

THE SUBTLE UNRAVELING OF FEDERALISM: THE ILLOGIC OF USING STATE LEGISLATION AS EVIDENCE OF AN EVOLVING NATIONAL CONSENSUS

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“Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.”

—James Madison, Federalist No. 10¹

The Supreme Court’s cruel and unusual punishment jurisprudence increasingly relies on state legislation to establish whether a national consensus has evolved against particular forms of punishment. This Article argues that trends in state legislation should not be a basis for interpreting the Eighth Amendment. Using state legislation to establish a national consensus is contrary to basic notions of federalism, and is so methodologically indeterminate as to be entirely subjective. The states were intended to be independent from one another’s policy preferences, to allow them to act as policymaking laboratories for the nation. Resting constitutional interpretation on the preferences of a majority of states is antithetical to the federal system. In application, the use of state legislation creates doctrinal chaos. The Supreme Court cannot agree on how to characterize, group, or count state legislation. Once legislation is counted, the Court cannot agree on what actually constitutes a “consensus.” Although the Court justifies its reliance on state legislation on the basis of its alleged objectivity, the uncertainty of using state legislation makes this approach more subjective than traditional doctrines, such as culpability and proportionality. The lack of a clear standard as to what constitutes

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1. THE FEDERALIST NO. 10, at 71 (James Madison) (Clinton Rossiter ed., 2003).

a national consensus has resulted in questionable findings, which in turn are relied on, creating an increasingly lax standard of cruel and unusual punishment jurisprudence.

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INTRODUCTION

Recent decisions in death penalty jurisprudence have resulted in a curious phenomenon: the Supreme Court Justices intensely disagree over how state legislation should be used to establish an

evolving national consensus, but all maintain an uncritical acceptance of the flawed practice itself.

Two recent landmark Supreme Court cases have developed the constitutional boundaries of the death penalty. *Atkins v. Virginia*² prohibited execution of the mentally retarded, while *Roper v. Simmons*³ exempted juveniles from execution. The two cases were highly controversial, both for their substantive rulings and particularly for their reliance on the laws and beliefs of foreign nations. But those controversies have distracted from a far more significant and dangerous development: *Atkins* and *Roper* confirmed and expanded an inherently defective practice, using state legislation as evidence of an evolving national consensus. Although justified in terms of deference to state legislatures, the reliance on state legislation to prove a national consensus regarding the application of the Eighth Amendment does violence to constitutional federalism and imposes judicial preferences under the facade of judicial modesty.

To determine what constitutes “cruel and unusual punishment” under the Eighth Amendment, the Supreme Court has in recent decades looked to “the evolving standards of decency that mark the progress of a maturing society.”⁴ The Court has repeatedly asserted that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures,”⁵ and to a lesser extent, jury sentencing practices.⁶ Since 1989, the Court has undertaken the thorny task of characterizing highly diverse state death penalty legislation, in order to group and count it, with the aim of “objectively” determining a national consensus.

At first glance, reliance on state legislation may seem consistent with the Rehnquist Court’s jurisprudence of favoring protection of states over the powers of the federal government. In fact, it has the opposite result. Constitutionally enshrining the views of a majority of

2. 536 U.S. 304 (2002).

3. 543 U.S. 551, 125 S. Ct. 1183 (2005) Throughout the remainder of this Article, the Supreme Court Reporter is used for citations to *Roper v. Simmons* because pinpoint citations to the United States Reports were unavailable at the time of publication.

4. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

5. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

6. Most of the analysis establishing a national consensus focuses on state legislation, and so this Article does likewise. Nevertheless, reliance on patterns in jury verdicts shares many of the problems that reliance on state legislation has; for simplicity, I refer to the use of state legislation except where specifically discussing jury determinations. However, the arguments can be read as referring to both practices. Some specific problems with looking to jury verdicts are discussed in Part III.

states robs the remaining states of their capacity to determine policy in a central area of constitutional law. Once recognized by the Supreme Court as establishing a national consensus, the twenty-sixth state to prohibit a practice not only binds the remaining twenty-four, but permanently entrenches the views of the previous twenty-five, such that future changes in public acceptability cannot constitutionally be represented in state legislation. One arm of the federal government, the judiciary, is using the actions of some states to prevent others from undertaking precisely the sort of social experimentation that the federal system was designed to allow. The states, as “laboratories,” were intended to be free to pursue policies, regardless of whether they are nationally popular.

Using state legislation as evidence of an evolving consensus harms the interests of states. Why then did Chief Justice Rehnquist, perhaps the modern jurist most concerned with state rights,⁷ say that state legislation “ought to be the sole [indicator] by which courts ascertain the contemporary American conceptions of decency for the purposes of the Eighth Amendment”?⁸ The Justices have emphasized in numerous cases that they are concerned to avoid the imposition of their own subjective judgments, subjectivity they see as especially apparent in more traditional Eighth Amendment doctrines such as culpability and proportionality. The use of state legislation is advocated as a means of avoiding such subjectivity.⁹ However, an examination of the cases makes it abundantly clear that counting state legislation is no more objective than the terms of traditional death penalty jurisprudence. In their attempt to locate some objective basis for their conclusions, the Justices often inadvertently rely on “junk social science,” accepting spurious correlations and making basic errors in the calculation of a supposed national consensus. Additionally, the level of discretion involved in the actual counting process—including how to characterize the differences between the various states statutes, how generally to characterize the nature of the

7. See, for example, his opinions in *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) and *United States v. Morrison*, 529 U.S. 598, 611 (2000), in which Chief Justice Rehnquist was central in reinvigorating the Tenth Amendment as a positive check on Congress’s commerce power and its power under the Fourteenth Amendment.

8. *Atkins v. Virginia*, 536 U.S. 304, 324 (2002) (Rehnquist, C.J., dissenting); see also *Penry*, 492 U.S. at 302, 351 (Scalia, J., concurring in part and dissenting in part) (joining the Court’s opinion as to both the principle of using state legislation to establish a national consensus and its application in this case, and questioning only whether the Court should then undertake an additional analysis of whether there is a lack of proportionality).

9. See *Roper v. Simmons*, 125 S. Ct. 1183, 1192 (2005); *Penry*, 492 U.S. at 335; *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989), *abrogated by Roper*, 125 S. Ct. 1183; *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

consensus at issue, how to treat the absence of state action, and whether to count non-death penalty states—renders the process capricious and open to manipulation, an effect exacerbated by judicial claims of modesty and deference.

The evolving standards doctrine is also justified on federalism terms, and so the damage it wreaks on the federalist notion of the states as laboratories is all the more pernicious. Only one Justice seems to recognize the dangers of using state legislation as evidence of a national consensus: Justice Scalia. Although Justice Scalia previously applied the doctrine approvingly,¹⁰ in *Roper* he described the entire jurisprudence as “mistaken”¹¹ and suggested that it made the Eighth Amendment a “mirror of the passing and changing sentiment of American society.”¹² However, unusually for Justice Scalia, he did not follow the logic of his own conclusion. He ultimately concluded that courts are simply ill-equipped to make this sort of legislative judgment.¹³ That is not the problem—the entire enterprise is ill-conceived.

Regardless of one’s support for or opposition to the recent substantive developments in death penalty jurisprudence, a close examination of the death penalty cases reveals the fundamental illogic of using state legislation to evince a national consensus to achieve those ends. This Article explores the extent of that illogic.

Part I describes the current status of the practice of using state legislation to establish a national consensus. Despite its flaws, the Justices all vehemently support the practice. This Part also summarizes the minimal literature directly assessing the merits of the use of state legislation and describes the relationship between it and other doctrines, notably proportionality and culpability analysis.

Part II argues that although the practice of using state legislation is often justified in terms of federalism, it is actually corrosive to federalism because it hamstringing the legislative capacity of states on

10. See *Stanford*, 492 U.S. at 370 (finding that existence of a national consensus should be informed by the objective factors of state legislation, but in this case an inadequate number of states had passed legislation barring execution of juveniles to constitute a consensus); cf. *Atkins*, 536 U.S. at 341–42 (Scalia, J., dissenting) (disagreeing as to the application of the doctrine where a clear majority of state support is not present); *Penry*, 492 U.S. at 351 (Scalia, J., concurring in part and dissenting in part) (“if an objective examination of laws and jury determinations fails to demonstrate society’s disapproval of it,” the Court need go no further in its analysis).

11. *Roper*, 125 S. Ct. at 1217 (Scalia, J. dissenting).

12. *Id.* at 1229.

13. *Id.* at 1222 (finding that the Justices are not qualified to pick and choose sociological studies and act as the “authoritative conscience of the Nation”).

the basis of the action of other states. The practice imposes uniformity on states that are meant to be free to pursue diverse policies; it potentially gives one state the power to determine the constitutionality of a mode of punishment for all others; differences in the state population sizes mean it can be based on an illusory consensus; and it constitutes an irreversible ratchet that may run counter to any future national consensus.

Part III shows why the other primary justification for looking to state legislation, its alleged objectivity, is also misguided. There is considerable uncertainty as to how to count legislation, how to treat the absence of state legislation, how to characterize state legislation when it is passed, and how to group that legislation, given the diversity of state legislative intentions. The indeterminacy of counting state legislation is so extreme that the process is entirely subjective. Recent attempts by the Court to improve the doctrine by looking to additional evidence has only made this problem worse. The Court now also considers the recency of legislation, the consistency of the trends in state legislation, and the rare application by juries of given modes of execution. Each of these forms of evidence is flawed in its conception and suffers from major methodological errors in its application.

Part IV shows that these problems are not merely theoretical: by relying on state legislation, the Supreme Court is in danger of creating its own evidence. The Court's rulings are based on state legislation, but its rulings in this area simultaneously change the incentives and actions of state legislatures in passing legislation. The doctrine also creates perverse incentives for litigants, is difficult for lower courts and state courts to apply, and actually encourages those courts to disobey Supreme Court precedent because the factual basis on which earlier decisions were based may no longer be accurate. Finally, the doctrine allows the Supreme Court to perpetuate its own worst rulings: the lack of a clear standard as to what constitutes a national consensus results in questionable holdings on one issue, holdings which are then used to justify borderline decisions on other issues.

I. THE CURRENT STATUS OF THE EVOLVING NATIONAL CONSENSUS DOCTRINE

The Supreme Court is sharply divided over the interpretation of the constitutional boundaries of the death penalty under the Eighth Amendment. The Court lacks any agreement as to how to count states, or even on what the relevant consensus in any case should concern. Nevertheless, the division among the Supreme Court

Justices is not over whether to rely on state legislation as evidence of an evolving national consensus, but whether to look to anything else.

A. *Supreme Court Acceptance of the Doctrine, Despite Ambiguity and Conflict*

The notion of an evolving national consensus was first elucidated in 1958 in a non-death penalty case, *Trop v. Dulles*.¹⁴ In assessing whether sentencing a soldier who defected from the military to denationalization was unconstitutionally severe, the Court explained that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁵ Since *Trop*, the Court has repeatedly stated that objective factors should be used as much as possible to establish the existence of a national consensus,¹⁶ and that state legislation is the “clearest and most reliable objective evidence of contemporary values.”¹⁷

State legislation has since been used to establish a national consensus against execution for the rape of an adult woman in *Coker v. Georgia*;¹⁸ against execution of the insane in *Ford v. Wainwright*;¹⁹ against execution for a felony murder conviction without an intent to murder or other aggravating circumstance in *Enmund v. Florida*;²⁰ against the execution of fifteen-year-old juveniles in *Thompson v. Oklahoma*;²¹ and most recently against execution of the mentally retarded in *Atkins v. Virginia*²² and against the execution of sixteen- and seventeen-year-old juveniles in *Roper v. Simmons*.²³ Execution

14. 356 U.S. 86, 101 (1958).

15. *Id.* Interestingly for the current debate on the use of foreign law, the Court did not inform its meaning with reference to state legislation. Instead, it based its opinion in large part on the fact that “civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.” *Id.* at 102. Relying on the fact that only two of eighty-four nations surveyed authorize the punishment of denaturalization for defection, the Court ruled that such punishment was cruel and unusual. *Id.* at 103; *see also* *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (stating that the *Trop v. Dulles* plurality “took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue”).

16. *Coker*, 433 U.S. at 592.

17. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

18. *Coker*, 433 U.S. at 597.

19. 477 U.S. 399, 408 (1986).

20. 458 U.S. 782, 789–90 (1982).

21. 487 U.S. 815, 826–29 (1988).

22. 536 U.S. 304, 314–16 (2002).

23. 125 S. Ct. 1183, 1192 (2005).

for felony murder,²⁴ execution of the mental retarded²⁵ and execution of sixteen- and seventeen-year-old juveniles²⁶ had all been previously upheld as constitutional using the same test, though with fewer states prohibiting the practice. The doctrine also has been applied by the lower courts and state courts.²⁷

Determining the existence of a national consensus in relation to particular modes of punishment and their applicability to certain categories of defendants now constitutes the primary determinant of the constitutionality of Eighth Amendment legislation. However, the practice of relying on state legislation to interpret the Constitution is fundamentally flawed: transforming the current views of the populace into constitutional law is problematic both in principle and in practice. The Constitution is meant to be above the whims of political majorities, even when expressed through a majority of states' legislation; and determining and meaningfully aggregating those views is impossible without importing enormous judicial subjectivity.

In every case where the Supreme Court has relied on state legislation to prove a national consensus, the Justices have been fundamentally at odds over its application.²⁸ Their disagreement is not simply as to the conclusions that can be drawn from the evidence; rather, there is a fundamental dispute over what evidence is relevant and how it should be assessed. The rancor over the nature and correct use of the evolving standards doctrine is captured by the dissenting Justices in *Atkins* and *Roper*, who considered that the majority's assessment of the legislative evidence "more resembles a *post hoc* rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency."²⁹

24. *Tison v. Arizona*, 481 U.S. 137, 152–54 (1987).

25. *Penry v. Lynaugh*, 492 U.S. 302, 337 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

26. *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989), *abrogated by Roper*, 125 S. Ct. 1183.

27. *See Hawkins v. Hargett*, 200 F.3d 1279, 1285 (10th Cir. 1999); *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 401–02 (Mo. 2003), *aff'd*, 125 S. Ct. 1183 (2005); *State v. Josephs*, 803 A.2d 1074, 1131 (N.J. 2002); *Sanders v. State*, 585 A.2d 117, 138–39 (Del. 1990); *see also United States v. Robinson*, 367 F.3d 278, 291 (5th Cir. 2004) (rejecting challenge to the death penalty as contrary to societal standards of decency because of a lack of evidence and due to uncertainty as to whether only the Supreme Court has power to make such a determination).

28. Part III below outlines in detail the numerous bases on which the Justices disagree.

29. *Atkins v. Virginia*, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting) (summarizing Scalia, J.); *see Roper v. Simmons*, 125 S. Ct. 1183, 1222 (2005) (Scalia, J., dissenting).

Rather than concluding that the use of legislative evidence is inherently amendable to such manipulation, those same Justices argued for the exclusive use of legislative evidence.³⁰ Even Justice Scalia, the only current Justice who considers that the national consensus jurisprudence is mistaken,³¹ primarily directs his criticisms at the national consensus doctrine itself, rather than at the use of state legislation to establish such a consensus. In fact, Justice Scalia has supported the argument that the determination of a national consensus should be based on the objective indicia found in state legislation.³² Thus, although often critical of the Court's application of state legislation, even Justice Scalia embraces the principle of its use, and seems primarily to be critical of the national consensus doctrine on originalist grounds. It is clear that, for the time being, the use of state legislation is accepted by the Court, although the extent of the disagreement over the basic elements of its use may lead some of the Justices to question its wisdom.

B. *A Lack of Academic Attention*

Most academic attention in this area has focused either on the use of foreign law, particularly in the *Roper* case,³³ or on a more general assessment of the evolving standards doctrine.³⁴ The

30. *Roper*, 125 S. Ct. at 1222 (Scalia, J., dissenting) (“On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people.”); *Atkins*, 536 U.S. at 324 (Rehnquist, C.J., dissenting) (“[T]he work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment.”).

31. *Roper*, 125 S. Ct. at 1217–18 (Scalia, J., dissenting) (“In determining that capital punishment of offenders who committed murder before age 18 is ‘cruel and unusual’ under the Eighth Amendment, the Court first considers, in accordance with our modern (though in my view mistaken) jurisprudence, whether there is a ‘national consensus,’ that laws allowing such executions contravene our modern ‘standards of decency.’ ”).

32. *Id.* at 1218; *Penry v. Lynaugh*, 492 U.S. 302, 330–31 (1989).

33. *See, e.g., Atkins*, 536 U.S. at 322 (Rehnquist, C.J., dissenting) (arguing that consideration of foreign laws in constitutional interpretation is “antithetical to considerations of federalism” and without precedent); John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 311 (2006) (arguing against most uses of international and foreign law in constitutional interpretation).

34. One work that provides some criticism of the inconsistent use of state legislation in the process of a more general critique of the evolving standards doctrine is Mark Alan Ozimek, Note, *The Case for a More Workable Standard in Death Penalty Jurisprudence: Atkins v. Virginia and Categorical Exemptions Under the Imprudent “Evolving Standards of Decency” Doctrine*, 34 U. TOL. L. REV. 651, 673–76 (2003); *see also* Victor L. Streib, *Moratorium on the Death Penalty for Juveniles*, 61 LAW & CONTEMP. PROBS. 55, 69 (1998) (arguing that state legislation does not constitute a consensus unless those laws are passed after careful consideration of the issues involved). On the evolving standards doctrine more generally, *see* Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death*

challenge to the appropriateness of interpreting the Eighth Amendment according to evolving standards is that it is axiomatic that the Constitution is meant to protect citizens from the whim of political majorities; as such there is a fundamental theoretical problem with interpreting a constitutional provision on the basis of whether there is a national consensus for or against it.³⁵ A response to this criticism is that, while this may be true of constitutional interpretation generally, the phrase “cruel and unusual” necessitates an inquiry into social mores and practices to determine what is unusual. This argument in turn can be countered in a number of ways.³⁶ One response is that “cruel” and “unusual” are not separate requirements;³⁷ in fact, the use of the word “unusual” appears to be inadvertent.³⁸ To the extent that the prohibition on “unusual” punishments has been treated independently from the prohibition on

Penalty Unconstitutional, 83 HARV. L. REV. 1773, 1782 (1970) (arguing that public opinion cannot be the appropriate standard for interpreting the Eighth Amendment because the approach would drain the Cruel and Unusual Punishment Clause of its independence as a moral principle); see also Neil Vidmar & Phoebe Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1247 (1974) (arguing that attempts to ascertain public views are ill-conceived because the level of public support for or against a mode of punishment is not informative as to whether those punishments are based on constitutionally acceptable standards of morality).

