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WHAT WOULD DARWIN SAY?: THE MIS-EVOLUTION OF THE EIGHTH AMENDMENT

Michael J. O'Connor*

Charles Darwin created the theory of evolution, which states that species evolve over time, and the strongest within each species survive and continue the evolution of the species while the rest are killed off—or something like that.¹ Had Darwin been a lawyer instead of a scientist, his theory might have gone something like this: law evolves over time, and the best judicial decisions survive and become part of the precedent on which the future of the law is built while the rest are overruled, forgotten, or killed off—or something like that. Assuming that this theory roughly describes the system of stare decisis in the American legal system, it is a wonder that the Supreme Court’s Eighth Amendment jurisprudence has reached its current state. It should have been overruled or forgotten a long time ago so that it could evolve into a stronger species. Yet the Court’s Eighth Amendment jurisprudence continues to live and evolve, defying the law of natural selection. As a result, a new Eighth Amendment, with a questionable history, was born in the Court’s recent decision in Atkins v. Virginia.²

In Atkins, the Supreme Court categorically exempted the mentally retarded from the death penalty, holding that executions of the mentally retarded are cruel and unusual punishments in violation of the Eighth Amendment.³ More precisely, the Court held that capital punishment is ipso facto a disproportionate punishment for any of-

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¹ This Note does not purport to describe accurately Darwin’s theory for scientific purposes.
² 122 S. Ct. 2242 (2002).
³ Id. at 2251–52. The Eighth Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.
fense committed by one who is mentally retarded. In reaching its
decision, the majority, in an opinion by Justice Stevens, rested its rea-
soning on too-often-accepted legal principles and questionable
“facts.”

According to Justice Stevens, a claim that a punishment is unconsti-
tutionally excessive is judged by “evolving standards of decency that
mark the progress of a maturing society.” Furthermore, the determi-
nation whether punishment in a particular case is unconstitutionally
excessive in light of evolving community standards should be in-
formed by objective factors to the maximum extent possible, with the
“clearest and most reliable” factor being “legislation enacted by the
country’s legislatures.” After setting forth this framework to govern
its analysis, the Court found a national consensus rejecting application
of the death penalty to the mentally retarded, based largely on the fact
that several states have recently enacted legislation to exempt the
mentally retarded from the death penalty.

Although the Atkins outcome is both laudable and altruistic, the
legal standard and methodology employed by the Court to achieve
that outcome are constitutionally suspect. Atkins, however, is not with-
out precedent; the Supreme Court has, in the past, applied similar
legal standards to the “cruel and unusual punishments” clause of the
Eighth Amendment. This Note contends that since 1958, the
Eighth Amendment has “mis-evolved” into the current species that
supports the Atkins decision. This Note traces that evolution and at-
ttempts to show where it went wrong.

This Note details the history and evolution of the Eighth Amend-
ment to show that the Court’s Eighth Amendment jurisprudence, re-
sulting in its decision in Atkins, is faithful neither to the Eighth
Amendment itself, the Constitution, notions of federalism, nor theo-
ries of legislation in a representative democracy. It is, however, faith-
ful to past decisions by pluralities of the Court. Specifically, Part I
challenges the notion that the Eighth Amendment must utilize as its

4 Atkins, 122 S. Ct. at 2252.
5 Id. at 2247 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).
6 Id. (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
7 Id. at 2248–50.
8 See, e.g., Penry, 492 U.S. at 340 (plurality opinion) (holding that the Eighth
Amendment does not prohibit capital punishment for the mentally retarded). The
Penry Court applied an identical legal standard, but reached a different outcome than
Atkins based on factual differences.
9 1958 marks the year that the Supreme Court decided Trop v. Dulles, 356 U.S. 86
(1958). For a discussion of Trop, see infra Part I.B.
10 See, e.g., Stanford v. Kentucky, 492 U.S. 361 (1989) (plurality opinion) (apply-
ing a legal framework similar to Atkins).
hallmark the "evolving standards of decency." Part I argues that the Court created this standard without adequately explaining its reasons for doing so. Part II challenges the notion that state legislation is the best objective indicator of society's evolving standards of decency, and concludes that this level of deference is inconsistent with precedent and considerations of federalism. Part II further concludes that a consensus among various states' legislation may not accurately reflect a national consensus, and, therefore, state legislation should be abandoned as the judicial measuring stick.

This Note does not advocate that the mentally retarded be subject to the death penalty. Rather, this Note utilizes the *Atkins* decision in an attempt to show the faulty reasoning behind the Court's legal analysis in the context of the Eighth Amendment. This Note traces the evolution of the "cruel and unusual punishments" clause in an effort to show where the Court lost its way. This Note does not contest the correctness of the final result in *Atkins*, only the methodology used to achieve that result.

I. EVOLVING STANDARDS OF DECENCY

A. The Origins of the Eighth Amendment's Ban on Cruel and Unusual Punishment

The popular history of the Eighth Amendment recites that the Amendment's prohibition on "cruel and unusual punishment" can be traced to the English Bill of Rights of 1689, and even back to the Magna Carta.\(^1\) In fact, the language of the Eighth Amendment is identical to that of the English Bill of Rights.\(^2\) Even though the clause itself came from the English Bill of Rights, from the beginning, the American version meant something different than did the English version.\(^3\) The English clause prohibited only those punishments that were disproportionate to the offense or were excessive.\(^4\)

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\(^{2}\) Granucci, supra note 11 at 840.

\(^{3}\) See id. at 847 ("It is indeed a paradox that the American colonists omitted a prohibition on excessive punishments and adopted instead the prohibition of cruel methods of punishment, which had never existed in English law.").

\(^{4}\) See id. at 860 ("The English evidence shows that the cruel and unusual punishments clause of the Bill of Rights of 1689 was . . . a reiteration of the English policy against disproportionate penalties.").
The American clause, however, originally prohibited only "tortuous or barbaric punishments." The clause was not intended by the Framers to prohibit excessive punishments. Rather, it was not until

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15 See id. at 842; cf. Harmelin, 501 U.S. at 1010 (White, J., dissenting) (citing Benjamin Oliver, The Rights of an American Citizen 185–86 (Philadelphia, P.H. Nicklin & T. Johnson 1832)). The citation stated,

No express restriction is laid in the constitution, upon the power of imprisoning for crimes. But, as it is forbidden to demand unreasonable bail, which merely exposes the individual concerned, to imprisonment in case he cannot procure it; as it is forbidden to impose unreasonable fines, on account of the difficulty the person fined would have of paying them, the default of which would be punished by imprisonment only, it would seem, that imprisonment for an unreasonable length of time, is also contrary to the spirit of the constitution. Thus in cases where the courts have a discretionary power to fine and imprison, shall it be supposed, that the power to fine is restrained, but the power to imprison is wholly unrestricted by it? In the absence of all express regulations on the subject, it would surely be absurd to imprison an individual for a term of years, for some inconsiderable offence, and consequently it would seem, that a law imposing so severe a punishment must be contrary to the intention of the framers of the constitution.

Id. (citing Oliver); see also Harmelin, 501 U.S. at 1011 (White, J., dissenting). Justice White stated,

Even if one were to accept the argument that the First Congress did not have in mind the proportionality issue, the evidence would hardly be strong enough to come close to proving an affirmative decision against the proportionality component. Had there been an intention to exclude it from the reach of the words that otherwise could reasonably be construed to include it, perhaps as plain-speaking Americans, the Members of the First Congress would have said so. And who can say with confidence what the members of the state ratifying conventions had in mind when they voted in favor of the Amendment?

