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Deciding Death

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DECIDING DEATH

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ABSTRACT

When the Supreme Court is deciding death, how much does law matter? Scholars long have lamented the majoritarian nature of the Court's Eighth Amendment "evolving standards of decency" doctrine, but their criticism misses the mark. Majoritarian doctrine does not drive the Court's decisions in this area; majoritarian forces elsewhere do. To make my point, I first examine three sets of "evolving standards" death penalty decisions in which the Court implicitly or explicitly reversed itself, attacking the legal justification for the Court's change of position and offering an extralegal explanation for why those cases came out the way they did. I then use political science models of Supreme Court decisionmaking to explain how broader social and political forces push the Court toward majoritarian death penalty rulings for reasons wholly independent of majoritarian death penalty doctrine. Finally, I bring the analysis full

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† Associate Professor of Law, University of Richmond School of Law. Sometimes it really does take a village. Special thanks to Michael Klarman, Barry Friedman, Cornell Clayton, Lee Epstein, Sara Sun Beale, Michael Perry, Paul Marcus, Scott Sundby, Michael Meltsner, Erik Lillquist, Bill Ross, and Supreme Court of Virginia Justice Don Lemons for their insights in developing this piece. Many thanks also to my colleagues at the University of Richmond, especially Jim Gibson, Shari Motro, Ron Bacigal, John Douglass, and Hank Chambers, who made invaluable comments on earlier drafts. Well deserved recognition goes to Christine Salmon and Mike Clements, who provided superb research assistance. Finally, I gratefully acknowledge the Southeastern Association of Law Schools (SEALS) for allowing me to present this Article at its 2006 summer workshop, and I thank fellow panelists Adam Gershowitz and Mae Quinn for their helpful comments at that time.

circle, showing how broader sociopolitical forces even led to the development of the “evolving standards” doctrine. In the realm of death penalty decisionmaking, problematic doctrine is not to blame for majoritarian influences; rather, majoritarian influences are to blame for problematic doctrine. The real obstacle to countermajoritarian decisionmaking is not doctrine, but the inherently majoritarian tendencies of the Supreme Court itself.

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INTRODUCTION

When the Supreme Court is deciding death, how much does law matter? For years, scholars have criticized the majoritarian nature of the Court's Eighth Amendment "evolving standards of decency" doctrine¹—and for seemingly good reason. Under the doctrine, a punishment violates the Cruel and Unusual Punishments Clause when it offends "evolving standards of decency," and a punishment offends "evolving standards of decency" when a "national consensus" has formed against it.² The result is constitutional protection that follows, rather than frustrates, majority will, prohibiting a punishment only after most states have already abandoned it on their own.³ And

1. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 69 (1980) ("[I]t makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1113 (2006) ("[D]eclaring 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."); Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455, 556 (1996) ("[I]f the evolving standards test is the sole standard for constitutionality, there will exist no real constraint on the death penalty under the Cruel and Unusual Punishment Clause and the clause itself will degenerate into a tool to validate the whims of the masses." (citation omitted)); Franklin E. Zimring & Gordon Hawkins, *Capital Punishment and the Eighth Amendment: Furman and Gregg in Retrospect*, 18 U.C. DAVIS L. REV. 927, 941 (1985) ("What is the significance of a curb on majority and legislative will which cannot be employed to check or restrain that will?"); see also William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 328–29 (1986) ("At the outset, it seems to me beyond dispute that we should not permit the legislature to define for us the scope of permissible punishment. . . . It would effectively write the clause out of the Bill of Rights were we to permit legislatures to police themselves by having the last word on the scope of the protection that the clause is intended to secure against their own overreaching.").

2. Compare *Roper v. Simmons*, 543 U.S. 551, 560–67, 578 (2005) (invalidating the juvenile death penalty upon finding that a national consensus had formed against it), and *Atkins v. Virginia*, 536 U.S. 304, 315–16, 321 (2002) (invalidating the death penalty for mentally retarded offenders for the same reason), with *Stanford v. Kentucky*, 492 U.S. 361, 370–73, 380 (1989) (upholding the juvenile death penalty upon finding of insufficient evidence of a national consensus against it), *abrogated by Roper*, 543 U.S. 551, and *Penry v. Lynaugh*, 492 U.S. 302, 334–35, 340 (1989) (upholding the death penalty for mentally retarded offenders for the same reason), *abrogated by Atkins*, 536 U.S. 304. For a discussion of the Court's shifting definition of a national consensus, see *infra* Part II.A. For a discussion of the evolution of the "evolving standards" doctrine, see *infra* Part III.B.

3. See *Atkins*, 536 U.S. at 322–23 (Rehnquist, C.J., dissenting) (describing state legislative judgments as "the 'clearest and most reliable objective evidence of contemporary values'" (quoting *Penry*, 492 U.S. at 331)); accord *Stanford*, 492 U.S. at 370; *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Gregg v. Georgia*, 428 U.S. 153, 173–76 (1976) (plurality opinion).

so it is true, the doctrine is decidedly majoritarian. But how much does majoritarian doctrine matter?

In the death penalty context, where the “evolving standards” doctrine is most often used, one would think it would matter a lot. One of the Supreme Court’s most celebrated roles is protecting unpopular minorities from tyranny of the majority,⁴ and the death penalty context is ideally suited for the performance of that task. Capital defendants are about as unpopular a minority as one can find (for obvious and perfectly legitimate reasons)—and those who end up on death row tend to be poor,⁵ black,⁶ and the recipients of woefully

4. The Supreme Court itself has promoted this countermajoritarian role. *See, e.g.*, *Chambers v. Florida*, 309 U.S. 227, 241 (1940) (“[Courts stand as] havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. . . . No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (reserving “more searching judicial inquiry” when statutes impinge upon rights of “discrete and insular minorities”). *See generally* ELY, *supra* note 1 (defending judicial review as a means of protecting unpopular minorities from tyrannical majorities).

5. *See* MARY WELEK ATWELL, *EVOLVING STANDARDS OF DECENCY* 35 (2004) (“[V]irtually every person sentenced to death could be classified as ‘poor.’”); Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1, 16 (“Throughout history, the death penalty has been reserved almost exclusively for those who are poor. The major consequence of poverty is being represented by a court-appointed lawyer who may lack the skill, resources, and, in some cases, even the inclination to provide a competent defense.”).