35. See Justice Brennan’s dissent in *Stanford*: “Justice Scalia’s approach would largely return the task of defining the contours of Eighth Amendment protection to political majorities. But ‘the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities’” *Stanford v. Kentucky*, 492 U.S. 361, 393 (1989) (Brennan, J., dissenting) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). This criticism continues to be made today. See, e.g., Michael P. DeGrandis, *Casenotes: Atkins v. Virginia: Nothing Left of the Independent Legislative Power To Punish and Define Crime*, 11 GEO. MASON L. REV. 805, 810 (2003) (“By rending substantive law from the people’s representatives and placing this power in an insular judiciary, the Supreme Court has effectively rewired constitutional circuitry to bypass the judgment and mores of the American people, in favor [sic] its own normative biases.”).

36. For example, by arguing that “cruel and unusual” should be interpreted solely according to what was unusual at the time of the Constitution’s ratification. See Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CAL. L. REV. 839, 852–53 (1969).

37. See, e.g., *Penry*, 492 U.S. at 351 (Scalia, J., dissenting) (citing *Stanford*, 492 U.S. at 378) (“The punishment is either cruel and unusual or it is not.”).

38. See *Furman v. Georgia*, 408 U.S. 238, 318 (1972) (Marshall, J., concurring) (recounting a detailed history of the clause and stating that “[a]n initial draft of the Bill of Rights prohibited ‘illegal’ punishments, but a later draft referred to the infliction by James II of ‘illegal and cruel’ punishments, and declared ‘cruel and unusual’ punishments to be prohibited. The use of the word ‘unusual’ in the final draft appears to have been inadvertent.”). Justice Marshall nevertheless concluded that the death penalty is cruel and unusual in any circumstance, because it is “morally unacceptable.” *Id.* at 360. Justice Marshall’s opposition to the death penalty gives this finding even greater credence.

“cruel” punishments, “unusual” has not been interpreted to mean seldom practiced, but rather arbitrarily or capriciously selected.³⁹

This debate, and the appropriateness of the more general doctrine of evolving standards, is beyond the scope of this Article; this Article is an appeal to both sides of the foregoing exchange, arguing that the tool that the Supreme Court currently uses to interpret that doctrine is unprincipled in theory and in application. However, it is worth noting that, to the extent that the criticism of the evolving standards doctrine is apt, the use of state legislation does not combat it. Recasting the views of political majorities through the lens of state legislatures does nothing to alleviate the problem that the evolving consensus doctrine involves interpreting constitutional rights according to popular opinion.

The popular and academic literature has given scant attention to the method of using state legislation to establish an evolving consensus. The critical academic literature consists of two student Notes and one Recent Case report; together they raise three problems with the use of state legislation, but these criticisms only scratch the surface of the manifold problems with its use.

The first problem the existing literature identifies is whether the use of state legislation constitutes an appropriate level of judicial deference to the states. The first Note characterizes the test as “little more than a crude poll of state legislatures in favor of or against a particular measure.”⁴⁰ Its central criticism is that using state legislation to determine the interpretation of the Eighth Amendment is an unconstitutional judicial delegation to state legislatures: “the Court, possibly unknowingly, constructed an intellectual infrastructure wherein its independent judgment would ultimately become slave to a simple tally of state laws in favor of or against a challenged punishment.”⁴¹ This misunderstands the effects of using state legislation and actually underestimates the perniciousness of the doctrine. In fact, the vagaries of the state legislation practice allow

39. *Id.* at 309–10 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”). It was ruled in *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) that this prohibition against arbitrary and capricious punishment can be satisfied by adequately specified legislative requirements for application.

40. Matthew E. Albers, Note, *Legislative Deference in Eight Amendment Capital Sentencing Challenges: The Constitutional Inadequacy of the Current Judicial Approach*, 50 CASE W. RES. L. REV. 467, 468 (1999).

41. *Id.* at 471.

Justices to characterize legislative action in such contrasting ways as to justify almost any conclusion the Court may wish to make. Part III establishes that use of state legislation allows for judicial manipulation and the pious elevation of the Justices' subjective judgments to the realm of objective observations.

The second problem identified in the literature is that the Court's reliance on state legislation as evidence of an evolving consensus is inconsistent with the dictates of federalism.⁴² The second Note argues that a state should not have the authority to regulate any other state, but by constantly re-deriving the meaning of the Eighth Amendment according to the actions of a majority of states, and then applying this new meaning to the states, the Court effectively allows one group of states to regulate another.⁴³ This problem undercuts one of the Supreme Court's central rationales for using state legislation to inform the meaning of the constitutional provision, but is only one of four problems centering on federalism that are explored in Part II.

The third problem, raised by the Recent Case report, is whether, given the conditionality of the death penalty holdings on the Court's empirical findings, a Supreme Court determination "remains binding when the empirical conditions that informed the decision have changed."⁴⁴ The logic of the doctrine suggests that lower courts may rule contrary to a Supreme Court holding without challenging it because the facts on which it rested are no longer accurate.⁴⁵ This is a fair criticism, but is only one of the many difficulties in applying the evolving standards test by using state legislation, which is analyzed in-depth in Part IV.

C. *Relationship to Proportionality and Culpability Doctrines and International Law*

Currently, the Supreme Court does not share any of these concerns. In fact, beyond the heated divergence of views on the nature and application of the state legislation analysis, the

42. Michael J. O'Connor, Note, *What Would Darwin Say?: The Mis-Evolution of the Eighth Amendment*, 78 NOTRE DAME L. REV. 1389, 1403 (2003).

43. *Id.* at 1410.

44. Recent Case, *Eighth Amendment—Death Penalty—Missouri Supreme Court Holds that the Juvenile Death Penalty Violates the Eighth Amendment*, 117 HARV. L. REV. 2456, 2456 (2004).

45. *Id.* at 2460. This expands on a concern expressed by the dissenting Justices in *Roper* that the majority failed to even reprimand the Missouri Supreme Court for disobeying direct Supreme Court precedent: the ruling in *Stanford v. Kentucky* that the execution of juveniles did not violate the Eighth Amendment. *Roper v. Simmons*, 125 S. Ct. 1183, 1229 (2005).

predominant conflict relating to the use of state legislation is over whether the cumulative position of the states settles the matter of whether a punishment is cruel and unusual, or whether the traditional doctrines of proportionality and culpability also inform the constitutional inquiry.

A statement quoted in every death penalty case that hinges on an evolving national standard is: “These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”⁴⁶ It is this statement, and its implications, that Justice Scalia and Chief Justice Rehnquist have taken greatest issue with:

Beyond the empty talk of a “national consensus,” the Court gives us a brief glimpse of what really underlies today’s decision: pretension to a power confined *neither* by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) *nor even* by the current moral sentiments of the American people. “‘[T]he Constitution,’” the Court says, “contemplates that in the end *our own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.’” (The unexpressed reason for this unexpressed “contemplation” of the Constitution is presumably that really good lawyers have moral sentiments superior to those of the common herd, whether in 1791 or today.) The arrogance of this assumption of power takes one’s breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus. It is just a game, after all. “‘[I]n the end,’ it is the *feelings* and *intuition* of a majority of the Justices that count”⁴⁷

As well as a strenuous objection to the use of foreign law, Justice Scalia refers here to the Court’s use of the more traditional jurisprudential concepts of proportionality and culpability, which the Court has often relied on in demarcating the limits of the Eighth Amendment. Culpability refers to a defendant’s responsibility for wrongdoing, and proportionality refers to the relationship between that wrongdoing and its punishment: the punishment must not involve unnecessary and wanton infliction of pain, nor be “grossly out

46. *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

47. *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting) (citations omitted).

of proportion to the severity of the crime.”⁴⁸ Proportionality has also been interpreted as drawing some of its meaning from public opinion, as it “becomes enlightened by a humane justice,”⁴⁹ which suggests a link between proportionality and evolving national standards. The requirement of proportionality has nevertheless appeared to be an additional inquiry to that of a national consensus; in *Trop*, where the national consensus standard was developed, proportionality analysis was also applied, leading to a complementary conclusion.⁵⁰ Following the nationwide moratorium brought on by the Supreme Court overruling all then-existing death penalty statutes,⁵¹ in *Gregg v. Georgia*,⁵² the Supreme Court settled that the death penalty is not invariably cruel and unusual, but simultaneously limited the circumstances and procedures under which it can be applied by establishing the proportionality requirement. Other cases have since included a proportionality analysis in their assessments of the constitutionality of various punishments and applications.⁵³

This suggests that there are multiple factors involved in assessing whether any punishment is cruel and unusual. However, in two important rulings, Justice Scalia questioned the place of any proportionality doctrine in Eighth Amendment jurisprudence. First, writing for the Court in *Harmelin v. Michigan*, Justice Scalia held that there is no proportionality guarantee in non-death penalty cases,⁵⁴ although both the concurring and dissenting Justices disagreed.⁵⁵ Second, in the plurality opinion in *Stanford*, Justice Scalia argued that proportionality is not a test in its own right and that the Court had never invalidated a punishment on the basis of proportionality alone.⁵⁶

However, the majority in *Atkins* explicitly applied their “independent evaluation” in addition to their assessment of the legislative consensus.⁵⁷ They approvingly discussed the

48. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

49. *Weems v. United States*, 217 U.S. 349, 378 (1910).

50. *Trop v. Dulles*, 356 U.S. 86, 99 (1958).

51. *Furman v. Georgia*, 408 U.S. 238, 239 (1972).

52. 428 U.S. 153, 206 (1976).

53. *See Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

54. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (overruling explicitly *Solem v. Helm*, 463 U.S. 277 (1983)).

55. *Id.* at 997 (Kennedy, J., concurring in part and dissenting in part); *id.* at 1013 (White, J., dissenting).

56. *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (plurality opinion).

57. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

proportionality doctrine⁵⁸ and found that executing the mentally retarded is also inconsistent with notions of culpability and deterrence.⁵⁹ And in *Roper*, the Court exercised its “independent judgment”⁶⁰ in undertaking culpability and proportionality analysis.⁶¹ In doing so, Justice Kennedy, writing for the Court, explicitly dismissed the idea that proportionality is not a key doctrine in Eighth Amendment jurisprudence, stating that to the extent *Stanford* was based on a rejection of proportionality, it is inconsistent with prior Eighth Amendment decisions and with *Atkins*.⁶²

So, it seems that proportionality is a living part of cruel and unusual punishment jurisprudence. The Court has suggested that the two methodologies are linked: the Court looks to evolving standards of decency to determine which punishments are so disproportionate as to be cruel and unusual.⁶³ But in undertaking its analysis, the Court has repeatedly begun with an evolving standards analysis, then commenced a proportionality and/or culpability analysis,⁶⁴ and sometimes sought confirmation in international law.⁶⁵ The Court has never explained what its conclusion would be if the various methodologies suggested conflicting conclusions.⁶⁶ It has never had

58. *Id.* at 311–12.

59. *Id.* at 319 (discussing retribution and deterrence).

60. *Roper v. Simmons*, 125 S. Ct. 1183, 1192 (2005).

61. *Id.* at 1194–98. Similarly, Justice O’Connor reaffirmed a commitment to looking at excessiveness, barbarity and proportionality. *Id.* at 1206 (O’Connor, J., dissenting). Note that Justice O’Connor also justified the ruling in *Atkins* by stating that it did not simply rest on the “tentative conclusion” of a national consensus, but also on questions of culpability, *id.* at 1209, and proportionality, *id.* at 1212.

62. *Id.* at 1198 (majority opinion).

63. *Id.* at 1190.

64. As Justice Stevens stated, “[W]e shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment.” *Atkins v. Virginia*, 536 U.S. 304, 313 (2002). Justice Stevens then went on to an analysis of the capacity of mentally retarded defendants to be adequately culpable to receive the death penalty, concluding they could not be adequately culpable. *Id.* at 318. Justice Brennan explicitly stated that the evolving standards test is only the beginning of the task of determining the constitutionality of a punishment. *Stanford v. Kentucky*, 492 U.S. 361, 383 (1989) (Brennan, J., dissenting). Justice Brennan looked to the views of other countries and the views of respected organizations in the relevant fields. *Id.* at 388–89.

65. *Roper*, 125 S. Ct. at 1198.

66. We know from *Roper* that the opinion of the world community is not controlling, but supplies only “significant confirmation” of the Court’s conclusions. *Id.* at 1200. Justice O’Connor also stated that because she does not share the Court’s conclusion that a national consensus exists, she did not need to look to international law for its potential “confirmatory role.” *Id.* at 1215 (O’Connor, J., dissenting). But in the same judgment, Justice O’Connor describes proportionality as playing a “decisive” role in the *Atkins* decision. *Id.* at 1212. This contrast seems to suggest that foreign or international law can

to. In each case, both the majority and dissents have always found that the national consensus confirms their proportionality, culpability, and international law conclusions. This begs skepticism of the claim that counting state legislation is an objective process, separate from the Court's application of its "independent judgment."

The following sections establish in detail why counting state legislation is contrary to principles of federalism, is highly subjective and open to manipulation, and is so indeterminate in its application as to be meritless and misleading. However, this raises the natural question of what is the best alternative. This Article does not focus on the proportionality doctrine, culpability analysis, or the appropriateness of looking to foreign law; as such, it cannot advocate any of those doctrines specifically as an alternative to looking to state legislation. Ultimately, this Article establishes that the evolving standards doctrine, as currently interpreted, is fatally flawed. It is contrary to the mandates of federalism; it involves numerous errors of poorly conducted social science; it presents a false impression of judicial deference; and it provides little guidance to lower courts. What is more, the criticisms leveled against proportionality and culpability analysis apply at least equally to the use of state legislation to evince a national consensus. As such, whether a new cruel and unusual jurisprudence is developed, or whether the jurisprudence reverts to a proportionality analysis, or to an originalist interpretation, or whether the jurisprudence maintains an evolving standards analysis without reliance on state legislation, Eighth Amendment jurisprudence can only improve. Reliance on state legislation is the least principled and the least logical alternative available to the Court. The use of state legislation to establish evolving standards is unsalvageable, not simply in its application, but

only support a conclusion, whereas proportionality can be determinative. Chief Justice Warren stated that a punishment can be cruel and unusual even if it is not disproportionate. *Trop v. Dulles*, 356 U.S. 86, 99 (1958) ("Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime. The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."). This statement suggests that a claim of unconstitutionality need satisfy only one of a range of tests, a conclusion which stands in direct contrast to Justice Scalia's view that "if an objective examination of laws and jury determinations fails to demonstrate society's disapproval of it, the punishment is not unconstitutional even if out of accord with the theories of penology favored by the Justices of this Court." *Penry v. Lynaugh*, 492 U.S. 302, 351 (1989) (Scalia, J., concurring in part and dissenting in part). Little else has been said by any other Justice as to how the tests interact or what would be concluded if they were in conflict.

because its very conception and purpose is flawed. The remainder of this Article establishes why that is the case.

II. FEDERALISM THEORY: WHY USING STATE LEGISLATION IS FLAWED IN ITS CONCEPTION

The Supreme Court has articulated two reasons for using state legislation to inform its assessment of the evolution of a national consensus. One is the claimed objectivity of the enterprise⁶⁷—the next Part shows that in fact the process of looking at state legislation is hopelessly subjective and generally methodically flawed. The other justification for looking at state legislation is respect for federalism: the Court claims that democratic governments and juries are institutionally better suited than courts to evaluate “the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.”⁶⁸ This Part shows that the practice is contrary to federalist principles.

Using state legislative developments as evidence of a national consensus on the acceptable borders of death penalty jurisprudence undermines the most basic conceptions of federalism, both in terms of the federal-state balance and the freedom of each state from regulation by another state. The recognition of a national consensus has obvious repercussions in terms of federal-state competition for policy control in regard to the death penalty: the incorporation of a wholesale ban on a type of execution in the U.S. Constitution eliminates the capacity of state regulation in this regard. But the doctrine also raises problems for horizontal federalism:⁶⁹ incorporating the prohibitions of some states into the national Constitution hamstring the legislative capacity of other states.

This Part presents four main federalist arguments. First, the federalist system was designed to allow the states to pursue diverse policies, regardless of their popularity with other states. Second, hinging the Court’s assessment of a national consensus on the number of states supporting a position means that one state will tip the balance between constitutionality and unconstitutionality. This is

67. *Penry*, 492 U.S. at 331.

68. *Atkins*, 536 U.S. at 324 (Rehnquist, C.J., dissenting). As such, the Court must determine whether “an across-the-board consensus has developed through the workings of normal democratic processes in the laboratories of the states.” *See also Solem v. Helm*, 463 U.S. 277, 290 (1983) (holding that “a reviewing court rarely will be required to engage in extended analysis to determine that sentence is not constitutionally disproportionate”).

69. Horizontal federalism refers to the principle of the mutual independence of institutions at the same level of government, particularly among states.

contrary to the federalist notion of the states being independent from each other's control. Third, the differences between state population sizes means that any simple number counting of states can lead to an illusory national consensus. Fourth, constitutionally enshrining a consensus creates an irreversible ratchet, which cannot be undone by future changes in state legislation. Attempts by the Court to amend the doctrine to avoid these four problems have only raised new federalist concerns.

A. *The States as Diverse Laboratories*

As the initial quote from the Federalist Papers shows, one of the ideals behind the development of the federalist system is that the diversity constituted by the states will protect against the tyranny of the majority.⁷⁰ This is entirely at odds with the notion of constitutionally enshrining popular views in the form of judicial aggregation of a majority of states' preferences. Doing so prevents the social experimentation that the federal system was designed for states to be able to undertake, even when they pursue nationally unpopular policies. This concept of social experimentation is captured by the notion of the states as "laboratories."⁷¹ In developing this idea, Justice Brandeis wrote: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."⁷²

The use of state legislation to evince an evolving national consensus is entirely at odds with the federalist ambition of states having freedom to experiment and diversify. A dissent by Chief Justice Burger in an early evolving standards case articulates the problem.⁷³ Challenging the Court's conclusion that an evolving consensus exists against the imposition of the death penalty for the rape of an adult woman because only three states permit the death penalty in that instance, Chief Justice Burger stated that the fact that "the states are presently a minority does not, in my view, make their judgment less worthy of deference."⁷⁴ Even if only one state imposed such a sanction, it does not follow that it is in violation of the Eighth Amendment. "The Court has repeatedly pointed to the reserve strength of our federal system which allows state legislatures, within

70. *See supra* note 1.

71. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

72. *Id.*

73. *Coker v. Georgia*, 433 U.S. 584, 616 (1977).

74. *Id.*

broad limits, to experiment with laws, both criminal and civil, in the effort to achieve socially desirable results.”⁷⁵ Limiting states through the action of other states “seriously strains and distorts our federal system, removing much of the flexibility from which it has drawn strength for two centuries.”⁷⁶

These concepts still influence current Justices, even though all have since endorsed the use of state legislation to establish a national consensus. For example, in arguing that a proportionality doctrine still exists in Eighth Amendment jurisprudence, Justice Kennedy noted five principles undergirding death penalty cases. Those principles included the primacy of legislatures in determining sentences and the great variety of legitimate penological schemes, which make interstate comparisons “a difficult and imperfect enterprise.”⁷⁷

Admittedly, there are some areas where the Court appropriately rejects the laboratory model and prevents states from abandoning national standards. Dormant Commerce Clause jurisprudence is one such example: state legislation will be overruled if it places an undue burden on interstate commerce.⁷⁸ But the imposition of a national standard, even at the cost of the states’ freedom to pursue diverse policies, makes sense in the context of the Dormant Commerce Clause: a major purpose of the formation of the Union was to prevent states from legislating a monopoly for themselves and preventing the free flow of national commerce.⁷⁹ Nevertheless, Chief Justice Rehnquist and Justices Scalia and Thomas have all challenged the breadth of the Dormant Commerce Clause,⁸⁰ whereas all three Justices support the counting of state legislation in death penalty cases.

