 (1992).

courts to assume incorrectly that courts in nonweighing states need not perform a harmless error review of the effect of invalid factors on a sentence of death.[41] This misunderstanding obscured the real problem of how invalid factors place added emphasis on certain evidence at the penalty stage and therefore tilt the scale in favor of death regardless of whether the state is weighing or nonweighing.[42] The majority's new rule ignored this problem entirely, as it turned on the admissibility of underlying evidence and not on the emphasis that the invalid factor placed on that evidence.[43] Therefore, Justice Breyer would have done away with the weighing-nonweighing distinction and required a reviewing court to examine whether an invalid factor was indeed harmless.[44]

The challenge for the *Sanders* Court was to bring coherence to the weighing-nonweighing distinction, a part of capital sentencing doctrine that had created more uncertainty than it dispelled. On one level, it was not clear what made a statute weighing or nonweighing,[45] and thus the effects of legislation and the outcomes of judicial review were unpredictable. On another level, the distinction did not address all possible instances involving invalid factors, as Justice Scalia pointed out.[46] The *Sanders* decision responded to these two shortcomings. But on a deeper level, the Court did not state clearly why the weighing-nonweighing distinction — and the Court's new, streamlined test — matters in a *constitutional* sense. The question that underlay the *Sanders* test but was left quietly unanswered was what makes an invalid factor admitted at the penalty stage constitutionally infirm in the absence of accompanying factors that encompass the same evidence. In crafting the new rule, Justice Scalia emphasized that an invalid factor must rise to the level of a "constitutional defect" if a death sentence is to be overturned.[47] However, he did not elucidate how the various invalid factors violate the Constitution or how his test accounts for those violations. This hole at the center of the Court's new rule undermines the acceptability of the decision,[48] as it offers no reasoned

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[41] *Sanders*, 126 S. Ct. at 902 (Breyer, J., dissenting).

[42] *See id.* at 903.

[43] *Id.*

[44] *Id.* at 902.

[45] *Compare id.* at 890 (majority opinion), *with id.* at 894–95 (Stevens, J., dissenting), *and id.* at 897 (Breyer, J., dissenting).

[46] *See id.* at 891 (majority opinion).

[47] *Id.* at 894 (using the terms "constitutional error" and "constitutional defect" to describe grounds for reversal).

[48] *See* Charles Fried, Commentary, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1156 (1994) ("To accept another's reasoning is to follow along with it. . . . [W]e demand that [a judge] commit to reason for us, in a way that we are invited to follow as she goes along, and so the public manifestation, the rituals of reasoning are owed as much as the substance."); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 516–17 (1988).

method of parsing constitutionality from constitutional infirmity. A rationale that may fill that hole is a focus on whether the scope of evidence considered at the penalty phase is equal among similarly situated defendants within each state.

There are three main reasons a factor at the eligibility phase would be invalidated. First, the factor may be prohibited by statute, as with the burglary-murder factor in *Sanders* that was barred by California's merger law.[49] Second, the factor may label constitutionally protected conduct as an aggravating circumstance.[50] Third, the factor may be found vague. It is clear why the first two reasons render a sentence unconstitutional if those eligibility factors are weighed at the penalty phase.[51] Less clear is why a vague eligibility factor admitted at the penalty phase is unconstitutional in the absence of an accompanying omnibus factor. The logic of disallowing consideration of a vague factor at the eligibility phase is that the factor is open to interpretation and therefore invites consideration of a random set of facts and circumstances that may tip the scale in favor of death in unpredictable ways. Eligibility factors are supposed to narrow the class of convicts eligible for the death penalty, not potentially widen it.[52] But that reasoning loses its force at the penalty phase, during which a sentencer may constitutionally consider any and all factors. A vague factor considered at the penalty phase is tantamount to an omnibus sentencing factor, which is constitutionally allowable.[53] If a vague factor and an omnibus factor are simply roses by other names, then it should not matter whether the vague factor is accompanied by an evidence-subsuming omnibus factor, as the Court's new test demands, if a sentence under such a scenario is to be upheld. While Justice Scalia's test adequately addresses a factor found invalid due to statutory prohibition or constitutionally protected conduct, the test failed to put forth a principled basis for its treatment of invalidly vague factors. The ma-

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[49] *See Sanders*, 126 S. Ct. at 893.