6. *See* Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. & L. 191, 195 (2002) (“African-Americans are markedly over-represented on death row compared with their percentage of the population (42.72% versus 12.3%).”); *see also* DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 149–55 (1990) (attributing racial disparity in death sentences to significant race-of-victim discrimination); U.S. GEN. ACCOUNTING OFFICE, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES* 5 (1990) *available at* <http://archive.gao.gov/t2pbat11/140845.pdf> (examining twenty-eight studies and concluding that 82 percent of those studies showed race-of-victim discrimination, a finding “remarkably consistent across data sets, states, data collection methods, and analytic techniques”). For later research in this area, *see* David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 41 CRIM. L. BULL. 194, 214–15 (2005) (confirming the persistence of race as a factor in sentencing patterns in the death penalty context, and noting in particular that “black offenders whose victims are white are at particular risk of more punitive treatment”).

inadequate legal representation.⁷ The politics of death only exacerbate their vulnerability, leaving little reason to trust other institutional actors to exercise self-restraint.⁸ In short, the death penalty context presents the quintessential case for the Court's countermajoritarian function. If there is any place one would want and expect the Supreme Court to guard against majoritarian overreaching, it is a capital case.

Recognizing the paradox, death penalty scholars have been among the most vocal critics of the "evolving standards" doctrine.⁹ They have blamed doctrine for the Court's failure to play a countermajoritarian role in the death penalty context and they are right, to an extent—doctrine stands in the way.¹⁰ But valid as the criticism is, it misses the mark. Majoritarian doctrine has little, if anything, to do with the Court's majoritarian decisions in this area due to two rather radical recognitions largely unappreciated in death penalty scholarship.

The first is a disconnect between majoritarian doctrine and majoritarian results. The "evolving standards" doctrine is majoritarian, and so are the outcomes of the cases employing it, but the closer one looks, the clearer it becomes that the two are not causally related. The Justices decide death the way they want to, not

7. Justice Ruth Bader Ginsburg, In Pursuit of the Public Good: Lawyers Who Care, Lecture at the David A. Clarke School of Law, University of the District of Columbia (Apr. 9, 2001), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_04-09-01a.html ("I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial."). See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (discussing the problem at length).

8. See generally Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995) (discussing how political pressures on elected judges result in incentives favoring punitiveness in high-profile capital cases); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030 (2000) (arguing that various institutional actors, including police, prosecutors, and judges, have strong incentives to "overproduce" death sentences, relative to the number that would be appropriate based solely on substantive law).

9. See *supra* note 1.

10. For clarification, the issue is *not* that doctrine prevents the Court from playing a countermajoritarian role at the local level. Any time the Supreme Court strikes down a state's law, it is acting in a countermajoritarian fashion at the local level, but even Congress can play that sort of countermajoritarian role. The Civil Rights Act, for example, was tremendously countermajoritarian in most Southern states. What other institutional actors cannot do (because they are popularly elected), but the Court can (at least in theory), is act in a countermajoritarian fashion on a national scale. This is why the "evolving standards" doctrine is so problematic. See *supra* note 1.

the way they have to—doctrine does little, if anything, to keep the Justices from ruling however they are a priori inclined to rule. In short, the “evolving standards” doctrine might be problematic in theory, but in practice, majoritarian doctrine imposes too little constraint to be the crux of the majoritarian problem. The Justices do not follow doctrine in any meaningful way. Doctrine follows them.

How then, if not for doctrine, do the Court’s “evolving standards” cases nevertheless manage to generate loosely majoritarian results? Concededly, majoritarian doctrine is likely to tilt the Court’s decisionmaking in a majoritarian direction (even if it does not dictate particular results), but the Justices still have plenty of room to go against the grain whenever they choose to do so.¹¹ Despite that room, the results in these cases remain remarkably majoritarian. Why?

The answer is a second recognition, more radical than the first: majoritarian doctrine does not constrain the Court, but *nondoctrinal* majoritarian forces do. Admittedly, the idea is perplexing at first blush. It is difficult to imagine sociopolitical influences operating outside doctrine when the doctrine purportedly incorporates sociopolitical influences. But given the first recognition (that the Justices decide death the way they want to), the plausibility of the second comes into view. Nondoctrinal majoritarian forces constrain the Court by affecting the way the Justices *want* to rule—specifically, by influencing their personal preferences, their ability to pursue those preferences, and their willingness to defer to institutional values like federalism and separation of powers. Conventional wisdom is that the judiciary is bound by the rule of law, but free of the majoritarian impulses that drive the other, electorally accountable branches. In fact, the opposite is true. Majoritarian doctrine fails to constrain the Court one whit, but where the law does not impose constraint, forces outside the law do.

Recognizing the difference is important for three reasons. First, as a purely intellectual proposition, one ought to accurately understand what is driving the Supreme Court’s majoritarian protection in the death penalty context. For years, scholars have lamented the Supreme Court’s “evolving standards” doctrine as if it

11. See *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (“[T]he 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.”); accord *Roper v. Simmons*, 543 U.S. 551, 564 (2005); *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

matters. By and large, it does not. Second, recognizing the Court's extralegal majoritarian constraints has implications far beyond the death penalty context. Indeed, those constraints ultimately call into question the theoretical precepts that undergird most justifications for judicial review.¹² Finally, the point has practical implications for death penalty reformers on the ground level. In the end, the analysis suggests that the Court will be more responsive to ill-defined, pervasive changes in extralegal sociopolitical context than to changes in state legislation—the chief doctrinal measure of “evolving standards”¹³—which, in turn, suggests that reform efforts should focus less on lobbying legislatures and more on changing popular attitudes. Granted, if popular attitudes change, legislative change will follow, but the Court may well respond more quickly—and it will respond (eventually) regardless of what state legislatures do. Three different reasons, one basic point: the “evolving standards” that matter are not doctrinal, but embedded in the larger sociopolitical context of Supreme Court decisionmaking itself.

To make my point, I first examine three sets of “evolving standards” death penalty decisions in which the Supreme Court explicitly or implicitly reversed itself. Part I analyzes *Gregg v. Georgia*,¹⁴ the 1976 landmark that formally recognized the “evolving standards” doctrine, along with its 1972 counterpart, *Furman v. Georgia*.¹⁵ Part II examines two of the Supreme Court's post-2000 death penalty landmarks, *Atkins v. Virginia*¹⁶ and *Roper v. Simmons*,¹⁷ along with the 1989 decisions they overruled, *Penry v. Lynaugh*¹⁸ and

12. See generally Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 279 (2005) (“Yet most extant normative theories of judicial review rest on the capacity of judges to act in a manner contrary to political or popular preferences. Love it or hate it, the countermajoritarian image of the Supreme Court endures.”).

13. See *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (“The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.”).

14. *Gregg v. Georgia*, 428 U.S. 153 (1976) (reinstating the death penalty).

15. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (invalidating the death penalty as then administered).

16. *Atkins v. Virginia*, 536 U.S. 304 (invalidating the death penalty for mentally retarded offenders).

17. *Roper v. Simmons*, 543 U.S. 551 (2005) (invalidating the death penalty for juvenile offenders).

18. *Penry*, 492 U.S. 302 (upholding the death penalty for mentally retarded offenders), *abrogated by Roper*, 543 U.S. 551.