Chief Justice Rehnquist and Justice Scalia have both recognized the significance of federalism in death penalty jurisprudence. Chief Justice Rehnquist, a jurist particularly concerned with the protection of states’ rights, referred approvingly to the notion of the states as “laboratories” in the death penalty context.⁸¹ Justice Scalia, in a non-death penalty cruel and unusual punishment case, made a classic

75. *Id.* at 615.

76. *Id.* at 613.

77. *Harmelin v. Michigan*, 501 U.S. 957, 998–1001 (1991).

78. *HP Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 545 (1939).

79. *Cf. id.* at 554 (Black, J., dissenting) (noting that judicial toleration of local commerce barriers will damage interstate commerce).

80. *See Camps Newfound/Owatonna, Inc. v. Harrison*, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting).

81. *Atkins v. Virginia*, 536 U.S. 304, 326 (2002) (Rehnquist, C.J., dissenting).

federalism argument as to why the actions of other states are irrelevant to the constitutionality of a given state's laws: the "character of the sentences imposed by other States to the same crime . . . has no conceivable relevance to the Eighth Amendment."⁸² One state may punish the same offense more severely than another state, or even reward it.⁸³ Justice Scalia then quoted *Rummel v. Estelle*⁸⁴ approvingly: "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other States."⁸⁵ He concluded that diversity "not only in policy, but in the means of implementing policy, is the very *raison d'être* of our federal system."⁸⁶

Yet these two Justices, whose judgments have also been joined by Justice Thomas, have not followed the logic of their own arguments. Despite the applicability of their comments to the reliance on state legislation to prove a national consensus, all three Justices have advocated *exclusive* reliance on such evidence.⁸⁷ Ironically, concern for federalism is often the driving force behind reliance on state legislation to establish an evolving consensus. As Justice Scalia stated: "the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views."⁸⁸ To avoid this danger the Court looks to what it considers the most objective indicators of society's views—state legislative enactments.⁸⁹ "It will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives."⁹⁰

However, it is a strange sort of deference to look to state action to determine if there is a national consensus, and then use that national consensus to prohibit any future state action. In fact, this deference creates a moral hazard for state legislatures: they must craft legislation with a view to not contributing to the sort of consensus that the Supreme Court may then use against them later to

82. *Harmelin*, 501 U.S. at 989.

83. *Id.* at 990.

84. 445 U.S. 263 (1980).

85. *Harmelin*, 501 U.S. at 990 (quoting *Rummel*, 445 U.S. at 282).

86. *Id.*

87. *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 324 (2002) (Rehnquist, C.J., dissenting, joined by Scalia, J. & Thomas, J.).

88. *Thompson v. Oklahoma*, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting).

89. *Id.*

90. *Id.*

take away their policymaking power. That dilemma is elaborated in Part IV.

In addition to eroding the basic theory of federalism that states should have power to make diverse policies, there are great practical federalist problems in looking to state legislation to show an evolving consensus, as the following sections illustrate.

B. The Decisive Power of the “Tipping Point” State

The Supreme Court currently considers that a majority of states passing similar legislation is enough to establish a national consensus.⁹¹ Given this, the twenty-sixth state of fifty to prohibit an action effectively decides for the other twenty-four states that have not prohibited the action. In effect, this means that state number twenty-six can impose its policymaking will on up to twenty-four other states. This is contrary to a fundamental principle espoused in *McCulloch v. Maryland*⁹² that the sovereignty of any state does not extend beyond its borders to powers over the nation generally; only the national government can have that power.⁹³

Additionally, the practical harm of such a rule extends beyond the twenty-four states that have not prohibited a particular type of execution or application to a particular class of offenders; the rule also misappropriates policymaking power from the previous twenty-five states who share the twenty-sixth state’s prohibition policy. As long as the prohibition is not constitutionally enshrined, those twenty-five states have the power to reverse the policy, perhaps representing the consensus of a new majority. Once a prohibition is incorporated into the meaning of the Eighth Amendment, however, those states lose the power to reconsider their judgment and reverse or amend that policy.

Even the decisive twenty-sixth state is harmed by the extent of its own influence on the interpretation of the Eighth Amendment. Like current majorities of the other states, future majorities of that decisive state will be denied the privilege the current majority enjoys, that of having their views represented by their state legislators.

91. See *Roper v. Simmons*, 125 S. Ct. 1183, 1192 (2005) (looking to states with death penalty legislation and finding a national consensus against juvenile execution among those states).

92. 17 U.S. 316 (1819).

93. *Id.* at 429. And the power of the federal government to make certain policies for the nation cannot be delegated to any state. *Id.* at 431. Thus, the argument that it is the federal government exercising this power, in the form of the Supreme Court, also does not stand up to scrutiny.

Anticipating this criticism, the *Atkins* majority stressed that it “is not so much the number of states that is significant, but the consistency of the direction of change.”⁹⁴ However, having some requirement other than a majority as the relevant number of state provisions that comprise a constitutionally operative national consensus renders the standard more vague, but does not address the inherent federalist problem.

The Supreme Court has certainly rendered the standard vague. Eighteen states have proved sufficient to establish a national consensus in relation to execution of fifteen-year-olds,⁹⁵ sixteen- and seventeen-year-olds,⁹⁶ and the mentally retarded.⁹⁷ In contrast, forty-six of forty-eight states that once regularly imposed hanging had by 1994 prohibited execution by hanging, but this was insufficient to form a national consensus.⁹⁸ And forty-nine of fifty states was insufficient to form a national consensus against life imprisonment for minor drug offenses.⁹⁹ These last two decisions can be distinguished on the basis that they related to a mode of punishment rather than a category of defendant; however, the consensus found in *Trop*, the case which established the rule, was against a form of punishment—denationalization.¹⁰⁰ At any rate, both mental retardation¹⁰¹ and juvenile status¹⁰² were dismissed as reasons for findings of unconstitutionality when only two and fifteen states, respectively,

94. *Atkins v. Virginia*, 536 U.S. 304, 315 (2002). The methodological perils of looking to trends in addition to sheer numbers are discussed in the next Section.

95. *Thompson v. Oklahoma*, 487 U.S. 815, 829 (1988).

96. *Roper*, 125 S. Ct. at 1192.

97. *Atkins*, 536 U.S. at 314–15.

98. *Campbell v. Wood*, 511 U.S. 1119, 1119 (1994) (Blackmun, J., dissenting).

99. *Harmelin v. Michigan*, 501 U.S. 957, 1027 (1991) (White, J., dissenting).

100. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Generally, the Supreme Court has refrained from ruling on whether particular forms of capital punishment are unconstitutional. Four types of capital punishment have been sanctioned to the extent that the Supreme Court has refused to prohibit them when the issue came before it. In *Wilkerson v. Utah*, 99 U.S. 130, 136–37 (1879), death by shooting was authorized; in *Gomez v. United States District Court*, 503 U.S. 653, 654 (1992), use of the gas chamber was allowed; in *Glass v. Louisiana*, 471 U.S. 1080, 1080 (1985), use of the electric chair was permitted; and in *Campbell*, 511 U.S. at 1119, death by hanging was tolerated. However, the latter three cases contained only cursory consideration of the type of punishment by the majority, but strong dissents on point. However, recently the Supreme Court allowed the stay of execution of a man convicted of kidnapping and murder, who is arguing that the drugs used in execution by lethal injection carry the risk of undue suffering, and thus violate the cruel and unusual punishment provision. *Crawford v. Taylor*, 126 S. Ct. 1192, 1192 (2006) (mem.).

101. *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989), *abrogated by Atkins*, 536 U.S. 304.

102. *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989), *abrogated by Roper v. Simmons*, 125 S. Ct. 1183 (2005).

held such provisions. So it seems that the sixteenth, seventeenth, or eighteenth state can sometimes be the decisive one in the foregoing analysis.¹⁰³

The lack of a clear standard, and the consequent inconsistency of the application of counting state legislation undoubtedly contributes to the paucity of intellectual rigor in the Court's analysis on the topic. However, ultimately even clarity in the standard would not solve the problem that, like Bruce Ackerman's "constitutional moments,"¹⁰⁴ at some point the addition of a state will constitute the tipping point, at which a previously constitutional type of execution is rendered unconstitutional by the action of one additional state legislature.

An associated problem comes with the question of whether each consensus being recognized by the Supreme Court is drawn from the actions of the same states in each case, or a variety of states. Either way, the flaws of the doctrine are illustrated. If it is the same eighteen-odd states whose actions are being relied on for a variety of constitutional prohibitions, then the preferences of a minority bloc are consistently defining the constitutional landscape for the remainder. This means that a faction of eighteen liberal-minded legislatures are dominating federal constitutional interpretation, an outcome contrary to the grounding logic of the constitutional system, as encapsulated in our original quote. If, on the other hand, the consensus for each prohibition is found by looking to a different collection of states in each case, then the Supreme Court is selectively looking to the opinions of the various states, and taking into account the most anti-death penalty views of each state.¹⁰⁵ This may be a

103. The majority in *Roper* claimed that thirty states prohibit the practice, because they also counted the twelve states that prohibit the death penalty entirely. *Roper v. Simmons*, 125 S. Ct. 1183, 1992 (2005). The uncertainty of the counting process is discussed in the next Section, but it will suffice to note for current purposes that the fifteen states that previously prohibited such executions were not included in the count in *Stanford*, and so it was the addition of three extra states prohibiting juvenile execution that tipped the balance from constitutional to unconstitutional, whether that addition is three of eighteen or three of thirty. *Stanford*, 492 U.S. at 361.

104. See BRUCE ACKERMAN, *WE THE PEOPLE: VOLUME 1, FOUNDATIONS* 289 (1991) (arguing that the Constitution can be effectively amended without the formal amendment process specified in Article V of the Constitution if a broad and sustained shift in public attitudes constitutes a constitutional reorientation); BRUCE ACKERMAN, *WE THE PEOPLE: VOLUME 2, TRANSFORMATIONS* 15–17 (1998) (same). I thank Steve Calabresi for suggesting this analogy.

105. In fact, there seems to be a significant but imperfect correlation between the various death penalty prohibiting states. For example in *Atkins* and *Roper*, eleven of the eighteen states relied on for each case prohibited both practices: Colorado, Connecticut, Indiana, Kansas, Maryland, Nebraska, New Mexico, New York, South Dakota, Tennessee

satisfactory, if not particularly principled, outcome for those who abhor the death penalty, but as is discussed below, not all movements in popular opinion are in a liberal direction. Those same death penalty opponents may be less pleased by the Court taking account of a “law and order”-based national consensus.

One problem is that the Supreme Court has perverted both notions captured in the term “national consensus”—its national nature, and the concept of a consensus. First, it has been argued elsewhere that the relevant consensus previously relied on by the Supreme Court was that of a given state, not a “national” consensus.¹⁰⁶ It was only in 1977, in *Coker v. Georgia*,¹⁰⁷ that the Supreme Court reframed the question to whether a national consensus had developed.¹⁰⁸ If the Court had stuck to the *Gregg* inquiry, the evolving standards doctrine would not be plagued by these federalism problems. However, an examination of the consensus of any state may present an alternative problem. Determining the constitutionality of a state legislative provision according to whether the state in question has a consensus in favor of or against such a provision tests only the effectiveness of the state’s political system in representing the views of its populous; it tells us little of whether such a provision is cruel and unusual.

Second, the Supreme Court has also perverted the concept of a national consensus through its bizarre interpretation of the term “consensus.” Traditionally, a consensus refers to the achievement of unanimity, or at least a condition close to it. The *Oxford English Dictionary* defines the term as “agreement in opinion; the collective unanimous opinion of a number of persons.”¹⁰⁹ Other dictionaries

and Washington. Compare *Atkins v. Virginia*, 536 U.S. 303, 314–15 (2002), with *Roper*, 125 S. Ct. at 1201.

106. O’Connor, *supra* note 42, at 1405. In *Gregg*, the Supreme Court looked to a state consensus:

In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Gregg v. Georgia, 428 U.S. 153, 186–87 (1976).

107. 433 U.S. 584 (1977).

108. *See id.* at 591–92.

109. OXFORD ENGLISH DICTIONARY 760 (2d ed. 1989).

provide similar definitions.¹¹⁰ If unanimity (bar one, since the state legislation is generally under challenge) is not achieved, it is reasonable to expect that a consensus will at least mean a lack of a significant number that are in disagreement on the given topic.¹¹¹

Although the Court's unusual interpretation contributes to the confusion surrounding the doctrine, insistence upon a very large majority would not solve the underlying theoretical problems outlined above. A certain number of states would still be deciding criminal law policy for other states. Additionally, requiring a larger number of states to establish a consensus would only highlight a different problem with the doctrine: declaring an action unconstitutional because a significant number of states prohibit the practice leaves the Supreme Court enforcing constitutional protections only in cases where they are least needed. If a consensus truly exists against a particular execution practice, then juries will largely avoid its use, and legislatures will pass statutes to that effect; Court intervention will be less necessary.

In fact, in many evolving consensus cases, the Supreme Court has sought to minimize the appearance of its interference with state sovereignty by stressing that most states that allow the relevant execution practice seldom actually exercise it.¹¹² The dubious nature of the empirical claims made by the Court in this respect is discussed in the next Part, but even accepting the facts as they are presented, this is a weak defense: it suggests that only toothless protections will be recognized as constitutional rules. The very purpose of the Constitution is to protect rights under threat, not to protect them when doing so is no longer needed. Constitutional rights are not mere echoes of legislative protections.

C. The Public Choice Problems of Counting States

The Supreme Court's method of ascertaining a consensus also presents its own unique problems. The variation in the population of

110. For example, *Merriam-Webster* defines consensus as "general agreement: UNANIMITY" and "group solidarity in sentiment and belief." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 265 (11th ed. 2003).

111. Or perhaps a three-fourths agreement, as Article V requires to formally amend the Constitution. U.S. CONST. art. V.

112. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1192 (2005) ("[E]ven in the 20 States without a formal prohibition, the execution of juveniles is infrequent."); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) ("[E]ven in those States that allow the execution of mentally retarded offenders, the practice is uncommon."); *Thompson v. Oklahoma*, 487 U.S. 815, 832-33 (1988) (noting the very small proportion of death sentences handed down to juveniles as compared to adults who were sentenced to death).

the states means that a simple count of the number of states supporting or opposing a particular application of the death penalty will often not give an accurate picture of what “national” consensus exists. Simply put, the legislation of a state with a population of thirty million death penalty adherents is given the same weight in the Court’s calculation as a state with a population of one million death penalty opponents.¹¹³

The calculation of an actual national consensus, in contrast to the simple counting of states, is further complicated by the fact that different states will have different levels of variation in their support for or opposition to the death penalty. In a three-state system, two states may pass legislation prohibiting a mode of execution by a margin of fifty-one percent and the Court will consider this a national consensus, even though the third state may have unanimous opposition to the prohibition, rendering a majority of the nation opposed to the “consensus.” This issue applies both to the number of legislators supporting a bill, as well as the number of citizens whose views the legislators represent. All of these effects interact, making calculations exponentially more difficult.

These public choice problems, including the difficulties in aggregating the preferences of the nation when the population is divided into unequal units with varying levels of disagreement within those units,¹¹⁴ render determining a national consensus by counting state legislation enormously inaccurate. The Court has, in its own way, recognized this dilemma, but inverted the lesson to be drawn from it. Writing for the majority in *Atkins*, Justice Stevens took into consideration the size of the legislative majority voting in favor of the prohibition on executing the mentally retarded, claiming it further supported the conclusion that a national consensus exists.¹¹⁵ But Justice Stevens was highly selective in considering these public choice issues—he did not attempt to make a more specific calculation of the

113. Of course, this imbalance of power among the states in the federal government was intentional: the Constitution gave each state two Senators, regardless of the size of their population. But as discussed, the Framers also intended the states to be able to pursue their diverse policies without being subject to a national consensus. See *supra* notes 70–71 and accompanying text.

114. See, e.g., DAVID AUSTEN-SMITH & JEFFREY S. BANKS, POSITIVE POLITICAL THEORY I: COLLECTIVE PREFERENCE 30 (2000) (describing Arrow’s general possibility theorem: no rule can satisfy all of the four criteria of rationality since any rule fails to be either transitive, non-dictatorial, weakly Paretian or independent of relevant alternatives).

115. *Atkins*, 536 U.S. at 316 (asserting that the evidence of the legislative movement against executing the mentally retarded “carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition”).

national consensus. He considered only the evidence that supported his conclusion, without considering whether the complications of the uneven electoral system could equally damage his arguments.¹¹⁶

Similarly, Justice Stevens used the divergence between the opinions of elites, as represented in state legislation, with that of the populaces they represent, to support his argument of the existence of a national consensus. Opposition to the death penalty tends to be disproportionately held by elites, and does not represent the consensus of ordinary Americans: general support for the death penalty has been consistently over sixty percent for over twenty years.¹¹⁷ In *Atkins*, Justice Stevens noted the “well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime.”¹¹⁸ However, Justice Stevens used this fact in support of restricting the death penalty, arguing that it is all the more remarkable that eighteen states exempted the mentally retarded from execution, providing “powerful evidence” of a national consensus.¹¹⁹ Justice Kennedy, writing for the Court in *Roper*, made a similar argument in relation to juvenile execution.¹²⁰ The Court in these cases is having it both ways: if the populous instead shared legislative opinion opposing the death penalty, the Justices could have legitimately used this as evidence of a national consensus. Using the fact that legislation has been passed *despite* popular opinion to the contrary turns an appreciation of public choice problems on its head.

Justice Scalia vehemently criticized Justice Stevens’ reliance on voting margins. He argued that if the Court is going to look to margins among legislators, then surely it should also consider the

116. Similarly, Justice Stevens included mention of a bill passed by the Texas legislature but vetoed by its governor in his tally of states prohibiting juvenile execution. *Id.* at 315.

117. National support for the death penalty has been consistent at 64%, +/-3%, from 2003–2005. This represents a small decline since 2000–2002, when support averaged 67%, and a more general decline since the 1980s and 1990s, when support averaged 75%. See Lydia Saad, *Support for Death Penalty Steady at 64%*, GALLUP POLL (Dec. 8, 2005), available at <http://poll.gallup.com/content/default.aspx?ci=20350&pg=1> (subscription required).

118. *Atkins*, 536 U.S. at 315.

119. *Id.* at 316.