[50] *See id.* at 891.

[51] The first two reasons for invalidity pose no conceptual problem for Justice Scalia's new rule. Basing a death sentence on constitutionally protected conduct is obviously unconstitutional. A sentence predicated on facts specifically precluded by state statute is also clearly unconstitutional, unless those facts were readmitted at the sentencing stage by other statutory provisions.

[52] *See* Gregg v. Georgia, 428 U.S. 153, 195 n.46 (1976) (plurality opinion) ("A system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries . . . [resulting in] arbitrary and capricious sentencing like that found unconstitutional in *Furman* . . . ."); *see also* Zant v. Stephens, 462 U.S. 862 (1983) (affirming *Gregg*'s holding).

[53] It is important to distinguish between the constitutional requirements at the eligibility phase and the penalty phase. The "guided discretion" requirement of *Furman*, as interpreted by the Court in *Gregg*, requires that the class of convicts eligible for the death penalty be "narrow[ed]" through clear criteria. *See Gregg*, 428 U.S. at 196–98. However, once that narrowing requirement has been fulfilled, the sentencer can be given full discretion at the penalty phase as long as all mitigating evidence is considered. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978).

jority's justification for its rule is less than satisfying and requires a more coherent theoretical grounding.

The dissenting opinions, however, are no better at bringing theoretical unity to the weighing-nonweighing doctrine. While Justice Stevens would have preserved the weighing-nonweighing distinction[54] and Justice Breyer would have abandoned it, both focused on the idea that an invalid factor may be "harmful" at the penalty stage by weighing in favor of death. Justice Stevens would have directed a reviewing court's attention to "the role [invalid] aggravating circumstances play in a jury's sentencing deliberations";[55] similarly, Justice Breyer identified the difficulty as a "problem of the emphasis given to [the] evidence" introduced by an invalid factor.[56] This distillation of the problem is curious. States are free to craft aggravating — even omnibus — factors at the penalty stage, and the mere fact that a factor draws attention to certain evidence in favor of imposing death cannot possibly make it constitutionally infirm. Indeed, that an aggravating factor serves to aggravate the crime is not a defect, but rather the point of an aggravating factor.[57] Even if a factor is found unconstitutionally vague at the eligibility phase, the dissenting opinions fail to explain why its vagueness should matter at the penalty phase. Rather, the dissents suggest that a sentence is "skewed" by the factor — that in the factor's absence, the sentence may have been different.[58] This focus on sentencing outcomes is misplaced. That an outcome might be different if the process were different does not make the process invalid. Something about the nature of the process must be invalid, and the dissents do not explain what is defective about the nature of a penalty phase that weighs factors found invalid at the eligibility phase.

Rather than concentrating on differences in outcomes caused by the randomness of a vague factor, a more coherent theory would focus on whether all those eligible for the death penalty within a state are subject to the same level of randomness at the penalty phase. Put simply, it is not *absolute* randomness that invalidates a vague factor at the penalty phase — since entirely random omnibus factors are permissible — but rather differences in the *relative* randomness of the process as applied to various convicts within each respective state. Consider

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[54] Albeit according to his definition and not the ones proffered by Justices Scalia and Breyer.

[55] *Sanders*, 126 S. Ct. at 896 (Stevens, J., dissenting).

[56] *Id.* at 903 (Breyer, J., dissenting).

[57] *See* Stringer v. Black, 503 U.S. 222, 243 n.2 (1992) (Souter, J., dissenting) ("The mere fact that an aggravating circumstance inclines a sentencer more towards imposing the death penalty cannot, of course, violate the Eighth Amendment.").