Stanford v. Kentucky.¹⁹ In each set of cases, I attack the doctrinal explanation for the Court's change of position, offering broader historical context as an alternative, *nondoctrinal* explanation for why the cases came out the way they did.

In Part III, I embark on a focused, albeit broader, discussion of the *nondoctrinal* ways that social and political influences can shape the Supreme Court's death penalty decisionmaking. In Part III.A, I use political science models of Supreme Court decisionmaking as a springboard for exploring the avenues by which broader social and political forces tend to drive the Court toward majoritarian death penalty rulings for reasons wholly independent of majoritarian death penalty doctrine. In Part III.B, I bring the analysis full circle, showing how broader social and political influences are even responsible for the birth (and shape) of the "evolving standards" doctrine. In this respect, death penalty scholars have it exactly backwards. Problematic doctrine is not to blame for majoritarian influences; rather, majoritarian influences are to blame for problematic doctrine. Reality turns scholarship on its head, proving again the central point—the real obstacle to countermajoritarian decisionmaking is not doctrine, but the inherently majoritarian tendencies of the Supreme Court itself.

I. IN THE BEGINNING

To acquire even the most basic understanding of the complicated and contradictory morass of law that constitutes the Supreme Court's "evolving standards" jurisprudence, one must first understand the two landmarks that gave birth to it: *Furman v. Georgia*²⁰ and *Gregg v. Georgia*.²¹ *Furman* is the 1972 bombshell that invalidated the death penalty as it was then administered.²² *Gregg* is the 1976 landmark that reinstated the death penalty a mere four years later, approving newly drafted "guided discretion" statutes²³ and inaugurating what has come

19. *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding the death penalty for juvenile offenders), *abrogated by Atkins*, 536 U.S. 304.

20. *Furman*, 408 U.S. 238.

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

22. *Furman*, 408 U.S. at 239–40 (per curiam) ("The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

23. *Gregg*, 428 U.S. at 195 (plurality opinion) ("[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a

to be known as the modern death penalty era.²⁴ In the present discussion, these decisions are significant not only because they forged the “evolving standards” doctrine, but also because they present the most graphic examples of how nonlegal social and political forces influence how the Court decides death.

A. *Furman v. Georgia: In the Beginning Was the End*

The Supreme Court’s 1972 decision in *Furman v. Georgia* marks the first time the Justices vacated a death sentence under the Eighth Amendment’s Cruel and Unusual Punishments Clause, and vacate they did—over 630 death sentences in one fell swoop.²⁵ What drove the Court to invalidate the death penalty as it was then administered? As this Section demonstrates, it was not legal precepts or precedents. Extralegal forces pointed toward the result in *Furman*, but conventional sources of constitutional interpretation—text, original understanding, prior Supreme Court dicta, even not-so-binding precedent from the year before—all pointed the opposite way.

1. *Furman’s Legal Context.* *Furman’s* result is perplexing given the legal context in which the case was decided. Constitutional text did not support the decision. The Fifth Amendment provides explicit protections in the capital context, implying (if not assuming) the death penalty’s existence and legitimacy.²⁶ Likewise, the Framers’ understanding did not support the decision. In 1791, when the Eighth Amendment was ratified, capital punishment was not only an accepted punishment, but also the *only* punishment for most felony crimes.²⁷ Thus, to the extent constitutional text and original

carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”).

24. Technically, the era began when states passed new death penalty statutes in the wake of *Furman*, but *Gregg* recognized the legitimacy of those statutes and allowed executions to resume after a nearly decade-long hiatus. See VICTOR L. STREIB, *DEATH PENALTY IN A NUTSHELL* 6–8 (2d ed. 2005).

25. MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 292–93 (1973). For a discussion of the history of legal challenges to the death penalty prior to *Furman*, see generally *id.*

26. See U.S. CONST. amend. V. (“No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in *jeopardy of life* or limb; . . . nor be *deprived of life*, liberty, or property, without due process of law.” (emphases added)).

27. In colonial days, a lack of facilities and manpower for long-term incarceration required punishments that could be carried out swiftly—fines, mutilations, and, for most felonies,

understanding mattered (a question hotly debated among the Justices in *Furman*),²⁸ neither supported the Court's landmark ruling.

Similarly, nothing in the Supreme Court's prior Eighth Amendment decisions provided a basis for the result in *Furman*. When *Furman* was decided, the Cruel and Unusual Punishments Clause was a dead letter in constitutional law. The Supreme Court had discussed the clause only ten times during the first 175 years of its existence, and had relied on it to decide a mere six cases.²⁹ Three of the six were capital cases involving challenges to the method, as opposed to the legality, of imposing death.³⁰ The Court affirmed in all three, approving even multiple attempts at execution—so-called “death by installments.”³¹ The second three were noncapital cases in which the Court articulated and applied the Eighth Amendment's proportionality principle, which, as the name suggests, prohibits punishments grossly disproportionate to the crime.³² In virtually every

death. See Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 11–12, 23–24 (2007) (discussing the prevalence of the death penalty in the colonial era).

28. Compare *Furman v. Georgia*, 408 U.S. 238, 269 (1972) (Brennan, J., concurring) (arguing that original intent of the Cruel and Unusual Punishments Clause was vague and, in any event, “was left behind with the 19th century”), and *id.* at 325 (Marshall, J., concurring) (arguing that the Court in 1910 rejected the notion that the Eighth Amendment was limited to tortuous punishments, as the Framers intended), with *id.* at 414 (Blackmun, J., dissenting) (noting that the Court's decision is “difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement”), and *id.* at 417 (Powell, J., dissenting) (lamenting that “[t]he Court rejects as not decisive the clearest evidence that the Framers of the Constitution and the authors of the Fourteenth Amendment believed that those documents posed no barrier to the death penalty”).

29. See THE SUPREME COURT IN CONFERENCE (1940–1985) 618 (Del Dickson ed., 2001); see also *infra* notes 30–32 (delineating cases).

30. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (plurality opinion) (considering a challenge to death by repeated electrocution); *In re Kemmler*, 136 U.S. 436, 447–48 (1890) (considering a challenge to death by electrocution); *Wilkerson v. Utah*, 99 U.S. 130, 132–33 (1878) (considering a challenge to death by public shooting).

31. *Francis*, 329 U.S. at 464, 474 (upholding death by repeated electrocution); *Kemmler*, 136 U.S. at 447 (upholding death by electrocution); *Wilkerson*, 99 U.S. at 136–37 (upholding death by public shooting). In *Francis*, Louisiana officials botched the defendant's electrocution and wanted to try again. 329 U.S. at 460–71. During the initial attempt, the defendant's body had reacted so violently to the shock it was receiving that the electric chair, which had not been anchored to the floor, gave way. *Id.* A majority of the Court upheld what the dissenters termed “death by installments.” *Id.* at 474 (Burton, J., dissenting). According to the Court, even a lingering death was tolerable so long as the state did not mean for it to be. *Id.* at 464 (plurality opinion).