120. *Roper v. Simmons*, 125 S. Ct. 1183, 1193 (2005) (“Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it. This fact, coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation . . . and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects.” (citation omitted)).

number of people represented by the legislators voting on a bill.¹²¹ On these calculations, Justice Scalia concluded that only forty-four percent of the population in death penalty states exclude the mentally retarded from execution.¹²²

However, Justice Scalia ultimately reached the wrong conclusion. Describing these calculations as absurd, he reasoned that in calculating a consensus, the Court should look to the same consensus that adopted the Eighth Amendment, that of the states.¹²³ Essentially then, having raised the specter of public choice problems, Justice Scalia ultimately decided that the Court should simply ignore them and not consider legislative margins. But as shown, the public choice issues relate not just to legislative margins, but to the size of the states themselves. Defending his conclusion by noting that a consensus of states adopted the Eighth Amendment does not answer this challenge; as an originalist,¹²⁴ Justice Scalia should recognize that the adoption of the Eighth Amendment, and the federalist compact itself that gave equal power to divergently populated states, was premised on the states being able to operate as laboratories with diverse policies.¹²⁵ One cannot assume that the colonies would still have agreed to the Constitution and its amendments if they knew that this power would be so abridged.¹²⁶

So, is the lesson from the public choice problems of counting state legislation that the Court should instead look to public opinion data directly? Mimicking national results,¹²⁷ public opinion in

121. *Atkins*, 536 U.S. at 346 (Scalia, J., dissenting).

122. *Id.*

123. *Id.* (noting that past measures of consensus have been “the same sort as the consensus that *adopted* the Eighth Amendment: a consensus of the sovereign States that form the Union, not a nose count of Americans for and against”).

124. See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (advocating originalism in a tribute to Justice Taft).

125. See generally DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 36–38 (2005) (describing the process of ratifying the Constitution and the nationalist-federalist debate).

126. In fact, Justice Scalia applied just this sort of logic to criticize the Court majority’s counting of state legislation in *Roper*. Justice Scalia argued that, although four states had changed their laws to prohibit the execution of juveniles since *Stanford*, he doubted whether those state legislatures “would have done so if they had known their decision would (by the pronouncement of this Court) be rendered irreversible.” *Roper v. Simmons*, 125 S. Ct. 1183, 1220 (2005) (Scalia, J., dissenting). This reasoning explicitly recognizes that consent to a doctrine is often dependent on associated interpretations of that or other doctrines.

127. See Jeffrey M. Jones, *Americans’ Views of the Death Penalty More Positive This Year*, GALLUP POLL (May 19, 2005), available at <http://poll.gallup.com/content/default.aspx?ci=16393&pg=1> (subscription required) (reporting that seventy-two percent

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Arizona,¹²⁸ Georgia,¹²⁹ Kentucky,¹³⁰ Oklahoma,¹³¹ and Texas¹³²—all states that do not distinguish between adults and juveniles in the application of the death penalty—consistently showed that only approximately one-third of the population of each state supported executing juveniles. Similarly, California,¹³³ Louisiana,¹³⁴ Oklahoma¹³⁵ and Texas,¹³⁶ all states that lacked legislation exempting the mentally retarded from execution, had opposition rates to executing the mentally retarded of between sixty-four percent and eight-four percent, much like national polls.¹³⁷ This admittedly incomplete evidence suggests there may be a large consensus against execution of both juveniles and the mentally retarded, even among states that do not have legislation that exempts those defendants.

Courts have insisted that they will not interpret the Eighth Amendment by reference to popular opinion polls.¹³⁸ Although the Supreme Court pointed to public opinion polls in *Atkins* to confirm its conclusion that a national consensus exists against juvenile execution,¹³⁹ the Court has never relied on public opinion polls

supported the death penalty in general, while only thirty-one percent supported capital punishment for juveniles convicted of murder).

128. Behavior Research Center, Poll, 2000, *referenced at* <http://www.deathpenaltyinfo.org/article.php?did=883> (last visited Feb. 27, 2006) (showing that thirty-seven percent of Arizonians support the death penalty for juvenile defendants).

129. Walter C. Jones, *State Is Opposed to Death for Youth*, *AUGUSTA CHRON.*, Jan. 17, 2003, at B5, *available at* LEXIS.

130. Joseph Gerth, *Death Penalty for Juveniles Opposed, Polls Show*, *LOUISVILLE COURIER-J.*, Oct. 25, 2002, at B1 (citing opposition to the death penalty for juveniles by two-thirds of Kentuckians).

131. *See* Robert E. Boczkiewicz & Bob Doucette, *Condemned Man Gets Last-Minute Delay*, *DAILY OKLAHOMAN*, Apr. 3, 2003, at A1, *available at* LEXIS.

132. *See* Steve Brewer, *Juvenile Cases: Just 1 in 4 in County Thinks Death Appropriate*, *HOUS. CHRON.*, Feb. 6, 2001, *available at* <http://www.chron.com/disp/story.mpl/special/penalty/816391.html> (showing that only twenty-five percent of Harris County, Texas residents support the death penalty for juvenile defendants).

133. *See* Paul Van Slambrouck, *Execution and the Convict's Mental State*, *CHRISTIAN SCI. MONITOR*, Apr. 27, 1998, at 4.

134. *Atkins v. Virginia*, 536 U.S. 304, 330 (2002) (referencing Louisiana Poll 104 from April 2001 which reports that sixty-eight percent oppose executions of the mentally retarded).

135. *Id.* at 332 (referencing the Survey of Oklahoma attitudes Regarding Capital Punishment, which was conducted in July 1999, reporting that 83.5% oppose execution of the mentally retarded).

136. SAM HOUSTON STATE UNIVERSITY COLLEGE OF CRIMINAL JUSTICE, *TEXAS CRIME POLL 19 (1995)* (reporting that sixty-one percent of Texans polled responded that they would be “more likely to oppose” the death penalty for the mentally retarded).

137. *See* Jones, *supra* note 127 (reporting that eighty-two percent opposed the death penalty for the mentally retarded).

138. *See* *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989).

139. *Atkins*, 536 U.S. at 316 n.21.

without evidence of state legislation. In fact, the Court has explicitly rejected that possibility. In *Penry*, for example, Justice O'Connor wrote for the Court that "[t]he public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely,"¹⁴⁰ but without legislative evidence, a national consensus cannot be established.

Good reason exists for this reluctance: as Chief Justice Rehnquist detailed in *Atkins*, reliance on public opinion surveys, particularly from a variety of sources, creates the risk of serious methodological errors.¹⁴¹ These errors include selection biases, framing errors, and spurious correlations.¹⁴² Ultimately, constitutional protection would be meaningless if it was determined by popular opinion.¹⁴³ For example, even though three-quarters of the nation opposes the execution of juveniles in general,¹⁴⁴ fifty-one percent supported the death penalty for the juvenile "D.C. sniper," Lee Boyd Malvo.¹⁴⁵ This suggests that public opinion is highly variable and potentially open to manipulation. But introducing an intermediary, namely a legislature, between the whim of the political majority and a constitutional protection only makes the determination of a national consensus more difficult, it does not solve the dilemma.

140. *Penry*, 492 U.S. at 335.

141. See *Atkins*, 536 U.S. at 326 (Rehnquist, C.J., dissenting).

142. Selection bias occurs when a non-random sample is taken, which makes results unreliable, as extrapolations cannot be made from the survey to the general public. See, e.g., DAVID FREEDMAN ET AL., STATISTICS 333-54 (1998) (outlining the challenges of using sample survey data). Framing errors result from survey subjects being influenced by the order or wording of the question; reframing the question can sometimes even reverse the results. See Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. OF BUS. S251 *passim* (1986). A spurious correlation is an incorrect conclusion that change in one variable causes an effect in another; this error can result from selection or framing biases, or numerous other methodological errors. FREEDMAN ET AL., *supra* at 333-54.

143. For other criticisms of the use of public opinion polls, see Tracy E. Robinson, *By Popular Demand?: The Supreme Court's Use of Public Opinion Polls in Atkins v. Virginia*, 14 GEO. MASON U. CIV. RTS. L.J. 107, 121 (2004). Note, however, that Robinson also reaches the wrong conclusion: that because of the various methodological problems with the use of opinion polls, Justices should return to looking at "objective indicators" such as legislative enactments. *Id.* at 144.

144. See Jones, *supra* note 127.

145. Deborah L. Acomb, *Crime and Guns*, 34 NAT'L J., 3223 (2002).

D. Future State Majorities Cannot Undo the “Irreversible Ratchet”

Roper and *Thompson*'s prohibition on juvenile execution,¹⁴⁶ *Atkins*'s prohibition on executing the mentally retarded,¹⁴⁷ *Enmund*'s prohibition on felony murder executions in the absence of intent,¹⁴⁸ *Coker*'s prohibition on execution for rape of an adult woman,¹⁴⁹ and *Ford*'s prohibition on executing the insane¹⁵⁰ all permanently limit the breadth of death penalty jurisprudence. All constitutional enshrinement is permanent, limited only by Article V amendment or judicial revocation. This permanent enshrinement may or may not be justified on the basis of morality, proportionality, culpability, or other considerations. But to the extent that a given limitation rests on a national consensus established by state legislation, the prohibition should not logically be permanent because there is no evidence that the consensus on which it rests is permanent. Ordinarily states could amend or even reverse their policies; however, once these policies are enshrined in the Constitution, the states are no longer free to do so. Once a state has passed such a prohibition, or even if it has not but enough other states have done so, the possibility of amendment or reversal through individual state legislative action is gone.

Once again, Justice Scalia has foreseen the problem, but stopped short of the inevitable conclusion of his logic. “The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.”¹⁵¹ Justice Scalia wrote that pertinent sentence in *Harmelin v. Michigan*, a non-death penalty Eighth Amendment case concerning the constitutionality of Michigan's mandatory life sentences for moderate drug possession. Writing for the Court, Justice Scalia concluded on this logic that such sentences are not contrary to the Eighth Amendment.¹⁵² But the logic Justice Scalia outlined in this non-death penalty case applies equally to the use of state legislation in death penalty cases.

Public opinion on the death penalty is prone to reversals, as Justice White's analysis in *Harmelin* illustrates. In his dissent, Justice

146. *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

147. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

148. *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

149. *Coker v. Georgia*, 433 U.S. 584, 592 (1976).

150. *Ford v. Wainright*, 477 U.S. 399, 417 (1986).

151. *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991).

152. *Id.* at 996.

White argued that no other jurisdiction imposed a punishment as restrictive as Michigan's mandatory life sentence for moderate drug possession.¹⁵³ Of the forty-nine other states, only Alabama provided a mandatory sentence, and that was for possession of a much larger amount.¹⁵⁴ Justice White concluded that "the fact that no other jurisdiction provides such a severe, mandatory penalty for possession of this quantity of drugs is enough to establish" an evolving consensus.¹⁵⁵

One state out of fifty is a much clearer position of the state legislatures than those relied on in *Atkins*,¹⁵⁶ *Roper*,¹⁵⁷ and all of the other cases mentioned,¹⁵⁸ excepting *Ford*.¹⁵⁹ But since 1991, when *Harmelin* was decided, twelve other states have introduced mandatory sentencing for drug possession: Alabama, Arkansas, Connecticut, Florida, Georgia, Idaho, Kansas, Louisiana, Mississippi, Missouri, New Hampshire and New Jersey now all have mandatory life sentences.¹⁶⁰ Twenty-three states have passed three strikes laws for felonies more generally.¹⁶¹ If Justice White had succeeded in his argument, a consensus for stronger punishment could never have been able to evince itself.

The *Harmelin* example is not anomalous. Comprehensive studies using established social science techniques have found that

153. *Id.* at 1026 (White, J., dissenting).

154. *Id.*

155. *Id.* at 1027.

156. See *Atkins v. Virginia*, 536 U.S. 304, 313–16 (2002) (noting that eighteen states had enacted a prohibition on executing the mentally retarded and others were considering doing so).

157. See *Roper v. Simmons*, 125 S. Ct. 1183, 1192 (2005) (noting that thirty states prohibit the juvenile death penalty).

158. See *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (commenting that none of the thirty-seven states that allow capital punishment impose it on offenders younger than sixteen); *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989) (noting that two state statutes prohibit execution of the mentally retarded and fourteen states had rejected capital punishment entirely); *Thompson v. Oklahoma*, 487 U.S. 815, 829 (1988) (observing that among the eighteen states establishing a minimum age for capital punishment, all require the defendant to be at least sixteen at the time of the capital offense); *Enmund v. Florida*, 458 U.S. 782, 789 (1982) (noting that of thirty-six states authorizing the death penalty, only eight impose it for participation in a robbery in which another defendant takes a life); *Coker v. Georgia*, 433 U.S. 584, 593–96 (1977) (chronicling the three remaining states authorizing capital punishment for the rape of an adult female).

159. See *Ford v. Wainwright*, 477 U.S. 399, 408 (1986) (noting that no state permits execution of the insane).

160. NATIONAL SURVEY OF STATE LAWS 178–210 (Richard A. Leiter ed., 5th ed. 2005).

161. VINCENT SCHIRALDI ET AL., THREE STRIKES AND YOU'RE OUT: AN EXAMINATION OF THE IMPACT OF STRIKES LAWS 10 YEARS AFTER THEIR ENACTMENT (2004), available at <http://www.justicepolicy.org/article.php?id=450>.

variation in popular views relating to the death penalty are systematic. One study by political science professor David C. Nice found that attitudes toward the death penalty co-vary with public perceptions of crime levels, particularly homicide rates.¹⁶² A high murder rate creates pressure to do something about the problem, or at least to appear to do so, and this enhances the appeal of capital punishment.¹⁶³ Since crime has been dropping dramatically since the 1990s,¹⁶⁴ the legislation the Court relied on in *Atkins* and *Roper* reflects the associated reduction in support for the death penalty that Nice would predict. But there is a consensus among crime experts that the fall in the crime rate will be temporary,¹⁶⁵ and as such we can expect each consensus those cases relied on to be equally transient.

In *Thompson v. Oklahoma*,¹⁶⁶ Justice O'Connor aptly described the dangers of relying on trends in public opinion or state legislative action in interpreting the Eighth Amendment. "The history of the death penalty instructs that there is danger in inferring a settled societal consensus from statistics like those relied on in this case."¹⁶⁷ Noting the dramatic trend toward abolition of the death penalty prior to *Furman*, Justice O'Connor continued:

We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.¹⁶⁸

O'Connor captured the dual problem of the irreversible ratchet of incorporating state legislative trends into the Eighth Amendment. A prohibition is likely to be far more permanent than the potentially fleeting public consensus that empowered it. Additionally, states can never evidence a reversal of public opinion because by virtue of the prohibition the previous consensus enshrined, they are barred from passing legislation that reflects a contrary consensus.

162. David C. Nice, *The States and the Death Penalty*, 45 W. POL. Q. 1037, 1042 (1992).

163. *Id.*

164. See JEREMY TRAVIS & MICHELLE WAUL, REFLECTIONS ON THE CRIME DECLINE: LESSONS FOR THE FUTURE iii (2002), available at <http://www.urban.org/publications/410546.html>.

165. *Id.*

166. 487 U.S. 815 (1998).

167. *Id.* at 854 (O'Connor, J., concurring).

168. *Id.* at 855.

We have seen that public opinion can swing in either a conservative or a liberal direction; however, the aforementioned problem only applies to the development of a public consensus in a conservative direction. A pro-death penalty consensus results in Court inaction; an anti-death penalty consensus, in contrast, results in a permanent constitutional prohibition. In *Roper*, the Court was free to note that to the extent that “*Stanford [v. Kentucky]* was based on review of the objective indicia of consensus that obtained in 1989, it suffices to note that those indicia have changed.”¹⁶⁹ But if the direction of the consensus was reversed in these two cases, that is if the original consensus was against executing juveniles, but that reversed, perhaps due to numerous shocking cases such as the D.C. Sniper and the actions of Simmons himself,¹⁷⁰ the Court would be unable to recognize that new consensus. It would have no evidence of the new consensus because state legislatures would be prohibited from passing legislation reflecting that consensus.

The Court assumes that when it sees a minority of legislatures supporting tougher death penalty rules, those legislators are stragglers who have not yet “seen the light.” But those stragglers may just as easily be innovators, who are ahead of the curve rather than behind it.¹⁷¹ The Court’s depiction of minority state legislatures as stragglers stems from its apparent assumption that there is only one direction in which a civilized society will “evolve,” that of gradually reducing the application of the death penalty. The Court should have learned the fallacy of this assumption after the resurgence of support for execution after the Supreme Court’s imposed hiatus in *Furman*.¹⁷² Similarly, the Court should be able to look ahead, particularly in a time of increasing law and order policies in response to the current terrorist threat, and anticipate the possibility of future increases in public and legislative support for the death penalty.

It would be unprincipled for the Court to selectively look only to movements in popular opinion against the death penalty. As such, the logical conclusion of looking to state legislation to establish a national consensus is the permanent enshrinement of the status quo. Since any innovation or development will almost always be initiated

169. *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005) (citation omitted).

170. While a high school junior, Simmons broke into a woman’s home, tied her up, and threw her off a bridge into a river, where she drowned. Before committing this crime, Simmons told friends that he wanted to murder someone and convinced them to join in by assuring them that they would “get away with it” because they were minors. *Id.* at 1187.

171. See *Coker v. Georgia*, 433 U.S. 584, 613 (1977) (Burger, C.J., dissenting).

172. See *infra* note 309 and accompanying text.

by a small number of states, any such change will be contrary to a national consensus, given that the Supreme Court insists on defining that national consensus by a headcount of current state practices. For example, when some states first contemplated passing hate crimes legislation, under the Court's current interpretation, their minority status would arguably render such an attempt contrary to the national consensus against the imposition of greater punishment based on the perpetrator's racial intent. Yet, it is possible that the nation could have widely embraced such legislation, if the legislation had the chance to be enacted.

Properly applied, the use of state legislation in Eighth Amendment jurisprudence will entrench the status quo. Few would dispute that the American criminal justice system is in need of improvement. Improperly applied, the use of state legislation in Eighth Amendment jurisprudence constitutes an irreversible ratchet, increasingly restricting the application of the death penalty. Either way, reliance on state legislation will eventually conflict with public and legislative sentiment.

We have seen in this Part that the use of state legislation to establish a national consensus is contrary to principles of federalism, may rely on a consensus that is not national in nature, does not require a consensus, may not even reflect the views of the majority, irreversibly imposes rules based on a potentially fleeting consensus, and ultimately does not truly reflect the views of the public or the state legislatures that represent them. As such, the claim that the doctrine is justified on the grounds of federalism and deference to state legislatures is without merit. The other justification for the doctrine is that it is objective; the next Section disproves this claim.