Id. at 1011 (White, J., dissenting). After his discussion of history in Harmelin, Justice White turned to Supreme Court precedent to support his position that the Amendment was meant to prohibit more than merely barbaric punishments. Quoting Justice Field's dissent in O'Neil v. Vermont, 144 U.S. 323, 339–40 (1892) (Field, J., dissenting), Justice White wrote, "The inhibition [of the Cruel and Unusual Punishments Clause] was directed, not only against punishments which inflict torture, 'but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.'" Yet, examination of Justice Field's O'Neil opinion reveals that Justice Field cited no authority (historical or otherwise) for this proposition. Id. (Field, J., dissenting).

16 See Granucci, supra note 11, at 842 ("Expressions in the first congress confirm the view that the cruel and unusual punishments clause was directed at prohibiting certain methods of punishment."). Furthermore, "[f]ollowing adoption, state and federal jurists accepted the view that the clause prohibited certain methods of punishments. . . . Attempts to extend the meaning of the clause to cover any punishment disproportionate to the crime were rebuffed throughout the nineteenth century and commentators believed the clause to be obsolete." Id.
1892 that the Supreme Court first recognized the possibility that the Eighth Amendment could also contain a proportionality requirement. Thus, at its adoption, the Eighth Amendment prohibited only certain methods of punishment. Not long after its adoption, however, the Amendment was construed also to prohibit excessive punishments. Although the Atkins decision purports to outlaw execution of the mentally retarded based on proportionality, the following discussion must begin by addressing a case of the "method of punishment" genre.

B. The Appearance and Evolution of "Evolving Standards of Decency"—Misplaced Reliance on Trop v. Dulles

*Trop v. Dulles* is one of the most famous and most often cited cases dealing with the Eighth Amendment's ban on cruel and unusual punishment. Yet subsequent judicial reliance on Trop's lofty language is often misplaced. At issue in Trop was the constitutionality of a statute authorizing denationalization for desertion from the U.S. Army during a time of war. Chief Justice Warren, writing for himself and three other Justices, gave two alternative theories under which the statute authorizing denationalization was unconstitutional. First, the plurality held that the government did not have the power to divest a person of his citizenship. In so holding, the opinion stated, "[A]s

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17 See id. at 842-43 (discussing O'Neil, 144 U.S. at 323). In O'Neil, the defendant raised the issue that his punishment was "cruel and unusual" because of the disproportion between his crime and his punishment. See O'Neil, 144 U.S. at 331-32. The Court refused to address this argument. Id. The dissent, however, stated that "the whole inhibition [of the Eighth Amendment] is against that which is excessive." Id. at 842 (quoting O'Neil, 144 U.S. at 340 (Field, J., dissenting)).

18 Granucci, supra note 11, at 842.

19 See Weems v. United States, 217 U.S. 349, 357, 380-81 (1910) (holding that a sentence of fifteen years' imprisonment was cruel and unusual punishment for falsifying an official public document).

20 356 U.S. 86 (1958) (plurality opinion).

21 A KeyCite of Trop on Westlaw reveals well over 2000 citations. KeyCite of Trop, 356 U.S. at 86 (performed Feb. 27, 2003).


A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: . . . (g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military of naval forces . . .

Id.

23 Trop, 356 U.S. at 87-88.

24 Id. at 92-93.
long as a person does not voluntarily renounce or abandon his citizen-
ship, . . . his fundamental right of citizenship is secure. On this
ground alone the judgment in this case should be reversed." 25 Yet the
opinion went on to state a second reason why the denationalization
could not be upheld, and this second reason, which was no more than
dicta in the case, has found a home in Eighth Amendment jurisprudence.

The Court’s second basis for declaring the statute authorizing de-
nationalization unconstitutional was that the purpose of the statute
was punitive, and denationalization was “cruel and unusual punish-
ment” prohibited by the Eighth Amendment. 26 The opinion noted
that because desertion was punishable by death, denationalization was
not “excessive in relation to the gravity of the crime.” 27 Instead, the
question was “whether [denationalization] subjects the individual to a
fate forbidden by the principle of civilized treatment guaranteed by
the Eighth Amendment.” 28 In lofty, often-quoted language, the Court
reasoned, “[T]he basic concept underlying the Eighth Amendment is
nothing less than the dignity of man.” 29 It continued, “[T]he Amend-
ment must draw its meaning from the evolving standards of decency
that mark the progress of a maturing society.” 30 The opinion contin-
ued to extol the virtues of the Constitution, singing the praises of how
the Constitution trumps even the most well-reasoned statute, if that
statute is indeed unconstitutional. 31

In a concurring opinion, Justice Brennan argued that the power
to denationalize a citizen for wartime desertion was beyond Con-
gress’s power because there existed no rational relation between the
questioned statute and Congress’s war power. 32 The dissent, consist-

25 Id. at 93.
26 Id. at 99–103.
27 Id. at 99.
28 Id.
29 Id. at 100. Notably, the Court cited no precedent for this assertion. One
would expect the plurality, upon memorializing such a bold statement in the United
States Reporter, to at least cite debates about the purpose of the Amendment, The Federal-
alist, or some other authority to support its conclusion that the “basic concept under-
lying the Eighth Amendment” is indeed “the dignity of man.”
30 Id. at 101.
31 See id. at 103–04.
32 Id. at 114 (Brennan, J., concurring). Justice Brennan’s concurrence stated,

I therefore must conclude that § 401(g) is beyond the power of Con-
gress to enact. . . . But here, any substantial achievement, by this device, of
Congress’ legitimate purposes under the war power seems fairly remote. . . .
I can only conclude that the requisite rational relation between this statute
and the war power does not appear . . . .
ing of four Justices, argued that because death was a permissible punishment for wartime desertion, denationalization—which is surely less harsh than death—could not be prohibited by the Eighth Amendment.

And thus was born the notion that the Eighth Amendment's ban on cruel and unusual punishment utilized "evolving standards of decency that mark the progress of a maturing society" and that human dignity was the core value protected by the Amendment. These propositions recur throughout Eighth Amendment jurisprudence. Yet subsequent opinions seem to overlook the fact that the Court cited no authority to support this conclusion. Atkins and other opinions

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Id. (Brennan, J., concurring).
33 The dissent was authored by Justice Frankfurter and joined by Justices Burton, Clark, and Harlan. Id. (Frankfurter, J., dissenting).
34 Id. at 125 (Frankfurter, J., dissenting).
36 See supra, 356 U.S. at 100–01. The opinion stated,

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. Weems v. United States, 217 U.S. 349. The Court recognized in that case that the words of the Amendment are not precise, and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Id. Footnote 32 of the opinion stated,

Whether the word "unusual" has any qualitative meaning different from "cruel" is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. See Weems v. United States, supra; O'Neil v. Vermont, supra; Wilkerson v. Utah, supra. These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word "unusual." But cf. In re Kemmner, supra, [136 U.S. at 443]; United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 225 U.S. 407, 430 (Brandeis, J., dissenting). If the word "unusual" is to have any meaning apart from the word "cruel," however, the meaning should be the ordinary one, signifying something different from that which is generally done. Denationalization as a punishment
overlook the fact that the controlling opinion was that of a four-Justice plurality.\textsuperscript{37} Courts and commentators do not seem to be troubled by the fact that because Justice Brennan’s concurring opinion was much more narrow—in fact, it did not even address the Eighth Amendment\textsuperscript{38}—the quoted language was only dicta. And no one seems to care that the “evolving standards” principle finds little support in the history or text of the Amendment,\textsuperscript{39} and only tangential support in precedent. Instead, the Court has grasped this language and used it to shape Eighth Amendment jurisprudence over the last forty-plus years. This Note will now examine that jurisprudence, specifically as it relates to the death penalty and the evolving standards of decency.