32. See *Robinson v. California*, 370 U.S. 660, 667 (1962) (plurality opinion) (holding that imprisonment for narcotics addiction is “cruel and unusual” punishment, explaining that “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold”); *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (holding that expatriation is “cruel and unusual”

one of these cases, the Justices acknowledged in some form or fashion the death penalty's legitimacy.³³ Granted, the statements were dicta. But Chief Justice Burger was exactly right when he wrote in his *Furman* dissent, "In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment."³⁴

That said, the most conspicuous problem with *Furman* was the Supreme Court's decision a mere fourteen months earlier in *McGautha v. California*.³⁵ In *McGautha*, the Court rejected the claim that standardless discretion in the imposition of death violated due process, holding, "[W]e find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."³⁶ For the Justices in *Furman*, *McGautha* was a problem because the gist of *McGautha*'s complaint—that death sentences were arbitrary and capricious—was also the gist of the Court's rationale in *Furman*.³⁷ Granted, the two decisions were distinguishable; *McGautha* was a due process case, *Furman* was not. But the irony was hard to miss. Having

punishment for a soldier's wartime desertion for a day); *Weems v. United States*, 217 U.S. 349, 382 (1910) (holding that a twelve-year sentence of *cadena temporal*—forced labor while chained at the ankles and wrists—is "cruel and unusual" punishment for the crime of forging a public document). For general discussion of the proportionality principle, see *Weems*, 217 U.S. at 367 ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

33. See *Furman*, 408 U.S. at 428 (Powell, J., dissenting) ("On virtually every occasion that any opinion has touched on the question of the constitutionality of the death penalty, it has been asserted affirmatively, or tacitly assumed, that the Constitution does not prohibit the penalty."); *id.* at 407–08 (Blackmun, J., dissenting) (discussing cases and making the same point); *id.* at 329 (Marshall, J., concurring) (conceding that a "fair reading" of the Court's prior death penalty cases "would certainly indicate an acceptance *sub silentio* of capital punishment as constitutionally permissible"). This is not to deny that the Court's 1958 pronouncement in *Trop* was more equivocal. See, e.g., *Trop*, 356 U.S. at 99 ("Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted it cannot be said to violate the constitutional concept of cruelty.").

34. *Furman*, 408 U.S. 238, 380 (1972) (Burger, C.J., dissenting).

35. *McGautha v. California*, 402 U.S. 183 (1971).

36. *Id.* at 207.

37. I use the phrase "Court's rationale" loosely. *Furman* had no majority or plurality opinion but rather five concurring opinions; the claim that the death penalty was administered in an arbitrary and capricious fashion was the one point on which each of the five concurring Justices agreed, and the one point the case would come to represent. See Lain, *supra* note 27, at 14–15 (discussing concurring opinions in *Furman*, and comparing those to the petitioner's claim in *McGautha*).

just held that the Constitution did not require standards in the imposition of death, the Justices then invalidated the death penalty because there were no standards.³⁸

In short, nothing in the conventional sources of constitutional law dictated or even supported the result in *Furman*. Not even the “evolving standards” doctrine can explain the ruling in *Furman*; before *Gregg* was decided in 1976, the doctrine (at least as a source of substantive Eighth Amendment protection) did not yet exist.³⁹ What, then, was driving the case? Clearly, *Furman* was a decision the Justices wanted to make, not one they had to make (or even had substantial support for making). The Court invalidated the death penalty because five Justices were convinced it was the right thing to do. The question then is why the Justices in *Furman* would have felt that way, and it is here that the decision’s extralegal context becomes important. Only by understanding the larger extralegal context of 1972 can one begin to understand why the Justices in *Furman* would have thought invalidating the death penalty was the right thing to do despite what the law provided, rather than because of it.

38. This was particularly ironic because, at its core, the arbitrariness that *Furman* denounced was a problem with how the death penalty was applied, rather than with the penalty itself, and thus better suited for the procedural due process challenge made and rejected in *McGautha*. See *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring) (“[T]hese discretionary statutes are . . . pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”); *id.* at 398–99 (Burger, C.J., dissenting) (“The decisive grievance of the opinions—not translated into Eighth Amendment terms—is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice It is essentially and exclusively a procedural due process argument.”); see also Lain, *supra* note 27, at 16 (“Acutely aware of the inconsistency, the Justices in *Furman*’s majority dealt with *McGautha* as well as they could—rejecting it, distinguishing it, even ignoring it altogether.”); *id.* at 44–45 (discussing possible explanations for the Court’s change of position from *McGautha* to *Furman*).

39. The Court had held that the Eighth Amendment was to be interpreted in light of “evolving standards of decency,” see *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), but before *Furman*, it had never suggested that a punishment could violate the Eighth Amendment just because it had become unpopular, see *Furman*, 408 U.S. at 383 (Burger, C.J., dissenting). In *Furman*, two of the Justices—Justices Brennan and Marshall—made that doctrinal leap, but the other three Justices in the majority were unwilling to do so. See Lain, *supra* note 27, at 17–18 (discussing concurring opinions of Justices Brennan and Marshall in *Furman*); see also *infra* Part III.B.1 (discussing the birth of the “evolving standards” doctrine).

2. *Furman's Extralegal Context.* When the Supreme Court decided *Furman* in 1972, the nation was in the midst of one of the greatest abolition movements it had ever seen.⁴⁰ Executions had dropped dramatically over the previous four decades, falling from an average of 167 per year in the 1930s to just forty-seven in 1962.⁴¹ By the mid-1960s, executions averaged less than ten a year, and by late 1967, they had stopped altogether.⁴² Death sentences, too, had fallen over time, despite an increase in the number of capital crimes committed.⁴³ Even state legislatures had begun to distance themselves from the death penalty. Between 1964 and 1969, six states abolished capital punishment, a move no state had made since 1919.⁴⁴ Granted, that still left forty death penalty states in 1972,⁴⁵ but few of these were ardent supporters of capital punishment. Death penalty statutes were

40. Lain, *supra* note 27, at 19–42 (discussing at length the sociopolitical context of 1972). For an excellent discussion of the developments that led to the Legal Defense Fund's litigation in *Furman*, and then *Gregg*, see MICHAEL MELTSNER, *THE MAKING OF A CIVIL RIGHTS LAWYER* 192–218 (2006).

41. See Walter C. Reckless, *The Use of the Death Penalty: A Factual Statement*, in *CAPITAL PUNISHMENT* 38, 51 (James A. McCafferty ed., 1972) (charting executions from 1930 through 1970).