III. HOW TO COUNT THE STATES? THE JUNK SOCIAL SCIENCE OF COUNTING STATE LEGISLATION

In cases prior to *Atkins* and *Roper*, there was significant uncertainty as to how to count and characterize the state statutes on which the Court relied to establish a national consensus on the death penalty.¹⁷³ The Court has been at odds over how to count state

173. Compare Justice O'Connor's majority opinion in *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989) (counting the fourteen states that have rejected capital punishment entirely and two state statutes prohibiting execution of the mentally retarded, but still finding insufficient evidence of a national consensus), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002), with Justice Scalia's dissent, *id.* at 351 (Scalia, J., dissenting) (agreeing that execution of the mentally retarded was constitutional, but because it contravened neither history nor "evolving standards of decency"); Justice Scalia's majority opinion in *Stanford*

legislation, how to treat the absence of state action, how to characterize state legislation, and how to deal with diversity in state legislation. *Atkins* and *Roper* confirmed the Court's approval of the doctrine of looking to state legislation, without resolving any of these disputes. Additionally, those two cases expanded the evidence on which the Court now relies. The Court now considers the recency of legislation, the consistency of trends in state legislation, and the rarity of the application of the mode of execution in question.¹⁷⁴ Some of these factors received passing attention in previous cases and some are new creations; all of them present major methodological hazards.¹⁷⁵ This Part presents the shortcomings of each of these forms of evidence.

v. Kentucky, 492 U.S. 361, 370–72 (1989) (finding a lack of national consensus by counting the laws of a majority of the states that permit capital punishment), *abrogated by Roper*, 125 S. Ct. 1183 (2005), with Justice Brennan's dissent, *id.* at 384–85 (Brennan, J., dissenting) (adding to the count the states that do not permit capital punishment at all); Justice Stevens' plurality opinion in *Thompson v. Oklahoma*, 487 U.S. 815, 826–29 (1988) (confining its count to the eighteen states that had established a minimum age for capital punishment) with Justice Scalia's dissent, *id.* at 867–68 (Scalia, J., dissenting) (arguing that the states that had set no minimum age for capital punishment should be included); Justice White's majority opinion in *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982) (considering only the states that authorize the death penalty and finding that most require a culpable mental state or mitigating circumstances for capital punishment for a felony murder) with Justice O'Connor's dissent, *id.* at 822–23 (O'Connor, J., dissenting) (analyzing the same group of states to find that the majority permit capital punishment "even though the felony murderer has neither killed nor intended to kill his victim"); Justice White's plurality opinion in *Coker*, 433 U.S. at 593–96 (noting that at no time in the prior fifty years had a majority of states authorized the death penalty for rape and concluding that only one state currently authorized death for the rape of an adult woman) with Chief Justice Burger's dissent, *id.* at 613–16 (Burger, C.J., dissenting) (counting two states that had attempted to enact death penalty statutes for adult rape and arguing that the Court should consider more than the immediate past to determine a consensus).

174. The majority in *Roper* listed the relevant factors:

As in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal."

Roper, 125 S. Ct. at 1194. The Court also relied on the size of the majority supporting state legislative enactments. *See supra* Part II.D.

175. It is worth noting that Justice Scalia has once again led the charge in criticizing these new forms of evidence. *See Roper*, 125 S. Ct. at 1220 (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 344 (2002) (Scalia, J., dissenting). He has also criticized the *application* of the more traditional factors. *See Roper*, 125 S. Ct. at 1218 (Scalia, J., dissenting); *Atkins*, 536 U.S. at 342 (Scalia, J., dissenting). But Justice Scalia has again not taken the final logical step of recognizing that the traditional forms of evidence are as inherently flawed as the new factors he criticizes and are not simply misapplied. Likewise,

A. How To Count the States

In addition to the previously discussed uncertainty as to how many states, once counted, constitute a national consensus, the Supreme Court is sharply divided over how to count the states in order to be able to do that addition. In particular, the Court is divided over whether to include non-death penalty states as part of a consensus with states opposing a prohibition on a specific mode of execution. Given that the death penalty itself is constitutional, the relevant opinion is that of whether the specific mode of execution at issue is particularly reprehensible and therefore unconstitutional. Can the Court infer disapproval of every mode of execution from a blanket ban on execution? Or, since non-death penalty states ban all executions and so do not make such distinctions, do they have no relevant opinion on the matter?

In *Roper*, the Court majority counted thirty states that prohibit the juvenile death penalty, “comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.”¹⁷⁶ Although the Court described this as “parallel” to *Atkins*’s recognition of a national consensus against executing the mentally retarded,¹⁷⁷ of which there were also eighteen states explicitly rejecting such an application and still twelve that prohibited all applications of the death penalty, the *Atkins* majority did not count the non-death penalty states.¹⁷⁸ Instead, the *Atkins* majority stressed that the direction of a trend was more important than the fact that only a minority were included in the consensus.¹⁷⁹

In both cases, Justice Scalia took objection to this mode of counting,¹⁸⁰ insisting instead that only forty-seven percent of states, less than half of the “38 States that permit capital punishment (for whom the issue exists),” barred execution of the mentally retarded.¹⁸¹ Justice Scalia’s parenthesized comment summarizes his position: only

Chief Justice Rehnquist recognized the considerable problems with the Court’s reliance on other forms of evidence, particularly the significant methodological weaknesses of relying on public opinion polling. See *Atkins*, 536 U.S. at 326 (Rehnquist, C.J., dissenting). But the Chief Justice did not apply equivalent critical thinking to the use of state legislation, instead accepting at face value its objectivity and superiority to judicial judgment. See *id.* at 324.

176. *Roper*, 125 S. Ct. at 1192.

177. *Id.*

178. *Atkins*, 536 U.S. at 313–16.

179. *Id.* at 315.

180. *Id.* at 342 (Scalia, J., dissenting); *Roper*, 125 S. Ct. at 1218 (Scalia, J., dissenting).

181. *Atkins*, 536 U.S. at 342 (Scalia, J., dissenting).

those states that have explicitly determined that the mode of execution at issue is particularly heinous have undertaken the relevant inquiry for their views to count.

Although Justice Scalia claimed in *Roper* that in no previous case had the Court counted states that had eliminated the death penalty entirely,¹⁸² Justice Brennan's dissenting opinions in both *Stanford*¹⁸³ and *Tison*¹⁸⁴ raised the specter of counting non-death penalty states, arguing that to do otherwise distorts the legislative record.¹⁸⁵ The possibility also was considered in *Penry*: Justice O'Connor, in finding for the Court that no consensus existed against executing the mentally retarded, commented that "the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus."¹⁸⁶ So the possibility of counting states in two different ways pre-dates *Roper*, but has gained little clarity in the past twenty years of Court debate.

The *Roper* majority picked up on Justice Brennan's criticism and denounced the *Stanford* majority for failing to consider states that had abandoned the death penalty as part of the consensus.¹⁸⁷ "[A] State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles."¹⁸⁸

Justice Scalia colorfully explained his opposing view:

Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of course they don't like it, but that sheds no light whatever on the point at issue. That 12 States favor *no* executions says something about consensus against the death penalty, but nothing—absolutely nothing—about consensus that offenders under 18 deserve special immunity from such a penalty. In repealing the death penalty, those 12 States considered *none* of the factors that the Court puts forth as determinative of the issue before us today—lower culpability of the young, inherent recklessness, lack of

182. *Roper*, 125 S. Ct. at 1219 (Scalia, J., dissenting).

183. *Stanford v. Kentucky*, 492 U.S. 361, 384 (1989) (Brennan, J., dissenting).

184. *Tison v. Arizona*, 481 U.S. 137, 175 (1987) (Brennan, J., dissenting).

185. See also *Thompson v. Oklahoma*, 487 U.S. 815, 829 (1988) (discussing whether to exclude some states). A similar issue raised in this case is discussed in *infra* Part III.B.

186. *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989), *abrogated by Atkins*, 536 U.S. 304.

187. See *Roper*, 125 S. Ct. at 1198.

188. *Id.*

capacity for considered judgment, etc. . . . The attempt by the Court to turn its remarkable minority consensus into a faux majority by counting Amishmen is an act of nomological desperation.¹⁸⁹

But this logic can be inverted, as was illustrated by the Supreme Court of Delaware, which used a similarly flamboyant metaphor when discussing Justice Scalia's parallel logic in *Stanford*:

In *Stanford v. Kentucky*, the Court declined to include States that do not authorize capital punishment at all in its catalogue of States that bar the execution of sixteen and seventeen year olds. The Court argued that including such States would be "rather like discerning a national consensus that wagering on cockfights is inhumane by counting within that consensus those States that bar all wagering." We must admit to finding this reasoning somewhat opaque. If one sought to discern a national consensus that cockfighting is inhumane, one would certainly look to States that outlaw cruelty to animals. Similarly, if a State has abolished capital punishment, it follows *a fortiori* that that State has rejected the execution of sixteen year olds, the mentally ill, the mentally retarded, or any definable class of defendants.¹⁹⁰

Ultimately, this debate comes down to what legislative intent regarding a specific prohibition can be discerned from a state's across-the-board ban on the death penalty. Unless the Court wishes to reconsider the issue of whether a national consensus exists against the death penalty itself, the relevant question is whether a judgment has been demonstrated that juveniles, the mentally retarded, or some other category of defendants are sufficiently *different* as to make their execution cruel and unusual.

The problem is that it is impossible to safely make the broader inference from a total prohibition of the death penalty because there are many reasons for opposing the death penalty. For example, a state may have concluded that the death penalty is simply impossible to administer fairly, or that the racial disparities in the application of the death penalty make it morally untenable, or that the death penalty itself is morally reprehensible, or any other reason. These reasons are consistent with the belief that execution of juveniles or the mentally retarded is in no way especially problematic. Yet each

189. *Id.* at 1219 (Scalia, J., dissenting).

190. *Sanders v. State*, 585 A.2d 117, 138–39 (Del. 1990) (citations omitted). However, because *Stanford* was still the binding authority at the time, the Delaware Supreme Court followed it and so counted the states accordingly. *Id.*

of the states banning the death penalty may nevertheless hold such a consensus. The problem is one of looking to the vague contours of state legislation and trying to decipher legislative intent. This problem is inherent to the Court's approach of examining state legislation.

B. How To Characterize State Inaction

The problem with discerning the position of non-death penalty states on specific death penalty applications is closely related to the dilemma of how to characterize state inaction. The same difficulty drives each problem: how to discern legislative intent, in order to categorize and then count legislative action, when the given state has in no way addressed the issue in its legislation.

Justice Brennan argued in *Stanford* that states that have not prohibited the killing of sixteen- and seventeen-year-olds may simply not have thought about it very carefully.¹⁹¹ This is an unsafe assumption for at least two reasons. First, the inaction may be intentional—a policy decision to leave such questions of when the death penalty is appropriate to the individualized judgment of juries and judges. Second, even where a state consensus exists, it may simply be too institutionally costly to pass the relevant legislation.¹⁹²

These simple and entirely plausible explanations have nevertheless been ignored in a number of cases. For instance, in determining whether a consensus exists against executing those under sixteen, Justice Stevens' plurality opinion in *Thompson* noted that nineteen of the thirty-six death penalty states set no minimum age.¹⁹³ He concluded that since it is "self-evident" that there must be a minimum age at some point, "it is reasonable to put this group of statutes to one side because they do not focus on the question of where the chronological age line should be drawn."¹⁹⁴ Consequently, the plurality confined its attention to those eighteen states "that have expressly established a minimum age in their death-penalty statutes."¹⁹⁵ Unsurprisingly, the plurality was able to discern a consensus among these selectively chosen states.

191. *Stanford v. Kentucky*, 492 U.S. 361, 385 (1989) (Brennan, J., dissenting).

192. See generally Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are not Organized as Markets*, 96 J. POL. ECON. 132 (1988) (applying industrial organization economic theory to legislative bodies).

193. *Thompson v. Oklahoma*, 487 U.S. 815, 826–27 (1988).

194. *Id.* at 829.

195. *Id.*

Regardless of whether counting non-death penalty states is appropriate, the plurality argument in *Thompson* is methodologically unsound; it presupposes its own answer. It is not surprising that when confining one's attention to states that have established a minimum age, those minimum age requirements will cluster around sixteen to eighteen. Further, the inference that it is "self-evident" that there must be a minimum age, when nineteen of thirty-six death penalty states set no minimum age, is quite unreasonable. But for unusual judicial interference such as that of the plurality in *Thompson*, the default position has been that such matters are left to the individualized determinations of judges and juries. Accordingly, it is reasonable for states to assume that inaction would leave judges and juries the discretion to make individualized determinations, not that such a policy choice would be used to infer intent to the contrary.

In criticizing this determination, Justice Scalia stated that it "is beyond me why an accurate analysis would not include within the computation the larger number of States (nineteen) that have determined that no minimum age for capital punishment is appropriate."¹⁹⁶ But the majority could use Justice Scalia's own logic against him to answer his rhetorical question: like the Amishmen contemplating electric cars, arguably these states have given no thought to the topic. The point is not to agree with the majority's self-serving counting system; rather, it is to suggest that both the majority and dissenting opinions in many of these cases appear to be outcome-driven. The Justices' positions on whether they want to count all fifty states seem to hinge on whether or not doing so supports or undermines a given consensus. A Justice's apparent amenability to restrictions on the death penalty would appear to correlate highly with his or her (variable) willingness to exclude groups of states when discerning a national consensus. Once again, then, the claim of the objectivity of looking to state legislation should be treated with great skepticism.

As well as an expectation that inaction leaves these matters to the state judicial process, state inaction may be deliberate for another reason: it may simply be impractical to act, despite majority agreement. The Supreme Court has repeatedly treated state legislation as if it were costless. As well as finding that the absence of legislative action to conduct execution of the mentally retarded is "powerful evidence" that the mentally retarded are considered

196. *Id.* at 867–68 (Scalia, J., dissenting).

categorically less culpable,¹⁹⁷ the Court has similarly relied on a state eventually giving up on such policies after repeated efforts have been struck down. For instance, in *Coker*, the Court found it significant that only three states had reinstated execution for rape of an adult woman in their statutes since *Furman* had struck down all state death penalty statutes.¹⁹⁸ But the death penalty moratorium had only been lifted the previous year in *Gregg*.¹⁹⁹ The majority would have been reasonable in finding it significant that three states had *already* reinstated the death penalty. But the Court did not stop there; the majority went on to use as evidence in its favor that two of those three states, whose statutes were again invalidated because the penalty was mandatory, did not then re-enact them a third time.²⁰⁰

This is to treat the passing of legislation as costless, and to ignore the manifold procedural impediments to legislative action. The public choice problems discussed in the previous Section apply equally to the passage of legislation. Bicameralism, (which forty-nine of the fifty states have), complicated committee structures, and executives with the power to veto legislation, all contribute to the difficulty of passing legislation.²⁰¹ This was of course the intention of the Framers in designing the constitutional system, but it is unreasonable for the Court to ignore these costs when characterizing the views of the states in order to determine a national consensus.

The Court's common if inconsistent characterization of legislative inaction as implying support for any given consensus threatens to place a positive burden on state legislatures to make death penalty distinctions. In fact, in her concurring opinion in *Thompson*, Justice O'Connor actually suggested that such a positive onus exists.²⁰² She stated that "where no legislature in this country has affirmatively and unequivocally endorsed [executing those under

197. *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

198. *Coker v. Georgia*, 433 U.S. 584, 594 (1977).

199. *See Gregg v. Georgia*, 428 U.S. 153, 186–87 (1976).

200. *Coker*, 433 U.S. at 594.

201. *See generally* GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK (2002) (arguing that the operative distinctions between political systems are in the extent to which they afford political actors veto power); George C. Edwards III et al., *The Legislative Impact of Divided Government*, 41 AM. J. POL. SCI. 547, 555–61 (1997) (discussing the likelihood of passing legislation when Congress is controlled by one political party and the President belongs to the opposing party); Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245, 245 (1979) (analyzing the formation of coalitions in Congress such that legislators can maximize benefits).

202. *See Thompson v. Oklahoma*, 487 U.S. 815, 849 (1988) (O'Connor, J., concurring).

sixteen], strong counter-evidence would be required to persuade me that a national consensus against the practice does *not* exist.”²⁰³

On this logic, not only can states be prevented from pursuing a criminal law policy because other states reject it, but they can also be denied such power because no state had yet specified that it thinks the states *should* be allowed to pursue it. Part IV discusses how such rules create a moral hazard for states, giving them an incentive to introduce more punitive legislation in order to simply maintain their power to introduce that or lesser punitive legislation in the future. But even putting that complication aside, this roundabout imposition of a positive legislative burden on state legislatures is unprecedented, and contrary to the basic compact of the Union that left states with the freedom to determine legislative policymaking, subject only to *negative* constraints.

Ironically, as Justice Scalia points out, Justice O’Connor’s requirement of an affirmative statement of intent on the part of legislators to express any view that is contrary to the consensus the Court is trying to ascertain would ultimately bypass the requirement of a national consensus.²⁰⁴ It would mean that for any group about whom there could imaginably be doubt as to whether the death penalty applies to them, such as the elderly,²⁰⁵ the application of the death penalty would need to be specified in advance.²⁰⁶ This would place an impossible burden on legislators, as they would need to predict every possible category about which a challenge could potentially be made. As mentioned, the cost of passing legislation may make this impossible. Even if it is possible, it certainly does not constitute the deference that the Justices have claimed justifies looking to state legislation. As such, the Court’s experimentation with a positive burden on the states, or a pseudo-positive burden in the form of inserting its own preferences into the characterization of legislative inaction, is contrary to federalism, highly subjective, and entirely lacking its claimed deference to state legislatures.

203. *Id.* (emphasis added).

204. *Id.* at 877 (Scalia, J., dissenting).

205. Justice Scalia raised this example to illustrate the absurdity of Justice O’Connor’s argument. *Id.* However, the argument that aged offenders cannot be put to death was recently made to the Supreme Court, although was ultimately unsuccessful. *See Allen v. Ornoski*, 126 S. Ct. 1139 (2006) (mem.) (denying application for stay of execution of sentence of death where defendant argued that his execution violated the Eighth Amendment’s prohibition against cruel and unusual punishment because he was both elderly and infirm.).

206. *Thompson*, 487 U.S. at 877 (Scalia, J., dissenting).

C. How To Characterize the Positions of States

The next two Sections describe two related methodological problems: how to characterize the position of the states, given the different levels of generality with which they address an issue about which there may be a consensus; and how to count positions of the states, given the different levels of generality and other forms of diversity among state legislation. The first issue relates to characterizing the question, the second relates to characterizing the answer. Each process is highly indeterminate.

The problem described in the previous Section, of reading specific intent into the general contours of broad legislation, has a flip side: that of reading in a broad intent into more specific but diverse legislative expressions. The problem for those Justices seeking to establish a consensus is that various state legislatures will often address different narrow issues within a broad topic; aggregating legislative intent for the purposes of establishing a national consensus often requires papering over those differences in order to establish a community of interest.