\section*{C. Death Penalty Cases}

1. \textit{Furman v. Georgia}

In \textit{Furman v. Georgia},\textsuperscript{40} one of the first modern death penalty cases, the question before the Court was whether three death penalty sentences imposed by Georgia and Texas courts violated the Eighth Amendment’s ban on cruel and unusual punishment.\textsuperscript{41} In a highly fragmented per curiam opinion, five members of the Court held that the imposition of the death sentences violated the Eighth Amendment.\textsuperscript{42} Each of the five Justices wrote his own concurring opinion,\textsuperscript{43} two claiming that the Eighth Amendment prohibits capital punishment for all crimes.\textsuperscript{44} The other concurring Justices, however, in essence argued that the method in which the death penalty was applied violated the Amendment.\textsuperscript{45} In so doing, their argument was literally

\textit{Id.} at 100 n.32.

\textit{Id.} at 105-14 (Brennan, J., concurring).

\textit{Id.} at 86.

\textit{Id.} at 239.

\textit{Id.} at 239-40.

\textit{Id.} at 240.

\textit{Id.} at 305 (Brennan, J., concurring); \textit{Id.} at 370 (Marshall, J., concurring).

\textit{Id.} at 306 (Stewart, J., concurring); \textit{Id.} at 310-11 (White, J., concurring).
more of a procedural due process argument than an Eighth Amendment argument.46

2. Gregg v. Georgia

In Gregg v. Georgia,47 the Court addressed whether the punishment of death under Georgia law was an ipso facto violation of the Eighth Amendment.48 In another highly fragmented opinion, the Court concluded that the punishment of death for the crime of murder was not, in all circumstances, “cruel and unusual punishment.”49 The lead opinion was authored by Justice Stewart, and joined by Justices Powell and Stevens.50 Justice White, Chief Justice Burger, and Justice Rehnquist concurred,51 and Justice Blackmun concurred in a separate opinion.52

Justice Stewart began his analysis by noting that “the Court has not confined the prohibition embodied in the Eighth Amendment to ‘barbarous’ methods that were generally outlawed in the 18th century.”53 Rather, he wrote, “[T]he Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that ‘a principle, to be vital must be capable of wider application than the mischief which gave it birth.’”54 The Court continued, “[T]hus the Clause forbidding ‘cruel and unusual’ punishments ‘is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”55 The opinion then discussed Weems v. United States56 to show how the Amendment’s meaning changed

46 See id. at 399 (Burger, C.J., dissenting). Chief Justice Burger wrote,

The Eighth Amendment was included in the Bill or Rights to assure that certain types of punishments would never be imposed, not to channelize the sentencing process. The approach of these concurring opinions has no antecedent in the Eighth Amendment cases. It is essentially and exclusively a procedural due process argument.

Id. (Burger, C.J., dissenting); see also id. at 399 n.28 (Burger, C.J., dissenting) (asserting that Justice White appeared to be “more concerned with a regularized sentencing process”).


48 Id. at 158.

49 Id. at 168–87.

50 Id. at 158.

51 Id. at 207 (White, J., concurring, with Burger, C.J., & Rehnquist, J., joining).

52 Id. at 227 (Blackmun, J., concurring).

53 Id. at 171.

54 Id. (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

55 Id. (quoting Weems, 217 U.S. at 378).

56 217 U.S. at 373 (holding that a sentence of fifteen years imprisonment was cruel and unusual punishment for falsifying an official public document).
from prohibiting only certain forms of punishment to prohibiting disproportionate punishment. The opinion next undertook a brief discussion of *Trop*, and reached the conclusion that “[i]t is clear from the foregoing precedents that the Eighth Amendment has not been regarded as a static concept.” It then dropped the famous line from *Trop* that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Hence, after *Gregg*, the Eighth Amendment required (1) that punishment not be barbaric or torturous in its methods, (2) that it not involve the “unnecessary and wanton infliction of pain,” and (3) that punishment “must not be grossly out of proportion to the severity of the crime.”

The Court’s conclusion, however, was not fairly based on the cases that it cited for support. *Trop* aside, the opinion cited cases that stand for the proposition that the Amendment requires proportionality. It then grabbed hold of *Trop*'s famous dicta that states that the concepts of barbarous punishments and proportionality must change with time, as society matures. In essence, the Court cited cases to show how the Amendment has changed in one way since its inclusion in the Bill of Rights—the Amendment now also prohibits disproportionate punishments—and then assumed that the Amendment must also evolve in other ways, to utilize as its basis evolving standards of decency. It is a logical fallacy to conclude that because the Amendment has changed in one way (it now includes proportionality review), it must also change to include society’s evolving preferences. The Court laid the foundation for one argument and then substituted a different conclusion, albeit one that used similar diction. The reader is left believing that he has just been persuaded that the Eighth Amendment must utilize an evolving standard of decency.

3. *Coker v. Georgia*

The Court applied the *Gregg* “test” only a year later when it decided *Coker v. Georgia*. At issue in *Coker* was whether the Eighth Amendment prohibited capital punishment for the crime of rape of

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58 Id. at 172–73.
59 Id. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).
60 Id. at 170.
61 Id. at 168–73.
62 See id. (emphasis added).
63 See supra notes 53–59 and accompanying text.
64 433 U.S. 584 (1977) (plurality opinion).
an adult woman. In yet another fragmented opinion, the Court held that capital punishment for the crime of rape of an adult woman was "grossly disproportionate and excessive punishment" forbidden by the Eighth Amendment. Coker was the "first modern decision in which the Supreme Court . . . relied on disproportionality to invalidate a punishment under the cruel and unusual punishments clause." As part of its reasoning, the Court noted, "In sustaining the imposition of the death penalty in Gregg . . . the Court firmly embraced the holdings and dicta from prior cases [including Furman, Trop, and Weems], to the effect that the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed." The Court continued, "Under Gregg, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." The Court then analyzed the individual states' rape statutes and found that all but three states did not allow capital punishment for the crime of rape of an adult woman. Based largely on this analysis, the Court concluded that capital punishment was an impermissible punishment for the rape of an adult woman.