42. In 1962, there were forty-seven executions, after which time the number of executions per year plummeted—there were twenty-one executions in 1963, fifteen in 1964, seven in 1965, one in 1966, two in 1967, and from 1968 until the death penalty was reinstated in 1976, there were none. See *id.*; Lesley Oelsner, *Decision is 7 to 2*, N.Y. TIMES, July 2, 1976, at 47.

Granted, the story is a bit more complicated than that; the complete halt of executions in 1967 was due to a litigation-induced de facto moratorium in place while the Supreme Court waded through various constitutional challenges to the death penalty. See generally MELTSNER, *supra* note 25, at 106–67 (discussing the implementation of moratorium strategy). But, as the National Crime Commission concluded in its 1967 report, the driving factor in the decline in executions (as opposed to their cessation) was the fact that those responsible for the administration of death were losing the will to carry it out. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE* 143 (1967).

43. Between 1935 and 1942, courts imposed an average of 142 death sentences per year. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 244 (2002). By the 1960s, that number had dropped to 106 despite a significant rise in the number of capital crimes committed during that interval. See *id.*; Lain, *supra* note 27, at 21 (discussing death sentences and skyrocketing murder rates in the last half of the 1960s).

44. With qualifications, the numbers are actually a little higher. In 1957, Alaska and Hawaii, then federal territories, abolished the death penalty, while Delaware abolished it in 1958, only to reinstate it three years later. See WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982*, at 9–10 (1974) (charting and discussing abolition legislation among the states).

45. See *Furman*, 408 U.S. at 417 (Powell, J., dissenting).

on the books, but with one regional exception—the South—they were rarely invoked in practice.⁴⁶

Public support for capital punishment in the years preceding *Furman* was relatively low as well. Despite a spate of violence in the late 1960s and the “law and order” mood that came with it,⁴⁷ only 50 percent of the American public professed to support capital punishment between 1968 and 1972.⁴⁸ The nation’s leading newspapers condemned it,⁴⁹ most major religious denominations in the country condemned it,⁵⁰ and a number of elite organizations condemned it, including the American Correctional Association and National Council on Crime and Delinquency.⁵¹ Even the amicus briefs in *Furman* were overwhelmingly opposed to the practice. Of the dozen amici to file briefs in *Furman*, only one—the State of Indiana—defended capital punishment.⁵² The others all asked the Court to invalidate it.⁵³

Political support for capital punishment when *Furman* was decided was likewise weak. President Nixon supported the death penalty, but he had not made it a part of his “law and order”

46. See Lain, *supra* note 27, at 24–26 (discussing Southern exceptionalism on the death penalty in the 1960s, but highlighting that even in the South, executions fell by 50 percent between 1940 and 1960).

47. See Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1427–29 (2004) (discussing urban riots, high-profile assassinations, and skyrocketing crime rates in the late 1960s, and the nation’s turn to “law and order” as a result).

48. Gallup reported death penalty support at 51 percent in 1969 and 49 percent in 1971 while *Furman* was pending. See David W. Moore, *Americans Firmly Support Death Penalty*, GALLUP POLL MONTHLY, June 1995, at 25. In March 1972, three months before *Furman* was decided, Gallup reported death penalty support at an even 50 percent, with 41 percent of the public opposed to the practice and 9 percent undecided. GEORGE H. GALLUP, 1 THE GALLUP POLL: PUBLIC OPINION 1972–1977, at 20 (1978).

49. See HUGO ADAM BEDAU, *DEATH IS DIFFERENT* 144 (1987) (listing newspapers).

50. See Brief of The Synagogue Council of America et al. as Amici Curiae Supporting Petitioner, *Furman v. Georgia*, 408 U.S. 238 (1972) (No. 69-5003), 1971 WL 134169 (representing various Jewish constituencies opposed to the death penalty); BANNER, *supra* note 43, at 241 (noting opposition to the death penalty among the Catholic, Methodist, Lutheran, Episcopal, and Presbyterian Churches by the 1960s).

51. See Lain, *supra* note 27, at 32 (discussing opposition to death penalty among these and other elite organizations).

52. See Brief of Theodore L. Sendak, Attorney General of Indiana, David O. Givens, Deputy Attorney General as Amici Curiae Supporting Respondent, *Furman*, 408 U.S. 238 (No. 69-5003), 1971 WL 126673.

53. See BURT HENSON & ROSS R. OLNEY, *FURMAN V. GEORGIA: THE DEATH PENALTY AND THE CONSTITUTION* 58–61 (1996) (discussing in detail the amicus briefs in *Furman*); MELTSNER, *supra* note 25, at 255–57.

campaign in 1963, nor did his administration file an amicus brief in *Furman*.⁵⁴ Indeed, the 1972 Republican Party platform was conspicuously silent on the death penalty issue, while the Democratic Party Platform that year favored abolishing it.⁵⁵

Other political indicators also signaled a lack of enthusiasm for capital punishment. For example, while *Furman* was pending, Congress considered a moratorium on executions⁵⁶ and the National Commission on the Reform of Federal Criminal Laws issued a report recommending abolition at the federal level.⁵⁷ In addition, the American Law Institute, whose advisory committee favored abolition by a wide margin, included a draft abolition provision in its Model Penal Code.⁵⁸ Even politicians in the South, where support for the death penalty was strongest, were starting to publicly criticize capital punishment during this time.⁵⁹ Indeed, North Carolina's governor made so many anti-death penalty remarks that clemency petitions in the state routinely referenced them.⁶⁰

Importantly, all of these developments took place against the backdrop of a global abolition movement. In the 1960s, the number of countries abolishing the death penalty more than doubled, rendering the United States an outlier among Western democracies in retaining

54. While campaigning in 1968, Nixon refrained from commenting on the issue, although his new attorney general had stated that Nixon was "not opposed to capital punishment." LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 61, 97 (1992) (noting solicitor general's lack of involvement in *Furman*). The Nixon administration did file an amicus brief supporting the death sentences in *McGautha*, see MELTSNER, *supra* note 25, at 230–31, so perhaps it thought one unnecessary.

55. See DONALD BRUCE JOHNSON & KIRK H. PORTER, *NATIONAL PARTY PLATFORMS 1840–1972*, at 809 (1973).

56. The chairman of the House Judiciary Committee introduced the legislation in the wake of *McGautha*. See MELTSNER, *supra* note 25, at 245 & n.10 (discussing S. 1969, 92d Cong. (1971)); *Bill to Seek Stay of Executions*, N.Y. TIMES, May 15, 1971, at 14.

57. See NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, *FINAL REPORT TO THE PRESIDENT AND CONGRESS* 312 (1971); see also MELTSNER, *supra* note 25, at 236 (discussing the Commission's 1971 Report).