[58] *See Sanders*, 126 S. Ct. at 895 (Stevens, J., dissenting) (arguing that vague factors allowed at the penalty phase lend a "legislative imprimatur" to those factors, giving them greater weight in the sentencers' minds); *id.* at 898 (Breyer, J., dissenting) (reasoning that an invalid factor would affect sentencers' decisions because sentencers would give "special weight" to the factor).

an illustration: In Situation *A*, two convicts are found eligible for death, Convict 1 on the ground that it was his second murder conviction, and Convict 2 on the same ground as well as on the additional ground — later held invalid for vagueness — that the murder was especially heinous and cruel. At the penalty phase, the respective juries decide to impose death after being allowed to weigh any eligibility factors in addition to an omnibus factor. Between the two convicts, the universe of evidence available for consideration is the same, and the *Sanders* rule would uphold the sentence for Convict 2. Now, consider Situation *B*, with the same facts except that the state has not adopted an omnibus factor at the penalty phase. The *Sanders* rule would render Convict 2's sentence unconstitutional. Why? Not because the vague factor introduced randomness into the process; in Situation *A*, that same randomness posed no constitutional problem. Rather, the distinction lies in the vague factor's expansion of the universe of evidence to be considered in Convict 2's process vis-à-vis Convict 1's process, which was limited to one finite factor. Convict 2's process contained a larger and more random set of aggravators than Convict 1's, subjecting Convict 2 to a different and more burdensome weighing process. This would create a disparate administration of capital sentencing, in which levels of randomness are introduced on the basis of which factors a jury finds at the eligibility phase.

This focus on intrastate equality of randomness finds adequate, if not explicit, support in precedent.[59] The separate concurrences of Justices Douglas, Stewart, and White in *Furman* stressed the idea of equality in capital sentencing. While Justice Douglas was bothered by what he saw as unbounded sentencing discretion's tendency to result in discrimination against racial, economic, and political minorities,[60] Justices Stewart's and White's opinions rested on a more general idea of inequality. Justice Stewart reasoned that unbridled discretion rendered capital punishment random and therefore "cruel and unusual in the same way that being struck by lightning is cruel and unusual,"[61] and Justice White agreed that there exists "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[62] Although these statements have

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[59] While legal doctrines should always find strong support in precedent, achieving this ideal is especially challenging in the death penalty sphere. *See* Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Scalia, J., concurring in denial of certiorari) (describing Eighth Amendment jurisprudence as consisting of "false, untextual and unhistorical contradictions"). Due to the fragmented nature of many post-*Furman* decisions, plurality opinions often hold significant precedential value. *See* Srikanth Srinivasan, Note, *Capital Sentencing Doctrine and the Weighing-Nonweighing Distinction*, 47 STAN. L. REV. 1347, 1351 n.30 (1995).

[60] *See* Furman v. Georgia, 408 U.S. 238, 249–57 (1972) (Douglas, J., concurring).

[61] *Id.* at 309 (Stewart, J., concurring).

[62] *Id.* at 313 (White, J., concurring).

accurately been interpreted to refer to the necessity of narrowing the class of convicts eligible for the death penalty,[63] there is no reason why their logic of minimizing capriciousness cannot be applied to the random admission of evidence at the penalty phase. While it is permissible for a state to throw open the weighing process to any and all aggravating factors, *Furman* seems to dictate that it should be impermissible for a state to do so for only some convicts based on chance considerations. Like the rhetorical lightning bolt referred to by Justice Stewart, such a system is unpredictable and falls under the *Furman* definition of "cruel and unusual."