4. *Harmelin v. Michigan*

In *Harmelin v. Michigan*, some members of the Court attempted to retreat from—or limit—the evolving standards of decency and proportionality approach to the Eighth Amendment. In *Harmelin*, the Court decided whether a mandatory sentence of life imprisonment without the possibility of parole constituted cruel and unusual punish-

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65 *Id.* at 586.
66 Justice White announced the judgment of the Court in which Justices Stewart, Blackmun, and Stevens joined. *Id.* at 586. Justices Brennan, Marshall, and Powell filed separate concurrences. *Id.* at 600 (Brennan, J., concurring); *id.* (Marshall, J., concurring); *id.* at 601 (Powell, J., concurring). Chief Justice Burger and Justice Rehnquist dissented. *Id.* at 604 (Burger, C.J., dissenting, with Rehnquist, J., joining).
67 *Id.* at 592.
69 *Coker*, 433 U.S. at 591–92.
70 *Id.* at 592 (emphasis added).
71 *Id.* at 593–96.
72 *Id.* at 592 & n.4.
74 *Id.* at 962–82.
ment.\textsuperscript{75} Announcing the judgment of the Court, Justice Scalia stated that the Eighth Amendment contains no proportionality guarantee in non-capital cases;\textsuperscript{76} instead, the cruel and unusual punishments clause was directed at prohibiting certain \textit{methods} of punishment.\textsuperscript{77} He therefore concluded that the petitioner’s mandatory life sentence did not violate the Eighth Amendment.\textsuperscript{78} Although only Chief Justice Rehnquist joined in this part of Justice Scalia’s opinion,\textsuperscript{79} three Justices concurred in the opinion because they felt that the punishment was not constitutionally disproportionate.\textsuperscript{80}

It is interesting to note, however, that as recently as 1991 in \textit{Harmelin}, the debate continued as to what, at the highest level, the Eighth Amendment prohibits. It is clear after \textit{Harmelin} that a majority of Justices on the Court believe that the Eighth Amendment does contain a proportionality requirement. And it is clear that a majority of Justices are willing to utilize the evolving standards of decency test to determine whether a punishment is cruel and unusual within the Eighth Amendment’s prohibition. In fact, in \textit{Atkins} (and in other cases), even Chief Justice Rehnquist and Justice Scalia (whose \textit{Harmelin} opinion was joined by no other Justices) appeared to adopt the evolving standards legal framework.\textsuperscript{81} Based on \textit{Harmelin}, it appears as though Justice Scalia and Chief Justice Rehnquist believe that the Eighth Amendment, by its terms, prohibits only certain modes of punishment. Yet, at least in death penalty cases, they are willing to defer to “precedent” and to the Court’s “death is different” jurisprudence, and employ an evolving standards of decency test.

\textsuperscript{75} \textit{Id.} at 961.

\textsuperscript{76} \textit{Id.} at 965. Justice Scalia argued that the clause contains no proportionality requirement, but concedes that the Court’s death penalty jurisprudence often utilized proportionality analysis based on evolving standards of decency. “Proportionality review is one of several respects in which we have held that ‘death is different’ and have imposed protections that the Constitution nowhere else provides. We would leave it there, but will not extend it further.” \textit{Id.} at 994 (citations omitted).

\textsuperscript{77} \textit{Id.} at 979 (quoting Granucci, \textit{supra} note 11, at 842); \textit{see also} \textit{Id.} at 979–86 (discussing early interpretations of the Eighth Amendment by politicians and courts).

\textsuperscript{78} \textit{Id.} at 996.

\textsuperscript{79} \textit{Id.} at 961.

\textsuperscript{80} \textit{Id.} at 1008–09 (Kennedy, J., concurring, with O’Connor & Souter, J.J., joining).

\textsuperscript{81} \textit{See Atkins v. Virginia,} 122 S. Ct. 2242, 2253 (2002) (Rehnquist, C.J., dissenting) (“In making determinations about whether a punishment is ‘cruel and unusual’ under the evolving standards of decency embraced by the Eighth Amendment, we have emphasized that legislation is the ‘clearest and most reliable objective evidence of contemporary values.’”).
D. Reasoned Substantive Due Process?

What is not clear from case law is why a majority of the Court came to the conclusion that the Eighth Amendment uses as its litmus test the evolving standards of decency. The history of the adoption of the Amendment, as discussed above,\(^8\) lends little support to the Court's interpretation. In fact, as has been shown, the history of the adoption of the Amendment shows that the Eighth Amendment was adopted only to proscribe certain methods of punishment.\(^8\) As has also been shown, the *Trop* plurality more or less created the evolving standards test, citing no authority for it.\(^8\) Because there is little support for the proposition that the Eighth Amendment, by its own terms, utilizes an evolving standards of decency test, one may wonder how the Court has come to interpret the Amendment in such a manner.

When courts over the last fifty years have interpreted the Eighth Amendment, it appears that what they have really done is engage in substantive due process lawmaking under the guise of the Eighth Amendment. This must be the case, because courts have not confined their Eighth Amendment jurisprudence to either the history or text of the Amendment itself. Instead, what they have done is take a seemingly altruistic principle—that punishment for crimes should be supported by an enlightened majority of the population—and constitutionalized it.

Constitutionalization of moral principles was not uncommon for the Court at the time *Trop* was decided. In fact, during the 1950s, 1960s, and 1970s, the Court constitutionalized several fundamental rights. In *Griswold v. Connecticut*,\(^8\) the Court recognized a fundamental right to privacy within the marital bedroom. In *Loving v. Virginia*,\(^8\) the Court recognized a fundamental right to marry. In *Roe v. Wade*,\(^7\) one of the most controversial cases in recent history, the Court recognized a fundamental right to choose to have an abortion. In all of these cases and others like them, the Court looked beyond the history and text of the Constitution to interpret the Fourteenth Amendment and recognize a fundamental right. In a similar way, the Warren Court, followed by the Burger and Rehnquist Courts, has looked beyond the history and text of the Eighth Amendment to recognize a

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\(^8\) See supra notes 11–19 and accompanying text.
\(^8\) See supra notes 11–19 and accompanying text.
\(^8\) See supra note 36 and accompanying text.
\(^8\) 381 U.S. 479 (1965).
\(^8\) 388 U.S. 1 (1967).
\(^8\) 410 U.S. 113 (1973).
right to a certain "kind" of punishment. Yet there is a fundamental difference between the substantive due process cases referenced above and the Eighth Amendment line of cases. The substantive due process cases provided historical, precedential, social, and political reasons in support of interpreting the Fourteenth Amendment in a certain way, where the Eighth Amendment cases did not. This is not to say that these types of reasons do not exist in the Eighth Amendment context, only that the Court has not adequately explained them.

First, *Trop* provided no support for its language that announced the evolving standards of decency test. Since the time of *Trop*, judicial proponents of the evolving standards test tend to cite *Trop* for the proposition that the Amendment uses the evolving standards test. In *Atkins*, Justice Stevens wrote,

> A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop v. Dulles*: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

The preceding excerpt comprises the majority’s entire discussion of the evolving standards test. The opinion cited *Trop* as conclusive and moved on. Since the 1958 opinion in *Trop*, no Supreme Court majority has ever articulated a reason why this must be the standard by which Eighth Amendment claims are to be judged. Rather, what usually happens is that a plurality of the Court cites *Trop* as authoritative and proceeds.

### E. Evolving Standards Conclusion

This analysis does not purport to contend that the Eighth Amendment cannot require proportionality. This analysis does not purport to contend that the Eighth Amendment cannot utilize an evolving standards of decency test. This analysis does not even contend that the Eighth Amendment should not do either of the two. Rather, if the Court is going to engage in this type of judicial activism, it should at least justify its reasons for doing so. A citation to an old,

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88 See supra note 36 and accompanying text.
90 See id.
91 Courts also sometimes cite *Weems v. United States*, 217 U.S. 349 (1910), to support *Trop*'s conclusion. See also supra note 56 and accompanying text.
obscure, off-point, non-binding decision by a plurality is not enough. After Atkins, it appears as though Trop's evolving standards of decency test is not going away. But until a majority of the Court states a persuasive reason why this must or should be the standard, we should question the legitimacy and continued evolution of the Court's Eighth Amendment jurisprudence.