*Coker v. Georgia*²⁰⁷ graphically illustrates the problem. In *Coker*, a recidivist rapist and murderer escaped from prison, then committed armed robbery, theft, kidnapping, and rape.²⁰⁸ Upon being recaptured, Coker was sentenced to death on the basis of the aggravated circumstances of the rape.²⁰⁹ The Supreme Court majority found his sentence to be unconstitutional because a national consensus exists against imposing the death penalty for the rape of an adult woman.²¹⁰ But Justice Powell, concurring on the facts but dissenting on the general principle, argued that although initial indications may support the conclusion that society finds the death penalty unacceptable for rape without aggravating brutality, it is not clear that society finds the death penalty disproportionate for all rapes.²¹¹ Simply examining societal attitudes to the application of the death penalty to rape generally does not answer this question; rather, he argued that there must be a careful inquiry into legislative enactments and jury actions on the narrower issue of execution for rape without aggravating brutality.²¹²

207. 433 U.S. 584 (1977).

208. *Id.* at 584.

209. *Id.* at 586–91.

210. *Id.* at 596.

211. *Id.* at 601 (Powell, J., dissenting).

212. *Id.* at 603–04.

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Chief Justice Burger, in a dissent joined by then-Justice Rehnquist, elaborated this point further. He noted that even if society considers the death penalty for rape generally disproportionate, it may not do so for a repeat felon for whom no other punishment would be effective: a recidivist rapist serving a life sentence who would otherwise be in no way deterred from committing further rapes when he escapes again, or even within prison.²¹³ Chief Justice Burger criticized the majority for the “unnecessary breadth” of its ruling.²¹⁴ He argued that the majority should have framed the question as whether

the Eighth Amendment’s ban against cruel and unusual punishment prohibit[s] the State of Georgia from executing a person who has, within the space of three years, raped three separate women, killing one and attempting to kill another, who is serving prison terms exceeding his probable lifetime and who has not hesitated to escape confinement at the first available opportunity?²¹⁵

To support his characterization, Chief Justice Burger cited the fact that the federal government and many state governments have legislated that a second crime can warrant more serious punishment than the first.²¹⁶ He concluded that whatever one’s view about the constitutionality of the death penalty for rape generally, this case was different because it concerned the execution of “a chronic rapist whose continuing danger to the community is abundantly clear.”²¹⁷

This exchange makes clear that by incorporating the counting and characterizing of state legislation into Eighth Amendment jurisprudence, the Supreme Court has lumbered that jurisprudence with all of the problems associated with the “indeterminacy of levels of generality” that plague other areas of constitutional law.²¹⁸ It is well-recognized that even when genuinely attempting to find a claimed requirement within the bounds of the Constitution’s text, determining exactly *what* must be tied to the text is still open to argument, as it will depend on the degree of detail at which the claimed requirement is characterized.²¹⁹ Anything described

213. *Id.* at 606 (Burger, C.J., dissenting).

214. *Id.*

215. *Id.* at 607.

216. *Id.* at 608.

217. *Id.* at 607.

218. See Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L. J.* 1063, 1084 (1981).

219. *Id.*

sufficiently broadly can be covered by an open-textured clause. A principle can come to be so broad that it is inadequate as a constitutional rule of decision, for it excludes nothing. Conversely, if a principle is described sufficiently narrowly, it will never be apparent from the broad protections of an open-textured Constitution.²²⁰ To describe the claimed right in very specific terms “is to disconnect it from previously established rights.”²²¹

A classic example of these different approaches is found in *Carey v. Population Services*.²²² In finding that mail-order contraceptives could not be constitutionally prohibited, Justice Brennan’s plurality opinion characterized the right in question in even broader terms than he used in *Eisenstadt v. Baird*,²²³ as protecting individuals’ interests in “making certain kinds of important decisions” concerning “the most intimate of human activities and relationships.”²²⁴ In contrast, then-Justice Rehnquist’s dissent characterized the right very narrowly as “the right of commercial vendors of contraceptives to peddle them to unmarried minors.”²²⁵ The breadth of Justice Brennan’s characterization of the right in question made his finding that the asserted interest was constitutionally protected appear predetermined. Similarly, Justice Rehnquist’s pronouncement that the right in *Carey* was not protected was easily foreseeable from his narrow characterization of the interest in question.

Since looking to state legislation, Eighth Amendment jurisprudence displays a similar variety of interpretation. Like *Coker*, the majority and dissenting opinions in *Thompson* rested their analysis on these differently specified characterizations. In *Thompson*, the majority queried whether a consensus against executing individuals under sixteen exists among states that establish some legislative minimum age requirement.²²⁶ By contrast, Justice Scalia’s dissent posed the question as

220. *Id.*

221. LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 75 (1991).

222. 431 U.S. 678 (1977).

223. 405 U.S. 438 (1972). Justice Brennan characterized it as “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters . . . fundamentally affecting a person.” *Id.* at 453. In his dissent, Chief Justice Burger argued that *Griswold v. Connecticut* established only a “right to use contraceptives.” *Id.* at 472 (Burger, C.J., dissenting).

224. *Carey*, 431 U.S. at 684–85.

225. *Id.* at 717 (Rehnquist, J., dissenting).

226. *Thompson v. Oklahoma*, 487 U.S. 815, 826–28 (1988).

whether there is a national consensus that no criminal so much as one day under 16, after individuated consideration of his circumstances, including the overcoming of a presumption that he should not be tried as an adult, can possibly be deemed mature and responsible enough to be punished with death for any crime.²²⁷

Years of constitutional debate have not resolved the argument of the relative superiority of narrowly or broadly characterizing relevant constitutional principles. Importing analysis of state legislation into Eighth Amendment jurisprudence requires similar characterizations, and so necessarily also imports all of this uncertainty over the appropriate level of generality of constitutional inquiry. Consequently, reliance on state legislation is not the objective endeavor its advocates claim that it is: John Hart Ely has noted “the understandable temptation to vary the relevant tradition’s level of abstraction to make it come out right.”²²⁸ By looking to state legislation to determine a national consensus, the Supreme Court has burdened the already complex inquiry of the constitutionality of aspects of the death penalty with the “levels of generality” problem, and all of the judicial subjectivity that is associated with it.

D. How To Treat Diversity Among State Legislation

Even when confronted with highly varied state legislation, the Supreme Court has nevertheless sometimes managed to unearth a national consensus against some forms of the death penalty. But in such a case, rather than attempting to aggregate as many states as possible into the consensus, the Supreme Court has typically attempted to pare down the number of states that are relevant to the inquiry, and narrowly recast the topic at issue. For example in *Atkins*, Justice Stevens differentiated among states that have legislation prohibiting the execution of mentally retarded defendants, from those that allow it but do not use it very often, from those who have it and practice it but have recently not had an instance of it for a person with an IQ under seventy.²²⁹

Justice Scalia criticized this finding because two states should have been excluded from the majority’s count: Kansas only exempts the severely mentally retarded, and New York permits the execution

227. *Id.* at 859 (Scalia, J., dissenting).

228. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 61 (1980).

229. *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002).

of mentally retarded defendants who commit murder in prison.²³⁰ Thus Justice Scalia wanted to use the diversity among the state statutes to count the states differently than the majority.²³¹ What he should have done is criticize the practice of categorizing and counting states at all. The problem lies not in the application, but in the fact that if you break any group of legislation down into enough categories, the numbers will never be very high. As such, it is always possible to differentiate states outside the alleged consensus, or alternatively those within it, depending on one's preferred outcome.

The problem of selective grouping is even more starkly illustrated in *Enmund v. Florida*,²³² which found a consensus against execution for felony murder in the absence of a requisite intent.²³³ The majority conceded that eight of the thirty-six death penalty states allow the death penalty for felony murder.²³⁴ Of the remaining twenty-eight, four did not allow execution for felony murder at all.²³⁵ Eleven required some culpable mental state, eight of which required intent and the other three required recklessness or extreme indifference.²³⁶ The majority grouped all eleven states as not supporting the death penalty in felony murder cases by casting the relevant qualification of the consensus as simply requiring the requisite "mental state."²³⁷ Thus we see the interaction between the indeterminacy in levels of generality and the amorphousness of counting states. Ultimately, with these and various other distinctions, the Court found that only eight of thirty-six death penalty states permitted execution in the specific circumstances of the case, or seventeen if counting the nine states where a defendant could be executed for an unintended felony murder if sufficient aggravating circumstances were present.²³⁸ The Court eventually concluded that "only about a third" of the states allow such execution, and therefore a consensus exists against it.²³⁹

230. *Id.* at 342–43. (Scalia, J., dissenting).

231. Justice Scalia also differentiated between states by arguing that not all of the states expressed the moral repugnance required to constitute an evolving standard because eleven of the eighteen states the majority relied on did not make the legislation retroactive, exempting mentally retarded defendants convicted prior to the legislation. *Id.* at 342.

232. 458 U.S. 782 (1982).

233. *See id.* at 782.

234. *Id.* at 789.

235. *Id.*

236. *Id.* at 790.

237. *Id.*

238. *Id.* at 792.

239. *Id.*

In her dissent, Justice O'Connor grouped the states quite differently. She counted thirty-three states that allowed execution for felony murder, twenty of which did not require an intent to kill or being the killer, and an additional three that did not require specific intent.²⁴⁰ Justice O'Connor commented that the Court's "curious method of counting the States that authorize imposition of the death penalty for felony murder cannot hide the fact that 23 States permit a sentencer to impose the death penalty even though the felony murderer has neither killed nor intended to kill his victim."²⁴¹

Justice O'Connor's criticism seems fair, until one reads *Tison v. Arizona*,²⁴² a case that came five years after *Enmund* and considered the closely related question of whether a national consensus exists against execution for "substantial participation in a violent felony under circumstances likely to result in a loss of innocent human life" even absent an intent to kill.²⁴³ In finding that no such consensus exists, writing for the majority this time, Justice O'Connor noted that eleven states prohibited capital punishment for all felony murders regardless of intent.²⁴⁴ Other state legislation varied, some requiring an intent to kill, some requiring substantial involvement, and some requiring aggravating circumstances.²⁴⁵ However, the Court had to find some way of grouping these state statutes, so it grouped all of the states that allowed the death penalty for felony murder together, even though there were various categories within them.²⁴⁶ Justice O'Connor then contrasted this to "only 11 states authorizing capital punishment [that] forbid imposition of the death penalty even though the defendant's participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness."²⁴⁷

So it is clear that both sides of the debate are guilty of selectively grouping dissimilar statutes, or alternatively splitting multiple levels of categories in order to avoid grouping similar statutes, according to the Justices' preferred outcomes. It is equally clear, then, that the use

240. *Id.* at 820–22 (O'Connor, J., dissenting).

241. *Id.* at 822.

242. 481 U.S. 137 (1987).

243. *Id.* at 154.

244. *Id.*

245. *Id.*

246. *Id.* at 152–53 ("Four States authorize the death penalty in felony-murder cases upon a showing of culpable mental state such as recklessness or extreme indifference to human life. Two jurisdictions require that the defendant's participation be substantial and the statutes of at least six more, including Arizona, take minor participation in the felony expressly into account in mitigation of the murder.").

247. *Id.* at 154.

of state legislation in establishing a national consensus is not the objective undertaking that all of the Justices claim that it is. Looking at other aspects of state legislation—its recency, its consistency and the rarity of its application—is no less problematic.

E. Recency of Legislation and the Pace of Change

In *Coker*, the Court turned its attention to “recent legislative action.”²⁴⁸ The Court apparently included the adjective “recent” in order to distinguish the long legislative history of not preserving the death penalty purely for murder. This was a response to the dissent’s argument that for most of the 20th century it was “the accepted practice in a substantial number of jurisdictions preceding the *Furman* decision” to allow such executions.²⁴⁹ Despite seemingly being created to rebut this argument, the recency of legislative action was given independent significance by Justice Stevens in *Atkins*, who italicized the quote from *Coker* “the judgment of most of the legislatures that have recently addressed the matter.”²⁵⁰ Then in *Roper*, the Supreme Court relied on *Atkins* and *Coker* to explicitly turn the recent nature of a state legislative trend into positive evidence in favor of a national consensus.²⁵¹

Other than its dubious genesis, the practice of relying on the recency of legislative change in support of ascertaining a national consensus has a number of problems. First, it is particularly illogical for constitutional interpretation. If the Court was trying to ascertain a national consensus for some other purpose, and was unsure of its data, then it would make sense to look to the most recent legislation, as this may be the most reliable indicator of the *current* consensus. But in order to ascertain whether a shift in public opinion has been so fundamental as to justify constitutionally enshrining a consensus, it would make more sense for the recency of the trend to be counted *against* incorporating it into the Constitution. Surely it should be more convincing if thirty states have considered it wrong to execute juveniles for fifty or 200 years than for thirty states to have recently come to that view. The pace of change would be less impressive, but the belief captured in state legislation would be much more certain and permanent, and thus more appropriate for constitutional incorporation. Instead, by taking the recency of legislative change as positive evidence of a national consensus, the Court is resting its

248. *Coker v. Georgia*, 433 U.S. 584, 594 n.7 (1977).

249. *Id.* at 614–15 (Burger, C.J., dissenting).

250. *Atkins v. Virginia*, 536 U.S. 304, 313 (2002).

251. *See Roper v. Simmons*, 125 S. Ct. 1183, 1193 (2005).

constitutional interpretation on the fleeting whims of the majority precisely because they are fleeting.

In a similar vein, positively considering the recency of legislation further undermines the capacity of the states to act as laboratories. As Justice Scalia pointed out in *Atkins*, all of the eighteen statutes the majority relied on were passed within the last fourteen years, five in the previous year.²⁵² “Few, if any, of the States have had sufficient experience with these laws to know whether they are sensible in the long term.”²⁵³ As the dissent argued in *Coker*, legislatures should be given time to evaluate the evidence and compare it with the experience of other states, to best assess the effectiveness of the death penalty in a given application.²⁵⁴ To do otherwise is to deny the states their power to experiment in policymaking, and to enshrine the unproven and potentially ill-conceived trend of the moment.

Finally, the analytic significance of the recency of legislation is highly uncertain. In *Atkins*, Justice Stevens described the difference in the rate of change between outlawing execution of the mentally retarded and execution of juveniles as “telling.”²⁵⁵ Then in *Roper*, the Court “borrowed” the phrase and the criteria of the pace of change. Despite the fact that two years earlier the Court had relied on the slowness of legislative change in relation to the juvenile death penalty to differentiate the more significant rate of change regarding the mentally retarded, the Court nevertheless found the former to be “significant” and a positive argument in favor of a national consensus regarding juveniles.²⁵⁶ As such, what constitutes a significant rate of change is open to debate.

This point was further illustrated by Justice O’Connor’s dissent in *Roper*. Having sided with the majority in *Atkins*, Justice O’Connor had to differentiate why eighteen states constituted a consensus against executing the mentally retarded but not against executing juveniles. Justice O’Connor noted that the pace of legislative change against executing juveniles was slower than that for executing the mentally retarded.²⁵⁷ However, Justice O’Connor had to admit that that was in part because more states had already opposed the execution of the mentally retarded.²⁵⁸ Justice O’Connor, generally

252. *Atkins*, 536 U.S. at 344 (Scalia, J., dissenting).

253. *Id.*

254. *Coker*, 433 U.S. at 618.

255. *Atkins*, 536 U.S. at 315 n.18.

256. *Roper*, 125 S. Ct. at 1193. This logical inversion is discussed further in Part IV, *infra*.

257. *Id.* at 1211 (O’Connor, J., dissenting).

258. *Id.*

renowned for her ability to distinguish minor differences in cases, could not explain how to weigh the pace of change with the allegedly objective size of the transformation. Instead, she simply reiterated the difference, stating that “[n]evertheless, the extraordinary wave of legislative action leading up to our decision in *Atkins* provided strong evidence that the country truly had set itself against capital punishment of the mentally retarded. Here, by contrast, the halting pace of change gives reason for pause.”²⁵⁹ But the halting nature of change indicates that states may have examined each other’s results, and learned from other states’ experiences.

Like the problems previously encountered with characterizing, counting and grouping the states, the Court’s new reliance on the recency of state legislative trends suffers from both federalism defects and enormous subjectivity. As such, it is contrary to the two stated aims of looking to state legislation. The other new forms of evidence suffer from similar faults.

F. Consistency in the Direction of Change

In *Atkins* and *Roper*, the Supreme Court considered the consistency of the legislative trend as further evidence of a national consensus. In *Atkins*, the consistency of the change was emphasized to counter the low number of states to have passed the prohibition.²⁶⁰ This counterweight was reiterated in *Roper*.²⁶¹ Thus, these two cases suggest that the consistency of direction outweighs the importance of the number of states to have passed a provision. This is even more anathema to federalism than enshrining the views of the majority: it allows the Court to enshrine the views of a minority, as long as they are a tightly coherent bloc.

Dissenting in *Roper*, Justice Scalia provided different criticisms of this type of evidence—one factual, one doctrinal. The factual criticism is that the Court was selective in finding that there had been total consistency in the legislative change. Justice Scalia pointed out that, although the majority noted that no state legislature had passed legislation that went against the alleged consensus, the majority ignored the fact that both Arizona and Florida had passed ballot

259. *Id.*

260. *Atkins*, 536 U.S. at 315.

261. *Roper*, 125 S. Ct. at 1193. “The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry*; yet we think the same consistency of direction of change has been demonstrated.” *Id.*

initiatives to maintain the juvenile death penalty.²⁶² If the Court is going to consider factors such as public opinion polls and the opinions of professional organizations, then surely successful ballot initiatives ought to be considered, or else the Court will appear selective in its use of evidence.

The second criticism Justice Scalia offered was that the consistency of the direction of change should logically count for little.²⁶³ Justice Scalia argued that the Court's conclusion that the legislative change has been consistent is really just another way of making the "unimpressive observation" that no state "has yet undone its exemption of the mentally retarded, one for as long as 14 whole years."²⁶⁴ Justice Scalia's argument reiterates the point that the recency of legislation should not be an argument in favor of finding consensus. But the argument also suggests that recency should particularly not be relied on when the Court also looks to consistency: a legislative trend that is both consistent and recent constitutes the very danger the Framers were attempting to avoid in structuring the Constitution, which was to control the passing whims of a majority (or a minority).

In *Roper*, Justice O'Connor dissented on the factual application but supported reliance on consistency, as she did when part of the *Atkins* majority. To differentiate juveniles from the mentally retarded, Justice O'Connor pointed to the fact that prior to *Roper*, two states had reaffirmed their support for executing juveniles, whereas this had not happened prior to *Atkins*. As such, the direction of change was consistent in *Atkins*, but not in *Roper*.²⁶⁵ However, this may well be a Court-created effect: *Atkins* came out of the blue, whereas *Roper* was greatly anticipated, as a result of *Atkins*.²⁶⁶ After *Atkins*, it was widely anticipated that the issue of juvenile execution would soon come before the Supreme Court.²⁶⁷ As such, states could

262. *Id.* at 1220–21 (Scalia, J., dissenting). Justice O'Connor provided further evidence along these lines, pointing out that since *Stanford*, both Missouri and Virginia have passed statutes setting the minimum age for capital punishment at sixteen. *Id.* at 1211 (O'Connor, J., dissenting).