Stringer also hinted at the equality of randomness idea. In his dissent, Justice Souter expressed surprise[64] at the Court's holding that a vague factor considered at the penalty phase in a weighing state was unconstitutional because it skewed the weighing process and "create[d] the possibility . . . of bias in favor of the death penalty."[65] Contemplating the Court's holding in *Zant v. Stephens*,[66] which allowed vague factors to be weighed at the penalty phase in nonweighing states,[67] Justice Souter argued that *Stringer* was a "leap of reason," and that "if unguided discretion [in an omnibus nonweighing state] created no risk of randomness, it was hardly obvious that this risk arose when a vague aggravating circumstance was weighed."[68] Justice Souter interpreted *Stringer* not as saying that a vague aggravating factor was unconstitutional because it served to incline a sentencer toward the death penalty, but rather as holding such vagueness at the penalty phase unconstitutional due to its "random application from case to case."[69] Justice Souter identified the theoretical tension in the Court's weighing-nonweighing distinction as applied to invalidly vague factors, and he also grasped at the idea of intrastate equality of randomness.

By finding adequate precedential grounding and bringing internal coherence to the *Sanders* rule, the intrastate equality of randomness idea would provide a satisfying response to Justice Stevens's and Justice Breyer's criticism that the new rule does not confront the reality that, even if the evidence underlying an invalid factor is admissible under a different valid factor, juries place more emphasis on that evidence, skewing the sentence.[70] Justice Scalia brushed aside the dissents' arguments by pointing out that the Court had previously found

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[63] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 197 (1976) (plurality opinion).
[64] Stringer v. Black, 503 U.S. 222, 243 n.2 (1992) (Souter, J., dissenting).
[65] *Id.* at 235–36 (majority opinion).
[66] 462 U.S. 862 (1983).
[67] *See id.* at 886.
[68] *Stringer*, 503 U.S. at 245 (Souter, J., dissenting).
[69] *Id.* at 243 n.2.
[70] *Sanders*, 126 S. Ct. at 895 (Stevens, J., dissenting); *id.* at 904 (Breyer, J., dissenting).

that such increased emphasis posed no constitutional problem, even assuming that it affected the sentencing outcome, and that it was a "merely a consequence of the statutory label 'aggravating circumstance.'"[71] But Justice Scalia's reasoning is formalistic[72]: The rule treats skewed outcomes as benign in states that incorporate omnibus factors at the penalty phase, but unconstitutional in states that restrict aggravating factors to an enumerated few and where, in Justice Scalia's formulation, the "balancing of aggravators with mitigators" is "skewed."[73] That distinction is not principled if merely stated as such, and must be supported by a more coherent theory. The idea of equality of randomness would provide such a theory. By reducing the constitutional significance of disparate outcomes to zero and introducing the constitutional significance of equalized weighing processes in each state, a theory of equality of randomness would render criticisms regarding emphasis and outcomes irrelevant.

Predictability and coherence as judicial values are especially important for a socially controversial issue like the death penalty. The new *Sanders* rule clarifies and provides predictability to the weighing-nonweighing distinction by jettisoning it in favor of a simplified rule. However, the majority and the dissents failed to provide a stabilizing theory that would allow the rule to escape the realm of mere formalism. The idea of intrastate equality of randomness would provide lawyers and judges with a theory to guide them through the Court's capital sentencing jurisprudence — a theory that is not only predictable, but also coherent, logical, and acceptable.

2. Eighth Amendment — Death Penalty — Weighing of Aggravating and Mitigating Factors. — Described as "confused,"[1] "anarchic,"[2] "vast,"[3] and "a minefield through which . . . perplexed legislators tread at their peril,"[4] the Supreme Court's death penalty jurisprudence demonstrates a notorious lack of clarity and frustrates state legislatures that seek to devise constitutionally valid capital punishment laws. While scholars argue that the Court should take steps to simplify this

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[71] *Id.* at 894 (majority opinion) (internal quotation marks omitted) (citing *Zant*, 462 U.S. at 888).

[72] *Cf.* Schauer, *supra* note 49, at 516–17 (noting that a judge's mere citing of a statute, without explaining his reasoning, precludes inspection of the decision and elicits accusations of formalism).

[73] *Sanders*, 126 S. Ct. at 890.

[1] Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1182 (2003).

[2] Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1781 (1987).

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