II. TOO MUCH DEFERENCE TO STATE ENACTMENTS

After adopting the evolving standards of decency test, the Atkins Court held that the clearest and most reliable objective evidence of contemporary values is the "legislation enacted by the country's legislatures."92 The Court then analyzed the states' laws on capital punishment of the mentally retarded and found a consensus sufficient to determine that the practice was contrary to our nation's evolving standards of decency, and therefore in violation of the Eighth Amendment's ban on cruel and unusual punishment.93 This Part of the Note contends that this level of deference to states' legislative enactments is contrary to Court precedent and considerations of federalism, and an abdication of the judicial role. Furthermore, this practice essentially allows the Eighth Amendment to mean whatever democracy says it means, a practice contrary to the nature of the Constitution. This Part also questions whether state legislative enactments are a reliable indicator of society's moral attitudes, and concludes that they are not.

A. Case Law

1. Trop v. Dulles

As with other analyses of the Eighth Amendment, Trop is the starting point for this discussion. Recall that in Trop, the Supreme Court held unconstitutional a statute that took away one's citizenship as a punishment for wartime desertion of the armed forces.94 In finding the statute unconstitutional, the Court undertook an important discussion of how the Constitution, by its very nature, must trump even the most well-reasoned statute. The Court stated,

[W]e are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. . . . Courts must not consider the wisdom of statutes but

92 Atkins, 122 S. Ct. at 2247 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
93 Id. at 2248–50.
94 See supra notes 20–34 and accompanying text.
neither can they sanction as being merely unwise that which the Constitution forbids.

We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights.

... When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less.\(^{95}\)

While the explicit language from \textit{Trop} applies directly to acts of the national legislature, one need not look farther than \textit{McCulloch v. Maryland} for the proposition that the Constitution also trumps acts of state governments that are contrary to the Constitution.\(^{96}\) The following will outline the evolution of the Eighth Amendment from a provision that protected citizens from the legislature to one that derives its meaning from the legislature.

\section{2. \textit{Gregg v. Georgia}}

In \textit{Gregg v. Georgia},\(^{97}\) the Court held that the death penalty is not unconstitutional per se. \textit{Gregg} is particularly relevant to this section of the Note, however, because of its analysis of how evolving standards of decency should obtain its meaning, and for its discussion of legislative enactments. After its explanation of "excessiveness,"\(^{98}\) the \textit{Gregg} Court stated,

\begin{quote}
Of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power. "Judicial review by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires."\(^{99}\)
\end{quote}

Here, the Court noted that Eighth Amendment cases often involve a conflict between state legislation and the Eighth Amendment itself. The Court continued in a footnote, that while "legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values, it is evident that


\(^{96}\) McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

\(^{97}\) 428 U.S. 153 (1976); \textit{see also supra} Part I.C.2.

\(^{98}\) \textit{See Gregg}, 428 U.S. at 173.

\(^{99}\) \textit{Id.} at 174 (quoting in part Furman v. Georgia, 408 U.S. 238, 313 (1972)).
legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power."¹⁰⁰ This discussion undertaken by the Gregg Court demonstrates that legislation is an important indicator of contemporary values, but by the very nature of the Constitution, state legislation cannot serve as a litmus test for federal constitutionality.

The Gregg Court then stated that, in a federal system, courts owe considerable deference to state legislatures because state legislatures are better suited to make policy determinations reflecting the moral values of the people.¹⁰¹ The Court then examined the history of the death penalty and its penological justifications before concluding,

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.¹⁰²

The Gregg opinion is significant in several respects. First, it is important to note that Gregg warns that the Eighth Amendment is a "restraint upon the exercise of legislative power."¹⁰³ Second, Gregg concedes that legislation is an objective factor that demonstrates the moral consensus of the people, but warns that legislation alone cannot serve as the embodiment of evolving standards of human decency.¹⁰⁴ Third, the Court deferred, at least in part, to the state's determination for reasons of federalism.¹⁰⁵ Finally, the relevant evolving standard of decency was a statewide standard, rather than a national standard.¹⁰⁶ In subsequent cases, we will see the Gregg test slowly, and somewhat innocuously, erode in a manner unfaithful to Gregg and to the Eighth Amendment itself.

¹⁰⁰ Id. at 174 n.19.
¹⁰¹ Id. at 175.
¹⁰² Id. at 186–87 (emphasis added).
¹⁰³ Id. at 174.
¹⁰⁴ Id. at 174–75, 179–86.
¹⁰⁵ Id. at 186–87.
¹⁰⁶ See id.
3. **Coker v. Georgia**

In *Coker*, the Court was faced with the question whether capital punishment was an acceptable punishment for the rape of an adult woman. The Court held that it was not, and therefore such a sentence violated the Eighth Amendment. In so holding, the Court utilized the "legislation as an objective indicator of evolving standards of decency" standard. The Court analyzed the various states' attitudes toward capital punishment for the crime of rape, and concluded that "[t]he current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." The Court analyzed several other factors as evidence of the evolving standard of decency, but the fact that a majority of states did not allow capital punishment for rape carried much of the weight in the opinion.

Although the *Coker* Court purported to base its decision in part upon *Gregg*'s mandate that courts utilize legislative enactments as a barometer for community morals, there is one important difference. In *Gregg*, the Court focused on the enactments of Georgia's legislature and implicitly defined the relevant community as Georgia. Recall the language from *Gregg*: "[c]onsiderations 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 . . . ." Thus, *Gregg*'s reliance on legislative enactment appears to have been about deference to the state legislature. In *Coker*, however, the relevant standard is a national one. Hence, *Coker* is less about judicial deference to a state legislature and more about reaching a national consensus.

4. **Stanford v. Kentucky and Penry v. Lynaugh**

In the years following *Coker*, the Court considered the Cruel and Unusual Punishments Clause several more times. In *Stanford v.
Kentucky, the Court’s jurisprudence made a fundamental shift. Stanford presented the question whether the death penalty constituted cruel and unusual punishment for a defendant sixteen or seventeen years old. Justice Scalia, writing for a four Justice plurality, concluded that because there existed no national consensus among state legislatures, the Eighth Amendment did not prohibit capital punishment for sixteen- or seventeen-year olds. The opinion placed a great amount of weight on states’ legislative enactments; it declined to accept as evidence of contemporary values federal sentencing statutes, jury determinations, prosecutorial discretion to seek the death penalty, public opinion polls, and official positions of professional associations. In fact, the opinion cited no additional basis for its decision other than the lack of a national consensus as evidenced by state statutes.

Justice O’Connor’s concurrence in Stanford stated that the Eighth Amendment demands that, after analyzing state statutes as the primary objective indicator of contemporary values, the Court conduct proportionality review. In Penry v. Lynaugh, decided the same day as Stanford, Justice O’Connor took a different approach. The issue in Penry was whether the Eighth Amendment categorically exempted the mentally retarded from capital punishment. (Note that this is the same issue as in Atkins.) Justice O’Connor, writing for the majority, held that there did not exist a national consensus (as evidenced by state legislation) against application of the death penalty to the mentally retarded. She then undertook proportionality review (not joined by the majority) where she examined whether the broad deference to state legislation is an abdication of the Court’s duty to be the final arbiter of the Constitution).