263. *Atkins*, 536 U.S. at 344–45 (Scalia, J., dissenting). "Given that 14 years ago *all* the death penalty statutes included the mentally retarded, *any* change (except precipitate undoing of what had just been done) was *bound to be* in the one direction the Court finds significant enough to overcome the lack of real consensus." *Id.*

264. *Id.* at 345.

265. *Roper*, 125 S. Ct. at 1211 (O'Connor, J., dissenting).

266. This difference is discussed further in Part IV, *infra*.

267. See, e.g., Tony Mauro, *Court Showing Interest in Juvenile Executions Debate*, THE RECORDER, Oct. 22, 2002, available at LEXIS (discussing expectations that the Court would reach the juvenile execution issue in the wake of *Atkins*).

have anticipated that evolving standards analysis would be applied, and states that opposed that trend would have had an incentive to legislate to express their support for juvenile execution.²⁶⁸

This gaming of the system by states is an unavoidable result of the Court examining state legislation as evidence of a national consensus. Any reasonably anticipated extension by the Court cannot reliably be established by looking to state legislation, without at least accounting for the Court's own influence.

G. *The Rarity of Death Penalty Applications*

As noted in the Introduction, the Court has labeled both state legislation and jury determinations the "objective indicia" of a national consensus.²⁶⁹ Reliance on jury determinations, particularly juries' rare sentencing of certain categories of defendants to death, shares the federalism and methodological problems that reliance on state legislation is plagued with.

In noting that the practice of executing mentally retarded offenders, even among states that allow their execution, is uncommon, Justice Stevens concluded that the practice of executing the mentally retarded "therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it."²⁷⁰ Similarly, in *Roper* the Court emphasized that "even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford*, six states have executed prisoners for crimes committed as juveniles. In the past ten years, only three have done so."²⁷¹ The rarity of jury imposition of the death penalty was also relied on in earlier cases, including *Coker*,²⁷² *Enmund*,²⁷³

268. Similarly, the Court's reasoning in *Roper* has reportedly convinced both prosecutors and anti-death penalty activists that the next claimed evolving consensus that the Court will need to assess is one against the imposition of life sentences for juveniles. See Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1 (reporting that life without parole for juveniles is theoretically available in only approximately twelve nations, and only three other nations have juveniles actually serving such sentences).

269. See *supra* note 5 and accompanying text.

270. *Atkins v. Virginia*, 536 U.S. 304, 316 (2002). As discussed, the Court has never taken "unusual" to mean seldom practiced; instead, the Court here is relying on the rare use of certain modes of execution as further evidence of a consensus against the practice, but in doing so, it comes close to arguing that unusual use constitutes unconstitutional use.

271. *Roper v. Simmons*, 125 S. Ct. 1183, 1192 (2005).

272. *Coker v. Georgia*, 433 U.S. 584, 596-97 (1977) (plurality opinion) ("The jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.").

Thompson,²⁷⁴ and by the dissent in *Stanford*,²⁷⁵ but rejected by the majority in that case.²⁷⁶

There are problems with the concept of looking to the rarity of jury sentencing, the methodology of assessing how common execution sentences are, and the unbounded nature of the application of this evidence. The very idea of inferring a national consensus from the fact that juries invoke the death penalty rarely is quite illogical. For example in *Coker*, the fact that, “in the vast majority of cases, at least nine out of 10, juries have not imposed the death sentence” showed that juries are capable of making the very distinctions that the criminal law intends them to make: sentencing defendants to execution only in extreme cases with aggravating circumstances.²⁷⁷ This is exactly the sort of “individualized assessment” that a sentence of death is meant to involve.²⁷⁸ As Justice O’Connor pointed out in *Enmund*, the low figures may simply show that jurors “are especially cautious in imposing the death penalty, and reserve that punishment” for the most culpable defendants as is appropriate, not that jurors must have concluded that the death penalty is *never* appropriate for a particular class of defendants.²⁷⁹

Given the accepted need for individualized judgment in death penalty cases, why then does the Court consider that it is necessary to have a bright line distinguishing various categories of defendants, such as juveniles, rather than simply considering the applicability of these categories as mitigating factors? The Court in *Roper* explained that the “differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.”²⁸⁰ The Court continued: “If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under eighteen as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile

273. *Enmund v. Florida*, 458 U.S. 782, 794–95 (1982) (“Society’s rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made.”).

274. *Thompson v. Oklahoma*, 487 U.S. 815, 832–33 (1988) (plurality opinion).

275. *Stanford v. Kentucky*, 492 U.S. 361, 386–87 (1989) (Brennan, J., dissenting).

276. *Id.* at 374.

277. *Coker*, 433 U.S. at 597.

278. *Stanford*, 492 U.S. at 375.

279. *Enmund*, 458 U.S. at 819 (O’Connor, J., dissenting).

280. *Roper v. Simmons*, 125 S. Ct. 1183, 1197 (2005).

offender merits the death penalty.”²⁸¹ What this quote makes clear is that the Court is not deferring to state legislatures, as it claims, but rather it is imposing its judgment in lieu of state judgments as to what assessments jurors are capable of making and what culpability juveniles may possess. Even if the Court is correct that jurors are incapable of such assessments, this finding cannot be justified under the rubric of deference to state legislatures.

If the Court is correct that jurors are incapable of assessing whether the death penalty may be applicable to juveniles and other categories of defendant, then looking to how often juries apply the death penalty is entirely illogical. As well as returning us to the argument that the Court is providing Eighth Amendment protection where it is least needed, the Court has also been highly selective in the evidence it favors. If jury judgments are relevant when juries find execution is not appropriate, then jury findings that execution is appropriate must be equally relevant. The Court cannot have it both ways, at least not if it is claiming that its decisions are based on generalizable principles.

The other reason that using rare jury sentencing to establish a national consensus is flawed in its conception is that such reasoning misunderstands the functioning of deterrence. If the criminal justice system works on deterrence, it should be preventing people from committing the sort of crimes for which the death penalty is applicable. The rare use of the death penalty is not evidence that it is not effective; indeed the death penalty could conceivably *never* be exercised and nevertheless be effective, as long as it remained a credible threat.

The facts of *Roper* should have reminded the Court of the nature of deterrence. The defendant Simmons considered, and in fact bragged to others, about the lack of sanctions he could expect as a result of his juvenile status.²⁸² Simmons’ expectation was inaccurate—he believed that he could “get away with it” altogether because he was a juvenile.²⁸³ Nevertheless this incorrect expectation encouraged him to commit his crime. His expectation of leniency was incorrect in detail, but now as a result of the Supreme Court’s action in his case, Simmons’ foolish belief has been substantially vindicated.

The Court’s reliance on jury findings is also riddled with methodological errors. First, the Court regularly relies on incomplete

281. *Id.*

282. *Id.* at 1187.

283. *Id.*

data.²⁸⁴ For instance, in *Enmund*, the majority pointed out that of 739 inmates sentenced to death for homicide at the time of the Supreme Court's ruling, only forty-one did not participate in the fatal assault, of whom only sixteen were not physically present at the time of the assault, and only three had not solicited or hired a killer.²⁸⁵ But, as Justice O'Connor pointed out in her dissent, the statistics relied upon do not establish the "fraction of homicides that were charged as felony murders, or the number or fraction of cases in which the State sought the death penalty for an accomplice guilty of felony murder," and so it is impossible to know the fraction of cases where juries *rejected* the death penalty for accomplice felony murder.²⁸⁶ So the Court made the basic social science error of "selecting on the dependent variable": looking only at one side of the equation—cases where the death penalty has been imposed—and not looking at what proportion those cases make up of all cases where the death penalty is available. This can result in wildly under- or over-inflated results.

The Court in *Enmund* responded to Justice O'Connor's criticism by arguing "it would be relevant if prosecutors rarely sought the death penalty for accomplice felony murder, for it would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive for accomplice felony murder."²⁸⁷ So, it seems the Court was suggesting that entirely opposing facts can both support the same conclusion. If the evidence showed that prosecutors were seeking the death penalty regularly, and juries were applying it only rarely, then in the Court's view this would constitute proof not of jurors' considered application of the various levels of punishment available to them, but of a national consensus against the death penalty on the part of juries. On the other hand, if prosecutors seldom seek the death penalty, this would be taken by the Court not as evidence of the considered exercise of prosecutorial discretion—saving the death penalty only for the most heinous cases—but as indicating a national consensus against the death penalty, this time among prosecutors. Such reasoning makes a farce of the practice of adducing evidence and shows why the "objective factors" the Court relied on are just as open to judgment as any other.

284. See also the exchange on this matter between the plurality in *Thompson v. Oklahoma*, 487 U.S. 815, 833 (1988) and Justice Scalia, *id.* at 869–70 (Scalia, J., dissenting).

285. *Enmund*, 458 U.S. at 795.

286. *Id.* at 818–19 (O'Connor, J., dissenting).

287. *Id.* at 796 (majority opinion).

Of course, if juries were imposing the death penalty in almost all cases where the option was available, the Court may well conclude that a consensus exists in favor of using the death penalty. But, it could equally take this as evidence that juries could not use their proper judgment, as such imposition would approach unconstitutional mandatory punishment. The level of jury-imposed executions that would satisfy the Court as not too much, but not too little, has yet to be clarified.

These errors have not been avoided by the Court in more recent cases. As Justice Scalia pointed out in *Atkins* and *Roper*, the Court's evidence of infrequent execution of juveniles and the mentally retarded does not prove a lack of consensus for a number of reasons. The death penalty may be used infrequently because few capital crimes are committed by juveniles or the mentally retarded, and/or because juries are required to consider such factors as mitigating.²⁸⁸

The final problem of the Court's reliance on the rare imposition of the death penalty is that, even accepting the meaningfulness of such data, this evidence tells us little about which execution categories are contrary to a national consensus, and which are simply uncommon for other reasons. In *Thompson*, Justice Scalia made the rhetorical point that one could use similar statistical arguments in relation to other classes of defendants, and cited the fact that women are very rarely executed.²⁸⁹ Between 1930 and 1955, only thirty women were executed; none were executed between 1962 and 1984.²⁹⁰ As the preceding analysis of *Enmund* illustrated, if you slice categories enough ways, there will seldom be many instances in any one category. As such, the Court's reliance on the rare use of execution tells us little about which categories of defendants or modes of execution are cruel and unusual.

288. *Roper*, 125 S. Ct. at 1221 (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 346–47 (2002) (Scalia, J., dissenting). Justice Scalia also questioned the facts relied on by the majority, presenting data suggesting that execution of juveniles may be increasing. *Roper*, 125 S. Ct. at 1221 (Scalia, J., dissenting). Justice Scalia also made this argument in *Stanford*, stating that “it is not only possible, but overwhelmingly probable, that the very considerations which induce petitioners and their supporters to believe that death should never be imposed on offenders under eighteen cause prosecutors and juries to believe that it should rarely be imposed.” *Stanford v. Kentucky*, 492 U.S. 361, 374 (1989), *abrogated by Roper*, 125 S. Ct. 1183.

289. *Thompson*, 487 U.S. at 871 (Scalia, J., dissenting).

290. *Id.* See also Janice L. Kopec, *Avoiding a Death Sentence in the American Legal System: Get a Woman to Do It*, 15 CAP. DEF. J. 353, 354 (2003) (noting that although “[t]housands of men have been executed in the last one hundred years . . . only forty-nine women have suffered the same fate.”).

As with the other allegedly objective legislative factors the Supreme Court relies on, the Court's reliance on rare jury determinations that death is appropriate has been shown in application to be highly subjective. This is not a problem simply with the Court's application, though the Court could certainly insist on more comprehensive and scientific evidence from petitioners before supporting their claims. Rather, the problem lies in the concept itself: the rare imposition of the death penalty on any group shows not that the group should be specially protected; instead it shows that, for that group of individuals, the system is working adequately. The Court should be much more concerned with groups, particularly racial groups, for whom imposition of the death penalty is exceptionally frequent.²⁹¹

H. The Resulting Methodological Quagmire

Ultimately, all of these methodological problems make the use of state legislation at least as subjective as other Eighth Amendment doctrines. The Supreme Court cannot even agree on how to characterize, group or count states; and even when the states are counted, the Justices cannot say what threshold needs to be met to constitute an evolving consensus. The more recent additional evidence makes the process not simply unclear but positively illogical. Although the Justices claim they are looking to objective criteria in state legislation, it is hard to avoid the conclusion that trends in state legislation are simply being used to add a gloss of respectability to the Justices' constitutional entrenchment of their own preferences.

This accusation could be rebutted by evidence that the Justices sometimes rule against their own preferences on the basis of the state legislative evidence they find. In all of the cases where the Supreme Court has considered the unconstitutionality of any death penalty category on the basis of evidence of state legislation, the only Justice who has ever switched votes on any issue is Justice O'Connor. Justice O'Connor wrote the majority opinion that denied the unconstitutionality of the execution of mentally retarded defendants in *Penry*,²⁹² but then joined the majority making the opposite ruling in

291. See generally *McCleskey v. Kemp*, 481 U.S. 279, 338 (1987) (Brennan, J., dissenting) (noting "striking evidence that the odds of being sentenced to death are significantly greater than average if a defendant is black . . . [thus,] the Court cannot rely on the [state's] statutory safeguards in discounting . . . [such] evidence, for it is the very effectiveness of those safeguards that such evidence calls into question").

292. See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

Atkins.²⁹³ But even this example does not rebut the argument, for in *Roper*, Justice O'Connor undermined the impression that her change of heart in *Atkins* was a result of an objective weighing of the evidence.²⁹⁴ In *Roper*, Justice O'Connor stressed that the decisive factor in *Atkins* was the question of proportionality, not state legislative trends.²⁹⁵ She stated:

In my view, the objective evidence of national consensus, standing alone, was insufficient to dictate the Court's holding in *Atkins*. Rather, the compelling moral proportionality argument against capital punishment of mentally retarded offenders played a *decisive* role in persuading the Court that the practice was inconsistent with the Eighth Amendment.²⁹⁶

As such, this one apparent exception to the Justices unwillingness to change their factual readings of a given consensus as evidenced by state legislative trends was actually determined by a change in opinion on culpability and proportionality of the mode of execution, and was not a change resulting from the new state legislation.

It may be a coincidence that all of the findings that rely on state legislative trends correlate with the Justices' view of fairness, culpability and the purpose of penal punishment. But the Justices have made themselves vulnerable to such accusations by their use of state legislation. Even if the Court sees different implications for federalism, its evidentiary bumbblings are so counter to accepted social science methods of factual determination that its examination of state legislation is at best pointless.

The Court is not unaware of the dangers of relying on unrigorous empirical evidence. Chief Justice Rehnquist criticized the Court's "blind-faith credence" accorded to opinion polls in *Atkins*.²⁹⁷ He rightly pointed out some of the methodological weaknesses of that data, including variation in the questions used, which makes comparison of results unreliable, and the lack of reporting of sampling sizes or errors sizes.²⁹⁸ Nevertheless Chief Justice Rehnquist

293. See *Atkins*, 536 U.S. at 321.

294. See *Roper v. Simmons*, 125 S. Ct. 1183, 1212 (O'Connor, J., dissenting).

295. *Id.*

296. *Id.*

297. *Atkins*, 536 U.S. at 326 (Rehnquist, C.J., dissenting) ("An extensive body of social science literature describes how methodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results.")

298. *Id.* at 326-27.

never undertook a similar critique of the use of state legislation, and was one of its strongest proponents.²⁹⁹ If he had engaged in such a critique, he would no doubt have recognized the many methodological flaws in the Court's analysis of that evidence.

IV. CREATING A MONSTER: THE RESULTING DIFFICULTIES FOR THE SUPREME COURT, LOWER COURTS, LEGISLATURES AND LITIGANTS

The criticisms made in this Article, that the use of state legislation to establish evolving standards is contrary to federalism and is so indeterminate as to be entirely subjective, are not merely theoretical evaluations that the practice is unprincipled or critiques of past practice. The essential problem is that although the Court may act as if it is an independent arbitrator, its actions actually affect the very national consensus in each case that it is attempting to ascertain and reflect. The "law and norms" literature has well established that judicial actions can alter the norms that courts often try to represent.³⁰⁰ There are two key problems. First, judicial action can alter incentives; even prohibiting actions that never or seldom occur can alter people's behavior.³⁰¹ Second, even laws that are specifically constructed with an eye to mirroring a pre-existing norm or consensus can adversely affect those customs and views.³⁰² In attempting to ascertain public opinion through state legislation, the Court is altering the facts on which it relies.

This Part shows that the use of state legislation creates numerous difficulties for legislatures, litigants, state and lower courts, and even for the Supreme Court itself. Supreme Court use of state legislation directly alters state legislatures' incentives because legislatures create evidence for future potential Court determinations in the form of additional legislation. The Court's determinations have created perverse incentives for litigants, by both removing some of the

299. See *supra* note 8 and accompanying text.

300. See Paul Mahoney & Chris Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027, 2058–60 (2001) (comparing the relative effectiveness of legal punishment and compensation in manipulating norms and associated behavior).

301. See generally DOUGLAS BAIRD ET AL., *GAME THEORY AND THE LAW* (1994) (providing game theoretic accounts of legal dilemmas).

302. See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1768–69 (1996) (studying the application of merchant law to merchant norms, Bernstein empirically established that courts' attempts to discover and apply prior business norms fundamentally altered the reality that the judges sought to reflect).

deterrence from committing crimes and by giving litigants incentives to claim that they fit within protected categories, for example by feigning mental retardation. State and lower courts have difficulty applying the state legislation doctrine because of its lack of clarity.³⁰³ Aside from this, these courts face a “Catch-22” because applying the state legislation doctrine often involves ignoring Supreme Court precedent, as those precedents are conditioned on factual findings that do not remain accurate.³⁰⁴ Finally, the Supreme Court itself faces problems in applying its own decisions. The borderline cases that result from the lack of a clear standard as to how many states constitute a consensus have subsequently been relied on to justify other questionable results.³⁰⁵ As such, the weakest Supreme Court arguments are self-perpetuating.

A. Legislatures

Legislatures are affected by Supreme Court decisions restricting the death penalty, and so state legislatures can be expected to adapt their behavior in response to Court action. This is particularly problematic for the doctrine of looking to state legislation for evolving standards because Supreme Court decisions affect the primary evidence upon which they base their decisions—state legislation.