58. The 1962 Model Penal Code contained a model death penalty statute and a "no death penalty" option, which offered life without parole as a maximum punishment. See HUGO ADAM BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 82 (1977) (discussing the American Law Institute's treatment of the death penalty in the 1962 Model Penal Code).

59. See BANNER, *supra* note 43, at 240–41 (discussing outspoken criticism of death penalty by the governor of North Carolina); Richard Hammer, *The Case That Could End Capital Punishment*, N.Y. TIMES, Oct. 12, 1969, at SM46 (discussing outspoken criticism of the death penalty by the governor of Arkansas).

60. See BANNER, *supra* note 43, at 240–41.

the practice.⁶¹ By 1968, almost all of Western Europe had formally rejected capital punishment, with those countries most like the United States—Great Britain, Canada, and Australia, among others—either taking an abolitionist stance or imposing moratoriums to begin the abolition process.⁶² Abolition was a worldwide phenomenon, and events abroad cast the United States as slowly but surely moving with the global trend.

In sum, by the time the Supreme Court decided *Furman*, it certainly *looked* as though the nation was moving toward abolition on its own. Indeed, *Time Magazine* twice wrote about the “dying death penalty” in the late 1960s, while *U.S. News & World Report* noted increasing abolition sentiment as late as 1971.⁶³ For swing Justices Stewart and White, who were essential to *Furman*’s five-Justice majority, the nation’s growing distaste for death was key to resolving the case. In conference, Justice Stewart reportedly voted to reverse in *Furman* because a vote to affirm the death penalty “would only delay its abolition.”⁶⁴ Justice White’s comments in conference suggested he felt the same way, and his observation in *Furman* that the death penalty “has for all practical purposes run its course” figured prominently in his concurring opinion in the case.⁶⁵ In *Furman*, then, events outside the law provide a better explanation for the decision than the law itself—and the same would be true four years later when the Court decided *Gregg*.

61. See Lain, *supra* note 27, at 26–28 (discussing the international abolition movement and the problems that the death penalty posed for foreign diplomacy).

62. Great Britain imposed a moratorium on executions in 1965, abolishing the death penalty altogether in 1969. Also in the 1960s, Canada, Australia, and New Zealand either imposed moratoriums on executions or abolished the death penalty altogether. See *id.* at 27 (citation omitted).

63. *Death Sentences for Manson Clan, But—*, U.S. NEWS & WORLD REP., Apr. 12, 1971, at 26 (“Sentiment to abolish the death penalty altogether appears to be growing throughout the United States.”); *Killing the Death Penalty*, TIME, July 7, 1967, at 47 (“By inches, the death penalty is dying in the U.S.”); *Signs of an End to ‘Death Row’*, U.S. NEWS & WORLD REP., May 31, 1971, at 37 (“Now a nationwide drive to do away with the death penalty is gaining momentum.”); *The Dying Death Penalty*, TIME, Feb. 17, 1967, at 50.

64. THE SUPREME COURT IN CONFERENCE, *supra* note 29, at 617.

65. *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring); see THE SUPREME COURT IN CONFERENCE, *supra* note 29, at 618 (recording Justice White as stating, “We should not legalize the death penalty at this time in our history. I reverse in all of these cases.”). Even three of *Furman*’s four dissenters made a point of stating their distaste for the death penalty in their dissenting opinions; only then-Justice Rehnquist supported it as a matter of policy and law. See Lain, *supra* note 27, at 43–44 (discussing and quoting dissenting opinions).

B. *Gregg v. Georgia: In the End Was a New Beginning*

When the Supreme Court issued *Furman* in 1972, many people (including the Justices themselves) believed that America had seen its last execution.⁶⁶ But it was not to be. In *Furman*'s wake, thirty-five states passed death penalty statutes purporting to cure the arbitrariness in capital sentencing that the Justices had found constitutionally offensive.⁶⁷ Once again, the Supreme Court was called upon to consider the death penalty's constitutionality, which it did in the 1976 landmark *Gregg v. Georgia*.⁶⁸ This time, the Court upheld the death penalty, approving "guided discretion" statutes that established standards for the imposition of death.⁶⁹ In retrospect, then, the first chapter of the Court's modern Eighth Amendment death penalty jurisprudence was more like a prologue—in the beginning was the end and in the end, a new beginning. Yet despite their juxtaposition, *Furman* and *Gregg* are the same in at least this respect: each is difficult to understand as a product of doctrinal decisionmaking, but easy to understand as a product of its time.

1. *Gregg's Legal Context.* Like *Furman*, *Gregg* is hard to reconcile with the law as it stood before the case was decided. According to the Justices in *Gregg*, the newly drafted guided discretion statutes passed constitutional muster for two reasons. First, those statutes were consistent with the nation's "evolving standards of decency"⁷⁰—an easy sell in 1976. With new death penalty statutes on

66. See EPSTEIN & KOBYLKA, *supra* note 54, at 80–81 (noting the widespread belief after *Furman* that there would never be another execution in America and quoting contemporary sources); THE SUPREME COURT IN CONFERENCE, *supra* note 29, at 619 (recording Justice Stewart's personal belief that after *Furman*, the death penalty "was finished" in America); see also BOB WOODWARD & SCOTT ARMSTRONG, THE BROTHERS 219 (1979) (noting Chief Justice Burger's private prediction that "[t]here will never be another execution in this country").

67. See *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976) (discussing and listing new death penalty statutes).

68. *Id.* at 153.

69. *Id.* at 169 ("We now hold that the punishment of death does not invariably violate the Constitution."); *id.* at 195 ("[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.").

70. See *id.* at 173 ("As Mr. Chief Justice Warren said, in an oft-quoted phrase, '(t)he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment." (citations omitted)); *id.* at 179 ("[I]t is now evident that a large proportion of American society

the books in thirty-five states, it was impossible to deny the country's renewed commitment to capital punishment in the years following *Furman*. That said, the Court's reliance on "evolving standards" was problematic. Before *Gregg*, the Court had never upheld or struck down a punishment because of its popularity (or lack thereof); the Court had used the words "evolving standards of decency," but only to capture the notion of a living constitution, not to enunciate majoritarian-based protection.⁷¹ Moreover, the death penalty's compliance with "evolving standards" did nothing to address the arbitrariness in capital sentencing that *Furman* had found constitutionally offensive.⁷² In short, the Court's use of "evolving standards" was not just newly minted doctrine; it was completely beside the point.

Gregg's second reason for reinstating the death penalty—that the new statutes eliminated arbitrariness in the imposition of death⁷³—was not beside the point, but was equally problematic. Once again, *McGautha* (at least what was left of it)⁷⁴ appeared to dictate a different result. In rejecting the claim that standards to guide capital sentencing discretion were constitutionally required, the Court in *McGautha* had written:

It is apparent that such criteria do not purport to provide more than the most minimal control over the sentencing authority's exercise of

continues to regard [the death penalty] as an appropriate and necessary criminal sanction. The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*.”)