113 492 U.S. 361 (1989) (plurality opinion).
114 See Albers, supra note 112, at 481–82.
116 See id. at 370–71 & n.2.
117 Id. at 380.
118 Id. at 370–73.
119 Id. at 373–74.
120 Id.
121 Id. at 377.
122 Id.
123 Id. at 373; see also Albers, supra note 112, at 482–83 (making this same point).
124 Stanford, 492 U.S. at 380–82 (O’Connor, J., concurring).
126 Id. at 307.
128 Penry, 492 U.S. at 333–35.
death penalty was appropriate given the penological justifications for the death penalty, and held that it was not unconstitutional. It is interesting to note, however, that Justice O'Connor looked largely to state statutes to determine culpability for her proportionality review. Thus, her proportionality review was largely guided by state legislative enactments.

B. The Resulting Framework

After Stanford and Penry, it is not entirely clear to what extent proportionality review affects an Eighth Amendment determination. It is clear, however, that a majority of the Court agrees that the most reliable factor for determining contemporary values is legislation enacted by state legislatures. It also appears that—regardless of the amount of work it does—proportionality review is used only if there exists no national consensus. In Penry, Justice O'Connor undertook proportionality review only after a review of state legislation failed to evidence a national consensus. In other words, if there exists a national consensus that prohibits a punishment, that ends the inquiry. If, however, there exists no national consensus, then proportionality review may still make the punishment unconstitutional.

Other courts, however, have interpreted the relationship between proportionality and state legislation differently. For example, in Duran v. Castro, in which a prisoner challenged his conviction for possession of heroin as "cruel and unusual," the district court stated,

The Supreme Court has prescribed the process for such a review as first requiring the reviewing court to determine whether a "threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." If so, the court should...compare the challenged sentence with..."the sentences imposed for commission of the same crime in other jurisdictions.""

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129 Id. at 337–38.
130 Id. at 338 ("On the record before the Court today, however, I cannot conclude that all mentally retarded people...lack the...culpability associated with the death penalty.").
131 Id. at 337 ("It is clear that mental retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act."). Justice O'Connor next analyzed state statutes. Id. at 337–38 & nn.2–3.
133 Penry, 492 U.S. at 333–36.
In *Atkins* itself, it is not entirely clear how the Court applied the proportionality test. Justice Stevens's majority opinion stated, "Proportionality review under those evolving standards should be informed by objective factors to the maximum possible extent. We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" He later 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 [other] reasons for agreeing or disagreeing with their judgment."

It appears then, that after *Atkins*, a majority of the Court construes the Eighth Amendment to require a proportionality review that uses as its baseline the legislative enactments of the states. If the state enactments provide no consensus, or a questionable consensus, then courts may still declare a punishment cruel and unusual for other reasons.

C. Problems with the Legal Framework

This legal framework, in a sense, raises Eighth Amendment protections to at least whatever level a majority of the states favors. This type of framework also raises several significant legal questions that the Court has failed to address. First, this high level of deference to decisions of state legislatures, it has been argued, is an abdication of the proper judicial role. This argument contends that it is the responsibility of the Supreme Court to interpret the Constitution, and that deferring to state legislatures is an abdication of this responsibility. This Note, however, will not address this argument, other than to make the reader aware of it. Second, and more important for this analysis, this type of legal framework for interpreting the Eighth Amendment raises serious questions of federalism and state sovereignty in general. Why can the federal government, through the vehicle of the Supreme Court, tell states in what manner they may punish? Finally, this legal framework, which uses state legislation as the best indicator of contemporary values, fails to measure adequately popular consensus.

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136 *Id.* at 2248.
137 See generally *Albers*, *supra* note 112.
1. Federalism and State Sovereignty

The simple answer to the question "why can the federal government tell states in what manner they may punish?" is that the Eighth Amendment has been incorporated against the states.\textsuperscript{138} The not-so-simple answer, however, is more complex than that. It was clear after \textit{Gregg} that the relevant community whose standards were to be applied was the state.\textsuperscript{139} After \textit{Coker, Stanford,} and \textit{Penry}, however, it is clear that the national community's standards govern.\textsuperscript{140} It seems contrary to principles of state sovereignty that Virginia should have to change its state laws because citizens in Arizona and South Dakota passed state statutes exempting the mentally retarded from capital punishment. The problem with this framework is not that the Eighth Amendment applies to the states; rather, the issue is that the Eighth Amendment, which constantly re-derives its meaning based upon the actions of a majority of states, then applies this meaning to other states.

It is well established (outside of the Eighth Amendment context) that each state's authority to regulate extends no farther than its own boundaries.\textsuperscript{141} Alabama could not, for example, pass a statute that regulates conduct that occurs in another state and whose consequences are felt only in that state. Alabama could not pass a law that set the Virginia speed limit at forty-five miles per hour. To even suggest that it could would be absurd.\textsuperscript{142} Nor could Alabama take actions that had the effect of reducing Virginia's speed limit to forty-five miles

\begin{itemize}
  \item \textsuperscript{138} See Robinson v. California, 370 U.S. 660, 666-67 (1962) (holding that the Fourteenth Amendment prohibits punishment (i.e., 90-day incarceration) for those found to be addicted to narcotics).
  \item \textsuperscript{139} See \textit{supra} note 106 and accompanying text.
  \item \textsuperscript{140} See \textit{supra} note 110 and accompanying text.
  \item \textsuperscript{141} See \textit{Bonaparte v. Tax Court}, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction . . . . Each State is independent of all the others in this particular."); \textit{see also Healy v. Beer Inst.}, 491 U.S. 324, 335-36 (1989) (noting that the Constitution has a "special concern . . . with the autonomy of the individual States within their respective spheres").
  \item \textsuperscript{142} See \textit{N.Y. Life Ins. Co. v. Head}, 234 U.S. 149, 161 (1914). The Court noted, [I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound.

\textit{Id.}
\end{itemize}
per hour.\textsuperscript{143} Likewise, for the Atkins Court to suggest that Virginia must be bound by the actions of state legislatures of other states raises serious questions about Virginia's sovereignty. Virginia's citizens never consented to be governed by other states' statutes, nor did Virginians ever have the opportunity to vote in other states' elections.

It is true that Virginians had the opportunity to participate in the ratification process of the Eighth Amendment, as well as the Fourteenth Amendment, which made the Eighth applicable to the states. Yet the Eighth and Fourteenth Amendments that Virginians had the opportunity to ratify did not, at the time, utilize a standard that allowed a majority of other states to change the meaning of the Eighth Amendment. Indeed, the Constitution sets forth a specific procedure required to amend the Constitution,\textsuperscript{144} and there is little reason to think that when Virginians ratified the Bill of Rights and the Fourteenth Amendment they contemplated that the Supreme Court would put in place a mechanism to skirt the amendment process.\textsuperscript{145} The response to this argument is that when Virginians had the opportunity to participate in the ratification process, the decision to ratify was not only the decision to adopt the text of the amendments, but also the decision to adopt Supreme Court interpretation of that text.