The problem is that state legislatures can be expected to anticipate future challenges to death penalty legislation and legislate accordingly. It is now well understood that the Supreme Court’s actions can affect public opinion.³⁰⁶ After *Furman v. Georgia*³⁰⁷ questioned whether the death penalty is constitutional,³⁰⁸ thirty-five states immediately reinstated the death penalty.³⁰⁹ This action

303. See *infra* Part IV.C.

304. See *infra* note 324 and accompanying text.

305. See *infra* note 334 and accompanying text.

306. See, e.g., Craig Haney, *Epilogue: Evolving Standards and the Capital Jury*, 8 LAW & HUM. BEHAV. 153, 154–57 (1984) (describing how jury determinations are also influenced by Supreme Court decisionmaking); Craig Haney et al., “Modern” Death Qualification: New Data on Its Biasing Effects, 18 LAW & HUM. BEHAV. 619, 631 (1994) (same). For instance, the Supreme Court determined that people must be excluded from juries for their anti-death-penalty attitudes. As a result, juries imposed the death penalty more often. These results were then taken to indicate increased public support for the death penalty, and as a result people who are more moderately opposed to the death penalty were seen as against public opinion. Thus, it was argued that these people should also be excluded from juries. *Id.*

307. 408 U.S. 238 (1972).

308. *Id.* at 239.

309. *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976).

“heavily influenced the Court to sustain the death penalty” in *Gregg v. Georgia*.³¹⁰ But significant uncertainty still existed as to the general validity of death penalty statutes, and, as such, Chief Justice Burger argued in *Coker*, decided one year after *Gregg*, that a failure of most states to enact death penalty legislation for rape “may thus reflect hasty legislative compromise occasioned by time pressures following *Furman*, a desire to wait on the experience of those States which did enact such statutes, or simply an accurate forecast of today’s holding.”³¹¹

Coker provided an illustration of the dangers of courts using evidence that states have not legislated on a topic; *Roper* provides an illustration of the danger when states have legislated on a topic. As discussed, the challenge to juvenile execution was widely anticipated following the *Atkins* decision and subsequent decisions.³¹² For example, in 2003, one author noted the anticipation of juveniles being the next exempt class: “The *Atkins* case is destined to be a precedent setting case The classification ruling has already begun to affect another class of offenders: juveniles. This year, at least twelve state legislatures will consider abolishing the execution of juveniles.”³¹³ That is all very well when legislatures seek to support the potential consensus, but when they oppose it, the Court may run into difficulty.

310. *Coker v. Georgia*, 433 U.S. 584, 594 (1977).

311. *Id.* at 614 (Burger, C.J., dissenting).

312. In *Atkins*, Justice Stevens discussed the similarities and differences between executing juveniles and executing the mentally retarded. *Atkins v. Virginia*, 536 U.S. 304, 315 n.18 (2002). Two months later, when the Supreme Court rejected an application for a stay of execution by a juvenile defendant, Justice Stevens issued what was considered an unusually forthright public statement. *Patterson v. Texas*, 536 U.S. 984, 984 (2002) (Stevens, J., dissenting on denial of cert.). Referring to *Atkins*, Justice Stevens wrote that “[s]ince that opinion was written, the issue has been the subject of further debate Given the apparent consensus that exists . . . I think it would be appropriate for the Court to revisit the issue at the earliest opportunity.” *Id.* Justice Ginsburg, with whom Justice Breyer joined, made a similar statement and joined Justice Stevens. *Id.* at 985 (Ginsburg, J., dissenting). Two months later, the Court denied a writ of habeas corpus for a juvenile offender facing the death penalty. *In re Stanford*, 537 U.S. 968, 968 (2002). This failure was unsurprising, given that *Stanford* arose from original jurisdiction, under which cases seldom succeed. Despite the failure of the second attempt, this case was encouraging to death penalty opponents because Justice Souter also joined Justice Stevens’s dissent, which explicitly called for an end to that “shameful practice.” *Id.* at 968 (Stevens, J., dissenting). The natural analogy of the logic in *Atkins* to juveniles was such that the Missouri Supreme Court applied *Atkins* and found that similar changes have occurred among the states regarding the imposition of the death penalty for juveniles and so ruled that juvenile execution was unconstitutional. See *Simmons v. Roper*, 112 S.W.3d 397, 399–400 (Mo. 2003), *aff’d*, 125 S. Ct. 1183 (2005).

313. Tiffany A. Mann, *The Supreme Court Exempts Another Class from the Death Penalty: Mentally Retarded Offenders—Atkins v. Virginia*, 4 LOY. J. PUB. INT. L. 77, 94 (2003).

When legislatures oppose the Supreme Court's direction of death penalty cases, two problems arise. The first is that state legislatures will have an incentive to attempt to anticipate every potentially exemptible category. This may not be feasible because of the high cost of legislation, but it could result in a frenzy of ill-considered legislation that may well harm the interests of more criminal defendants than the practice the Supreme Court originally sought to prevent. The second problem is similar, but one of degree rather than quantity: the Supreme Court's action may induce legislators to introduce highly punitive legislation in order to provide evidence to contradict the posited anti-death penalty consensus.

Ironically, both of these possibilities mean that the anti-death penalty actions of Supreme Court Justices could result in higher rates of death penalty legislation and executions, as states protect their policymaking powers. Thus the feedback effects between courts and legislatures makes judicial reliance on state legislation subjective and its effects unpredictable.

B. Litigants

The Court's effect on litigant incentives is the most straightforward. As discussed earlier, Simmons's behavior illustrates the fact that legal rules structure the incentives and therefore the behavior of potential offenders.³¹⁴ This unintended undermining of deterrence will only be increased by the Court's decision to exempt juveniles from the death penalty. As with the mentally retarded, Justice Stevens asserted in *Atkins* that mere exemption would not undermine the deterrent effect of the death penalty, because the mentally retarded are typically unable to form the requisite intent for premeditation, and the non-mentally retarded will in no way be affected.³¹⁵ Putting aside the accuracy of the first factual claim, there was already reason to question the accuracy of the second claim by the time Justice Stevens wrote it. As Justice Scalia pointed out in his dissent in that case, the rate of claims of mental retardation had already skyrocketed while the case was pending.³¹⁶

314. See *supra* notes 282–83 and accompanying text.

315. *Atkins*, 536 U.S. at 320.

316. *Id.* at 353–54 (Scalia, J., dissenting). Mental retardation cannot be reliably proved or disproved, as *Atkins*'s fate proved. Despite winning in the Supreme Court, a jury found that *Atkins* is not mentally retarded, as he scored over seventy on some of the more recent IQ tests he took. Adding a further twist to this discussion of Court-created evidence, *Atkins*'s lawyers argued that his higher scores were an effect of the trial itself, which provided such stimulation as to increase *Atkins*'s testable IQ. See Harry Mount, *Murderer*

As such, we can expect that exempting defendants from indeterminate categories, such as mental retardation or religious belief,³¹⁷ will encourage the falsification of claims that litigants fall within that category. Exempting defendants from categories that are not malleable, such as minimum ages, will not encourage ex post claims, but will affect these defendants' ex ante incentives in the commission of crimes.³¹⁸ These two effects may not ultimately provide adequate reasons to avoid creating constitutional prohibitions, but they do constitute effects that the Court should at least acknowledge in making their findings, and they also contribute an additional methodological problem to the already confused determination of national consensus.

C. *Lower Courts and State Courts*

The indeterminacy of the state legislation doctrine makes its application by state courts and lower courts difficult. State courts have applied the doctrine in two ways: looking to their own state legislature, and looking to the actions of other states. Both of these applications are problematic.

Citing *Atkins*'s claim that state legislation constitutes the clearest and most reliable objective evidence of contemporary values, the Supreme Court of New Jersey concluded that, analogously, it should defer to its own legislature "[u]nless rebutted by other similarly reliable evidence of community standards."³¹⁹ The court found that its state legislature had done nothing to rescind the death penalty and had even shown signs of supporting it.³²⁰ This may follow logically from the U.S. Supreme Court's own use of state legislation, but it results in the illogical outcome of a state court determining whether a

Declared Intelligent Enough for Death Row, DAILY TELEGRAPH (London), Aug. 6, 2005, available at 2005 WL 12387623.

317. This argument is demonstrated in the case of Karla Faye Tucker, a white woman who found Christianity and gained national attention. The attention given to this case stood in contrast to the numerous black men on death row for whom finding Islam warrants little publicity or talk of commutation. See, e.g., *Robertson, Bush, Religious Right in Death Penalty Miasma*, AM. ATHEIST, Jan. 8, 1998, <http://www.americanatheist.org/forum/robtuck2.html> (discussing the argument that defendants who find religion after their incarceration should consequently be exempted from the death penalty).

318. A recent study has shown that deterrents do reduce the probability that juveniles will commit crimes and rebuts the claim that "at-risk young Americans are so present-oriented that they do not respond to incentives and sanctions." H. Naci Mocan & Daniel I. Rees, *Economic Conditions, Deterrence and Juvenile Crime: Evidence from Micro Data*, 7 AM. L. & ECON. REV. 319, 344 (2005).

319. *State v. Josephs*, 803 A.2d 1074, 1130–31 (N.J. 2002).

320. *Id.* at 1131.

state legislative death penalty scheme is unconstitutional by looking to whether the same legislature that passed the scheme has since rescinded it, which by definition it has not.

But state courts attempting to follow the Supreme Court's state legislation doctrine by looking to the legislation of other states does not produce a much better result. The New Jersey Supreme Court also undertook this analysis, and noted that since thirty-eight other states then had death penalty legislation, this "supplies objective evidence in support of the view that the death penalty does not offend current standards of decency."³²¹ However, the Court did not explain why the actions of other states are relevant at the state level. Surely it is the state level consensus that is relevant to state constitutional interpretation. This compounds the Supreme Court's mistake in transforming the relevant consensus from state opinions to national opinions, aggregated by state.

An additional problem when states consider the position of other states is that Supreme Court precedent becomes impotent. In *Roper*, Justice O'Connor complained that the majority did not even reprove the Missouri Supreme Court for its "unabashed refusal" to follow *Stanford*, which was clear and recent authority on the execution of juveniles.³²² But this is the unavoidable effect of the Court's reliance on state legislation to assess a national consensus (which Justice O'Connor approves of in principle)³²³ because state legislation changes.³²⁴ This willingness to ignore Supreme Court precedent is illustrated by the dissent in *Josephs*: "I remain mystified by the Court's resistance to revisiting a fifteen-year-old opinion that, by its very terms, was rooted in conclusions about the public's appetite for the death penalty that appear to have changed."³²⁵ It is unclear when the facts that determined the previous Supreme Court precedent on

321. *Id.*

322. *Roper v. Simmons*, 125 S. Ct. 1183, 1209 (2005) (O'Connor, J., dissenting).

323. *See id.* at 1206-07 ("Let me begin by making clear that I agree with much of the Court's description of the general principles that guide our Eighth Amendment jurisprudence Laws enacted by the Nation's legislatures provide the 'clearest and most reliable objective evidence of contemporary values.'" (citing *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989))).

324. *See, e.g., Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996) (holding that a factual inquiry was sufficient to override an earlier argument based on previous legislative trends), *vacated*, 519 U.S. 918 (1996), *remanded to* 147 F.3d 1158 (9th Cir. 1998); *see also* Recent Case, *Constitutional Law—Eighth Amendment—Ninth Circuit Holds California's Lethal Gas Method of Execution Unconstitutional—Fierro v. Gomez*, 110 HARV. L. REV. 971, 971-72 (1997) (same).

325. *State v. Josephs*, 803 A.2d 1074, 1146 (N.J. 2002) (Long, J., concurring in part and dissenting in part).

an issue have changed enough to merit judicial reassessment. *Atkins* and *Roper* followed only thirteen and fifteen years respectively from *Stanford* and *Penry*, and in the case of *Roper*, only five states had changed their laws.³²⁶

One response to this dilemma might be that these matters should only be determined by the Supreme Court. Yet, state courts are certainly in a better position to make the fact-intensive evidentiary determinations involved in ascertaining the intent behind state legislation.³²⁷ There does not seem to be an easy solution to the problem that state courts cannot apply the state legislation doctrine without disrespecting Supreme Court authority, or for the doctrinal confusion that courts seem to be encountering, even when genuinely attempting to follow Supreme Court precedent.

D. *The Supreme Court*

In addition to the many methodological problems involved in making initial determinations based on state legislative evidence of national consensus, as outlined in Part III, the Supreme Court faces an insurmountable difficulty in drawing principles and analogies from those cases to apply itself in future cases. Not only are judicial determinations based on legislative evidence of national views questionable because the Court may have created its own evidence of a national consensus in the first place, but these determinations place the Court in danger of perpetuating its errors when it revisits the issue.

As previously discussed, the Supreme Court has not set a clear standard as to how many states are necessary in order to constitute a consensus. In *Atkins*, less than the majority was sufficient,³²⁸ and in *Enmund* a consensus was found despite the fact that one-third of states allowed felony murder executions in the absence of intent.³²⁹ These cases raise problems of whether these low numbers can really be counted as a “consensus” and the uncertainty created by a lack of a clear standard. Additionally, borderline decisions such as these not only result in dubious decisions in the case, but their very borderline

326. *Roper*, 125 S. Ct. at 1193.

327. See, e.g., Recent Case, *supra* note 324, at 973–74 (describing some of the “fact-intensive analysis” involved in evaluating whether the “infliction of pain” analysis is satisfied, which would render the use of lethal gas execution unconstitutional); see also Recent Case, *supra* note 44, at 2456 (discussing whether a Supreme Court determination “remains binding when the empirical conditions that informed the decision have changed”).

328. *Atkins v. Virginia*, 536 U.S. 304, 304 (2002).

329. *Enmund v. Florida*, 458 U.S. 782, 792–93 (1982).

nature is often then relied on in later cases to justify similarly questionable findings of the existence of another consensus.

For instance in *Coker*, only three states had legislation permitting execution for rape at the time of the decision,³³⁰ but this came so shortly after *Gregg* as to be highly questionable evidence of a consensus.³³¹ Looking historically, or even just in the twentieth century, execution for rape was commonly permitted.³³² Nevertheless, the Court found a consensus against it.³³³ In *Enmund*, the Supreme Court used the fact that execution for rape was relatively common compared to execution for felony murder to justify a consensus against the latter practice.³³⁴ The Court in *Enmund* used the dubious evidence in *Coker* to justify its borderline decision in the current case.

The Court played a similar game in *Roper*. The *Atkins* Court had used the fact that only two legislatures had raised the threshold age for imposition of the death penalty since *Penry* in order to differentiate mental retardation, for which sixteen states had changed their laws since *Stanford*, decided on the same day.³³⁵ Three years later, the same Court nevertheless found that there was a consensus against executing those under eighteen, and specifically drew an analogy between age and mental retardation, both in terms of culpability and state legislative evidence of a consensus.³³⁶ The Court not only based these cases on weak evidence, but paradoxically it used the weakness of that evidence to make auxiliary determinations, thus propagating its mistakes.

CONCLUSION

When *Roper* was handed down last term, it received enormous attention, sparking debates on the use of foreign law and the narrowing of the death penalty's applicability. However, there was almost no popular attention given to the dubious premise on which the case actually rested: the national consensus against executing

330. *Coker v. Georgia*, 433 U.S. 584, 594 (1977).

331. See *supra* notes 198–99 and accompanying text.

332. See, e.g., *Coker*, 433 U.S. at 614–15 (Burger, C.J., dissenting) (“Far more representative of societal mores of the 20th century is the accepted practice in a substantial number of jurisdictions preceding the *Furman* decision” of imposing the death penalty for rape).

333. *Id.* at 595–96 (plurality opinion).

334. *Enmund*, 458 U.S. at 794–95.

335. See *Atkins v. Virginia*, 536 U.S. 304, 316 n.18 (2002).

336. *Roper v. Simmons*, 125 S. Ct. 1183, 1192 (2005). Justice Scalia pointed out this inconsistency. *Id.* at 1218–19 (Scalia, J., dissenting).

juveniles that was alleged to have evolved, as evidenced by state legislative trends. It is too soon to assess the academic response to *Roper*, but of the hundreds of law reviews that cite *Atkins*,³³⁷ only a handful give even passing attention to the Court's reliance on state legislation. Yet this reliance has been shown to be contrary to fundamental notions of federalism, to be so indeterminate as to be highly subjective and open to manipulation, and to be impossible to apply in any principled way.

This Article has attempted to create the missing debate over the appropriateness of using state legislation to establish an evolving national consensus over whether types of execution, and the categories of defendant being subject to execution, are unconstitutional. To do so, this Article has critically examined the cases that use state legislation in this way, and applied the basic lessons of social science to assess the Court's empirical claims.

An examination of the case law reveals that the sum of the cases is worse than their individual flaws. Individually, the cases make unsubstantiated assertions of fact, apply makeshift rules and consistently reach findings compatible with each Justice's acknowledged views of the defendants' culpability and the proportionality of the various punishments. But when these cases are comprehensively examined as a whole, it becomes apparent that the Supreme Court Justices are changing the rules in each case to fit the facts: state legislation is characterized, grouped and counted in ways that are entirely contrary to precedent. Beyond the sheer numbers of states, other aspects of legislation are relied on selectively, resulting in unpredictable and unprincipled decisions.

The use of state legislation has been shown to be flawed in both its conception and practice, and consequently it should be explicitly rejected by the Court. Of course, such an action would leave a void in cruel and unusual punishment jurisprudence. This Article has not specified which doctrine should replace the use of state legislation, but all of the options available to the Court would be preferable to using state legislation. Traditional notions of culpability and proportionality are, as the Court has often noted, influenced by the subjective judgment of the Justices, and others have made similar arguments regarding originalism.³³⁸ However, the use of state

337. As of January 1, 2006, a Shephardized LexisNexis search found 664 law review articles, of which only three meaningfully addressed the use of state legislation.

338. See, e.g., STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 329–30, 358–59 (1989) (noting that originalism does not constrain interpretation, because the

legislation is far more subjective, and the harm of this subjectivity is exacerbated by the Court's pretense that it is objective.

The Court is dabbling in social science, but doing so using incomplete evidence that is selectively chosen, and making inferences that the data often does not support. The Court is experienced in dealing with traditional concepts such as culpability, proportionality, and original intent, whereas the Court's haphazard experimentation with social science has led to highly misleading conclusions. The doctrine of using state legislation to establish a national consensus should be disavowed by the Court because it is flawed in its basic premise. However, if the Supreme Court insists on continuing to use such evidence, it must begin to do so in a principled and unbiased way. To do that requires far more rigorous social science methodology than the Court has yet displayed. The Supreme Court cannot be expected to hire a team of social scientists; its only choice if it wishes to proceed with a rigorous use of state legislation is to refuse to make findings based on flimsy evidence. This will put the onus on litigants and their advocates to provide the Court with more reliable and objective evidence.

Such an approach will necessarily slow down the process of recognizing categorical limits on the application of the death penalty. But even those who support the recent death penalty developments on their substance should recognize that such a change is appropriate on principles of constitutional interpretation. Six categorical restrictions have been placed on state legislatures in less than thirty years since *Gregg v. Georgia* determined that the death penalty was constitutional. In each of these decisions, the Supreme Court paid lip-service to giving deference to state legislatures. It is time to start practicing that deference and stop the rushed evolution of constitutional interpretation.

Framers' intentions are not "self-declaring," but instead must be constructed from evidence that is ambiguous and requires interpretation); see also Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1434 (2003) (discussing the difficulties of objectively determining the intent of a collective due to the dominance of outlying voices).