71. See *supra* note 39 and *infra* Part III.B.2 (discussing evolution of “evolving standards” doctrine).

72. See *supra* note 38 and accompanying text. *Gregg*'s plurality opinion stated that the petitioners had renewed the “evolving standards” argument they had made four years earlier, see *Gregg*, 428 U.S. at 179, but the argument was not in *Gregg*'s brief nor, given the sociopolitical context of 1976, would the argument have made sense at that time. See Brief of Petitioner, *Gregg*, 428 U.S. 153 (1976) (No. 74-6257), 1976 WL 178713; see also EPSTEIN & KOBYLKA, *supra* note 54, at 103 (noting that the attorneys in *Gregg* “tried to avoid” the “evolving standards” argument).

73. See *Gregg*, 428 U.S. at 206–07 (“No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.”).

74. In *McGautha*, the Supreme Court rejected the petitioner's claim that standards were constitutionally required in capital sentencing, in part because the Court thought standards were unnecessary—discretion was the virtue of jury sentencing, not the vice—and in part because the Court thought they would not work. *McGautha v. California*, 402 U.S. 183, 207–08 (1971). *Furman* called into question the first part of *McGautha*'s holding, and *Gregg* called into question the second—although neither technically overruled *McGautha* because *McGautha* was decided under the Fourteenth Amendment, rather than the Eighth. See *supra* notes 35–38 and accompanying text.

discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. They do not even undertake to exclude constitutionally impermissible considerations. And, of course, they provide no protection against the jury determined to decide on whimsy or caprice.⁷⁵

The Court's ruling in *Gregg* was plainly at odds with its ruling in *McGautha*, which was still good law on this point,⁷⁶ and it was at odds with *Furman* as well. *Furman* had held that the arbitrary imposition of death was unconstitutional, and *McGautha* had held that guided discretion statutes would not—indeed, *could* not—cure arbitrariness in the imposition of death.⁷⁷ Between the two, the Court had boxed itself in. The Justices had no doctrinal room to affirm the death sentences in *Gregg*, but affirm they did, acknowledging *McGautha* only by the vague reference: “some have suggested that standards to guide a capital jury’s sentencing deliberations are impossible to formulate.”⁷⁸ True, “some” had—four of the very same Justices who formed the majority in *Gregg*.⁷⁹

Gregg's result was even more inexplicable given the particulars of Georgia's guided discretion statute. Like most guided discretion statutes, Georgia's statute purported to curb capital sentencing discretion by establishing a limited number of aggravating circumstances that triggered death penalty eligibility. In Georgia's case, those circumstances included murders that involved “depravity

75. *McGautha*, 402 U.S. at 207; *see also id.* at 208 (“For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless ‘boiler-plate’ or a statement of the obvious that no jury would need.”). Ironically, the Justices made these comments in the context of discussing the Model Penal Code’s proposed guided discretion statute—the same guided discretion statute that the Justices would use to make the opposite point in *Gregg*. Compare *id.* at 207, with *Gregg*, 428 U.S. at 193–95 (using the Model Penal Code’s guided discretion statute to refute the claim that standards in the imposition of death are impossible to formulate).

76. *See supra* note 74.

77. *See supra* notes 37–38, 75 and accompanying text.

78. *Gregg*, 428 U.S. at 193.

79. Justices White, Stewart, Burger, and Blackmun all supported the result in *Gregg*, *id.* at 157, and had also signed on to the majority opinion in *McGautha*, THE SUPREME COURT IN CONFERENCE, *supra* note 29, at 614–16 (discussing the votes of the Justices in *McGautha*); MELTSNER, *supra* note 25, at 241 (same).

of mind” or “aggravated battery to the victim”⁸⁰—descriptors that made almost any murder a capital murder, if the jury wanted.⁸¹ Compounding the problem was the fact that Georgia’s statute provided no guidance whatsoever as to how juries were to make the capital sentencing decision once a defendant was found to be death eligible.⁸² According to the Court in *Gregg*, the decision to grant mercy (as opposed to the decision to impose death) did not require guidance.⁸³ In the end, then, juries still had enormous room to impose death whenever they wanted, obliterating any discernable difference between the standardless discretion invalidated in *Furman* and the guided discretion upheld in *Gregg*.

The Justices in *Gregg* were not oblivious to these problems. Most of them also had been in *McGautha*’s majority, so they had already gone on record against the feasibility of the guided discretion statutes.⁸⁴ That aside, it was impossible not to know that four years after *Furman*, arbitrariness in the imposition of death remained. The petitioners argued it,⁸⁵ the papers reported it,⁸⁶ and the empirical

80. *Gregg*, 428 U.S. at 165 n.9 (citing the Georgia statute, GA. CODE ANN. § 26-3102 (Supp. 1975)).

81. Empirical evidence would later prove the point. See BALDUS, WOODWORTH & PULASKI, *supra* note 6, at 268 n.31 (“Of the murders and nonnegligent manslaughters reported to the FBI during this period . . . 86% of these offenders were death-eligible under Georgia’s broad death-sentencing statute.”); see also Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2608–09 (1996) (discussing aggravating factors at issue in *Gregg* and in other death penalty statutes and concluding that the phrases used “describe the circumstances surrounding most murders”).

82. See *Gregg*, 428 U.S. at 162–66, 196–99 (reproducing and discussing the statute).

83. See *id.* at 203 (holding that “the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants” under guided discretion statutes). But see Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 391 (1995) (“If standardless discretion is problematic because it gives those with a mind to discriminate the opportunity to discriminate, unconstrained consideration of any kind of mitigating evidence is problematic for precisely the same reason.”); *id.* at 392 (“‘Kill him if you want’ and ‘Kill him, but you may spare him if you want’ mean the same thing in any man’s language.” (quoting Brief for the NAACP Legal Defense et al. as Amici Curiae Supporting Petitioner at 69, *McGautha v. California*, 402 U.S. 183 (1971) (No. 71-203), 1970 WL 122025)).

84. For a discussion of the Justices’ votes in *McGautha* and *Gregg*, see *supra* note 79. Justices Powell and Stevens recognized the box the Justices were in; in fact, Justice Powell thought that between *McGautha* and *Furman*, total abolition was the only available option. WOODWARD & ARMSTRONG, *supra* note 66, at 430–32.