Whatever the outcome of this debate, it is worthwhile to note the Court's apparent lack of concern for its quashing of state sovereignty.

\textsuperscript{143} See, \textit{e.g.}, Bigelow v. Virginia, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.").

\textsuperscript{144} See \textsc{U.S. Const. art. V.}

\textsuperscript{145} The current Eighth Amendment interpretation creates tension with Article V, and may be viewed as circumventing the amendment process. At the very least, the current framework blurs the line between constitutionally permissible constitutional interpretation by the judiciary and the Article V process for amending the Constitution. For example, if a majority of states were to abolish the death penalty, then presumably the Court would find the death penalty unconstitutional, relying on state legislation as the most reliable objective indicator of evolving standards of decency. Holding the death penalty unconstitutional would not only change the understanding of the Eighth Amendment, but it would also change the understanding of other parts of the Constitution. For example, it would render all references to capital crimes and capital punishment in the Constitution superfluous. It would change the meaning of the Due Process Clauses, which state that the government cannot "deprive any person of \textit{life}, liberty, or property, without due process of law." \textit{See id. amend V; id. amend. XIV, §1.} One could argue that such a drastic evolution of the Eighth Amendment's meaning essentially amends the Constitution, yet without following Article V's strict amendment procedures. It accomplishes the same end, yet does so via an "end-run" around the procedural safeguards required to affect the meaning of the Constitution.
In *Harmelin*, however, Justice Scalia undertook some discussion of the effect of other states’ legislation. He wrote,

That a State is entitled to treat with stern disapproval an act that other States punish with the mildest of sanctions follows a fortiori from the undoubted fact that a State may criminalize an act that other States do not criminalize at all. Indeed, a State may criminalize an act that other States choose to reward—punishing, for example, the killing of endangered wild animals for which other States are offering a bounty. What greater disproportion could there be than that? “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 State.” Diversity not only in policy, but in the means of implementing policy, is the very raison d’etre of our federal system. . . . 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.146

Yet it appears that the Eighth Amendment has become the ratchet of which Justice Scalia wrote. This ratchet can be turned by a simple majority of the states, forcing all other states to abide by their policy decisions.

It is interesting to take this abstract argument about federalism, and bring it to a more concrete level. The following is an example of why considerations of federalism should persuade the Court that its reliance on state legislative enactments should be abandoned. Consider a criminal defendant who claims that his punishment for drunk driving is cruel and unusual, in violation of the Eighth Amendment. Assume further that the severity of his punishment, on a scale of 1 to 10, ranks a 4. The court, in adjudicating his case, looks to state legislation and determines that there exists a consensus that other states’ punishments for drunk driving tend to rank a 2 or 3 in terms of their severity. Therefore, the court, applying the Supreme Court’s Eighth Amendment framework, would declare the punishment cruel and unusual because it is disproportionate to the offense.147

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147 Query whether this type of comparison to other states’ legislation really tells whether the punishment is disproportionate to the offense. It seems more realistic that all that this comparison really tells is that the punishment is disproportionate to the punishment utilized by other states.
Yet, imagine that the state imposing the punishment of severity level 4 was Utah. Assume that many citizens of Utah do not consume alcohol and believe that drunkenness is immoral. Assume further that they believe that driving while drunk is very immoral, and poses a great safety risk. So citizens of Utah try to deter drunk driving, which they view as a greater harm than do citizens of other states, by attaching to it a more severe penalty. If Utah makes the judgment that drunk driving is a more serious crime than do other states, should not their criminal laws be allowed to reflect that judgment?

One of the benefits of federalism is that if one is intent on driving while drunk, he can move next door to Nevada, where (for purposes of the hypothetical) the practice is considered less offensive and therefore is punished less severely. Society ends up with two happy communities; Utah—where almost no drunk driving occurs (and whose citizens like this fact)—and Nevada, where citizens can drive while intoxicated with little fear of being harshly punished.

If this hypothetical seems unrealistic, consider then the First Amendment and obscenity law. The First Amendment defines proscribable obscenity by reference to what the local community thinks about it. Hence, in a more conservative community, certain works may be prohibited (or their distribution may be punished) because they are offensive to the community, even though these works would be allowed in a majority of communities that are presumably more liberal. This means that a person may be punished for distributing obscenity in Utah, while the same conduct may be perfectly acceptable in Nevada. Why should the same set of rules not apply to punishment in general? Or, at the very least, why does not the Eighth Amendment govern the punishment of obscenity? If the First Amendment is reducible to a local community, and one’s First Amendment protections depend to some degree on locality and local morals, why cannot Eighth Amendment rights depend to some degree

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148 See Miller v. California, 413 U.S. 15, 24–25 (1973). One prong of the Miller obscenity test is “whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest.” Id. at 24.

149 One can foresee an Eighth Amendment challenge to an obscenity charge. Under the Court’s Eighth Amendment jurisprudence, one may expect the Court to look at the material in question and determine if a majority of jurisdictions (or states) would punish its distribution. If a majority would, so can the jurisdiction in question. If a majority of states would not punish the distribution of the material, the jurisdiction in question would be precluded from doing so, because such punishment would be prohibited as excessive under the Eighth Amendment.
on locality and local morals? The Court has not provided a satisfactory answer. Indeed, the Court has provided no answer.

2. Legislation Is an Unreliable Indicator of Consensus

In addition to trampling state sovereignty, utilizing state legislation as the best indicator of evolving standards of decency raises other problems. Namely, state legislation is not the best indicator of a popular national attitude. At the time of the founding of the Constitution, there was great debate as to the question of state representation in the federal government. Although a drastic oversimplification, the debate was whether each state should receive equal representation in the federal government, or whether representation should be based on state population. The resulting compromise created a House of Representatives where state representation was based on population, and a Senate where each state received equal representation. A similar problem applies to the question of popular attitudes toward punishment.

Simply put, a majority of states could form a consensus sufficient to evolve meaning of the Eighth Amendment, even though a majority of the people do not support such evolution. Because of such outcomes, the judicially created measuring stick does a poor job of quantifying that which it is supposed to measure. As a result, if the Court is determined to continue to utilize an evolving national consensus standard, it should come up with a better device to measure evolving national consensus.

3. Legislation May Not Be as “Objective” as the Court Thinks

The third problem with utilizing state legislation as an objective indicator of national consensus is that state legislation may not be as objective as the Court thinks it is. In Atkins, much of the difference in

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150 See, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 48–54 (3d ed. 2001) (explaining interest group theories of the legislative process and the power of special interests in passing statutes); id. at 54–60 (explaining public choice theories of the legislative process, including the idea of rent extraction); see also id. at 65–73 (explaining proceduralist theories of legislation, which state that it is easier to block legislation than to enact it). Proceduralist theories of legislation that state that it is more difficult to pass statutes than to block their passage lend support to the proposition that public support for exempting the mentally retarded from the death penalty is actually more prevalent than is indicated by state statutes. Regardless of what outcome these theories lead to with respect to capital punishment for the mentally retarded, they demonstrate that state legislation is not, in fact, the best indicator of popular values.

151 U.S. CONST. art. I, § 2, cl. 3; id. § 3, cl. 1.
opinion between the majority and Justice Scalia's dissent was based on the question what should count in the survey of state legislation. For example, twelve states do not permit capital punishment of any kind.\textsuperscript{152} Are those states' legislative enactments relevant to the narrow question of whether the Eighth Amendment prohibits capital punishment for the mentally retarded? Justice Stevens's majority opinion counted New York among the states that had outlawed application of the death penalty to the mentally retarded.\textsuperscript{153} New York's law, however, allowed the sentence of death for a person who is mentally retarded if the killing occurred while that person was confined.\textsuperscript{154}

Furthermore, Justice Stevens found persuasive a bill passed by the Texas legislature but vetoed by the governor.\textsuperscript{155} While this bill may be persuasive evidence of what the people of Texas think,\textsuperscript{156} does it comport with the Court's test that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures"?\textsuperscript{157} Strictly speaking, it does not, for the bill was never enacted. In his analysis, Justice Stevens continued, by noting that similar provisions passed at least one house in several other states.\textsuperscript{158} This fact has little relevance if the Court was looking strictly for enactments of state legislatures, as it purported to do. Surely these facts would be relevant if the Court were merely trying to gauge popular attitudes. But in the Eighth Amendment context, the Court purports to be doing more than that. It purports to be relying on "legislation enacted by the country's legislatures" as the "clearest and most reliable objective evidence of contemporary values."\textsuperscript{159} Justice Stevens's approach seems to "subjectify" this inquiry, at least to some extent.

In his dissent, Justice Scalia pointed out that of the thirty-eight states that allow capital punishment, less than half (eighteen) have enacted legislation that exempts the mentally retarded.\textsuperscript{160} If one as-

\textsuperscript{153} Id. at 2248.
\textsuperscript{154} Id. at 2248 & n.13. New York's law states that a sentence of death "may not be set aside . . . upon the ground that the defendant is mentally retarded" if "the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution." Id. at n.13; see also N.Y. CRIM. PROC. § 400.27.12(d) (McKinney 2001–2002 Interim Pocket Part).
\textsuperscript{155} Atkins, 122 S. Ct. at 2248–49 & n.16.
\textsuperscript{156} For the reasons stated in Part II.C.2, this bill may not be evidence of what Texans in fact think about the issue.
\textsuperscript{157} Id. at 2247.
\textsuperscript{158} Id. at 2249.
\textsuperscript{159} Id. at 2247 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
\textsuperscript{160} Id. at 2261 (Scalia, J., dissenting).
sumes that states that ban the death penalty outright should not be included in the count, then it appears that objectively speaking, there exists no consensus about application of the death penalty to the mentally retarded.\textsuperscript{161} Furthermore, of the eighteen states that have exempted the mentally retarded from the death penalty, only seven have fully exempted them.\textsuperscript{162} The other eleven have, to some extent, still allowed executions of the mentally retarded.\textsuperscript{163} Yet the \textit{Atkins} majority utilized this state legislation as objective evidence for the proposition that all executions of the mentally retarded are prohibited by the Eighth Amendment.\textsuperscript{164} Justice Stevens responded to this point by stating, "It is not so much the number of these States that is significant, but the consistency of the direction of change."\textsuperscript{165}

There more than likely does exist a nationwide consensus against application of the death penalty to the mentally retarded. If there does exist a consensus however, it is debatable whether it is evidenced by state legislation. If state legislation does evidence a consensus, it is even more debatable whether the consensus can really be gleaned in an \textit{objective} manner. Therefore, the Court’s objective measuring stick is rather subjective. If the Court is going to utilize subjective determinations, it should openly do so and stop trying to utilize state legislation as an objective indicator. In the alternative, the Court should adopt a new measuring stick that is actually objective.

4. Laws May Not Reflect Morality

Yet another limitation with the Court’s utilization of state legislation as the best indicator of contemporary values is that the existence or non-existence of legislation cannot necessarily be attributed to public values.\textsuperscript{166} In \textit{Atkins}, Justice Stevens wrote, “We have pinpointed that the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’”\textsuperscript{167} This assumes a direct correlation between morality and legislation; it assumes that moral laws are enacted precisely because they are moral

\textsuperscript{161} If states that ban capital punishment outright are to be included in the tally, then there is, objectively speaking, a consensus.
\textsuperscript{162} \textit{Id.} (Scalia, J., dissenting).
\textsuperscript{163} Several states have not made their statutes retroactive, which means that the mentally retarded currently on death row could, in the states' judgment, be subject to capital punishment. \textit{Id.} at 2261-62. (Scalia, J., dissenting).
\textsuperscript{164} \textit{Id.} (Scalia, J., dissenting).
\textsuperscript{165} \textit{Id.} at 2249; \textit{see also} \textit{id.} at 2263 (Scalia, J., dissenting).
\textsuperscript{166} \textit{See supra} note 150.
\textsuperscript{167} \textit{See Atkins}, 122 S. Ct. at 2247 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
and that immoral laws are not passed precisely because they are immoral.

A law with a seemingly moral purpose may be the product of many motivations other than morality. To assume that a law was enacted solely because of its moral undertones is naïve and reflects a misunderstanding of the legislative process. Furthermore, society may possess a certain moral belief, but may be unable to pass a law reflecting that belief because a few dissenters hold key positions in state legislatures and are able to block the passage of a bill. Therefore, Justice Stevens's claim that "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures,'" is somewhat misguided. As a result, the Court should look for some other objective indicator that also indicates the purpose for the law's enactment. A better objective indicator of contemporary values might be a preamble to the legislation, the purpose clause of the legislation, or legislative history, which could purportedly explain society's morality. The fact that a state punishes a crime a certain way does not necessarily reflect the people's moral stance on that issue. Rather, the punishment as explained by its preamble, purpose clause, or legislative history is better evidence of contemporary values.

CONCLUSION

The Court's Eighth Amendment, reaching its culmination in Atkins, has "mis-evolved" into a strange and peculiar species. Since Chief Justice Warren's famous line in Trop, the Court has grasped hold of Trop's language and declared that "evolving standards of decency" is the hallmark of the Eighth Amendment. While the Eighth

168 The types of state laws at issue in Atkins—those exempting the mentally retarded from capital punishment—more than likely were enacted based on citizens' moral perceptions. However, this is certainly not the case with all types laws dealing with punishment, and should not be assumed to be so.

169 See ESKRIDGE, supra note 150, at 66–67 (discussing the theory of "vetogates," which are "choke points" in the legislative process where a small minority can often kill legislation).

170 Atkins, 122 S. Ct. at 2247 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

171 This proposition, of course, assumes that society's moral reasons for passing a statute can be reasonably gleaned from the statute's preamble, purpose clause, or legislative history. This assumption is questionable.

172 It is true that introducing legislative history loses some of the objectivity that a simple count of laws provides. It does, however, more accurately reflect society's values.

Amendment could utilize an evolving standards test, no Court majority has ever articulated a reason why this must be the case. The Court's Eighth Amendment jurisprudence dictates that courts analyze state legislative enactments as objective evidence of society's evolving standards. As a result, the Eighth Amendment's meaning changes whenever a majority of states raise state protections. Therefore, the meaning of the federal Constitution derives its meaning from current popular consensus. This type of framework raises several problems, not the least of which are considerations of federalism. Furthermore, the Court's chosen measuring stick—legislative enactments—does a poor job of measuring. As a result, the Eighth Amendment continues to evolve into a strange and peculiar beast. Darwin would be dumbfounded.