85. Brief of Petitioner at 11–14, *Gregg*, 428 U.S. 153 (1976) (No. 74-6257), 1976 WL 178713; see also EPSTEIN & KOBYLKA, *supra* note 54, at 131–32 (noting that the NAACP Legal Defense Fund “made at least as plausible a showing of arbitrariness in [the new statutes]’ application and

evidence confirmed it.⁸⁷ Even Georgia's Governor Jimmy Carter had publicly expressed doubts about the constitutionality of the guided discretion statute at issue in *Gregg*.⁸⁸

In sum, *Gregg* may not have explicitly overruled *Furman*, but it was a wholesale repudiation of *Furman*'s spirit and constitutional command. *Gregg*'s opinions read like *Furman*'s dissents, and even cited them from time to time.⁸⁹ The Court's stance had changed;

enforcement in 1976 as [it] did in 1972" and that "what a majority saw as troubling in *Furman* remained present in *Gregg*").

86. E.g., Mary Ellen Gale, *How Fair Is Our Justice, How Fitting Is Execution?*, N.Y. TIMES, Jan. 5, 1975, § 7 (Book Review), at 1 (praising a book concluding that, even under the new statutes, "a few people are selected, without adequately shown or structured reason for their being selected, to die"); Michael Meltsner, *Cruel and Unusual Punishment*, N.Y. TIMES, Oct. 11, 1974, at 39 (arguing that "[d]iscretion has not been eliminated, it has merely become less visible" and that the new law presented by Georgia's guided discretion statute "work[ed] much like the old one"); Patrick R. Oster, *In Spite of All the Talk of Restoring the Death Penalty*, U.S. NEWS & WORLD REP., Apr. 14, 1975, at 52 (discussing the claim that new death penalty statutes do not satisfy the objections in *Furman*); Warren Weaver, *Ruling Expected on Death Penalty*, N.Y. TIMES, Oct. 21, 1974, at 68 (noting argument that arbitrary infliction of the death penalty "has been carefully preserved" and that in Georgia, only seventeen men have received the death penalty out of nine hundred rapes, eight hundred murders, and six thousand cases of armed robbery); Tom Wicker, *The Question of Death*, N.Y. TIMES, Mar. 14, 1975, at 39 (arguing that the "unassailable record shows capital punishment to be racially discriminatory" and providing statistics to back up the claim).

87. See, e.g., CAPITAL PUNISHMENT IN THE UNITED STATES 151 (Bryan Vila & Cynthia Morris eds., 1997) (discussing and quoting a 1973 study concluding that "[r]acial variables are systematically and consistently related to the imposition of the death penalty"); Marc Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 TEMP. L.Q. 261, 282 (1976) ("[T]here is no evidence to suggest that post-*Furman* statutes have been successful in reducing the discretion which leads to a disproportionate number of nonwhites being sentenced to death."); *Death Penalty for Nonwhites Found More Likely Now Than Previously*, N.Y. TIMES, Apr. 4, 1976, at 42 (discussing study finding that new state laws had not "succeeded in reducing the discretion in lower courts that was said to have made blacks more likely than whites to receive capital punishment for similar crimes").

88. EPSTEIN & KOBYLKA, *supra* note 54, at 87 (noting Governor Jimmy Carter's doubts about the new death penalty law he signed into effect); Jerry M. Flint, *States on Move*, N.Y. TIMES, Mar. 11, 1973, at 1 (reporting Jimmy Carter's pledge to sign the death penalty bill despite questions about its constitutionality).

89. Compare *Gregg v. Georgia*, 428 U.S. 153, 168 (1976) (noting multiple occasions when the Court assumed or asserted the death penalty's constitutionality in the past), and *id.* at 174-76 (noting the responsibility of the Court not to act as a legislature, citing *Furman* dissents), and *id.* at 176-78 (noting the long history of public acceptance of the death penalty in United States), and *id.* at 181-82 (characterizing the rarity of death sentences as a result of juries being more discriminating in imposing the death penalty), with *Furman v. Georgia*, 408 U.S. 238, 428 (1972) (Powell, J., dissenting) (noting multiple occasions when the Court had assumed or asserted the death penalty's constitutionality in the past), and *id.* at 431 (Powell, J., dissenting) (noting the importance of judicial restraint and deference to legislative prerogative), and *id.* at 385-86 (Burger, C.J., dissenting) (discussing indicators of public acceptance of the death penalty

Justices Stewart and White had switched sides.⁹⁰ The question, again, is what made these Justices change their minds, and the answer, as in *Furman*, had nothing to do with the law. To understand what was really driving the Court's ruling in *Gregg*, one must again turn to the extralegal context in which it was decided.

2. *Gregg's Extralegal Context.* Commentators have described *Gregg* as a "judicial surrender" to political pressure,⁹¹ and the decision's particularly hostile sociopolitical context makes it easy to see why. As already noted, thirty-five states reenacted death penalty statutes in the wake of *Furman*.⁹² And that was not all. Juries imposed death sentences in record numbers under the newly drafted statutes⁹³ while public support for the death penalty made an impressive rebound. In 1972, when *Furman* was decided, the public could barely muster 50 percent support for the practice.⁹⁴ By 1976, when the Court decided *Gregg*, a comfortable 66 percent of the public favored capital punishment, the highest figure in nearly twenty-five years.⁹⁵ Not surprisingly, both incumbent Republican President Gerald Ford and his Democratic rival, Jimmy Carter, supported the death penalty in the 1976 presidential election.⁹⁶ This time, the solicitor general rallied behind the death penalty as well, asking the Court as amicus to overrule its 1972 landmark decision.⁹⁷

in the United States), *and id.* at 388 (Burger, C.J., dissenting) (viewing selectivity of juries in imposing death as "a refinement on, rather than a repudiation of" the death penalty). Justice Blackmun's one-sentence concurrence made the point explicitly. *Gregg*, 428 U.S. at 227 (Blackmun, J., concurring) (stating "I concur in the judgment" and citing the four *Furman* dissents). *See generally* FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 64 (1986) (describing *Gregg* as "an apparently outright reversal of opinion" from *Furman*).

90. Lain, *supra* note 27, at 61-62 (noting that Justice Douglas retired and was replaced by Justice Stevens in the four years between *Furman* and *Gregg*, but that *Furman's* majority was gone anyway given the changed positions of Justices Stewart and White).

91. Tom Wicker, *Foreword to ZIMRING & HAWKINS, supra* note 89, at ix, xi.

92. *See supra* text accompanying note 67.

93. Death sentences hit a three-decade high of 149 in 1974. *See BANNER, supra* note 43, at 270 (discussing death sentences in 1973, 1974, and 1975). In 1975, a whopping 298 death sentences were imposed—at the time, the highest year-end figure ever recorded. *Id.*

94. *See supra* note 48 and accompanying text.

95. Moore, *supra* note 48, at 24.

96. EPSTEIN & KOBYLKA, *supra* note 54, at 112 (discussing the positions of 1976 presidential candidates Carter and Ford).

97. Lesley Oelsner, *High Court Is Urged by Bork to Restore Capital Punishment*, N.Y. TIMES, Apr. 1, 1976, at 1.

Why the nation would turn its back on *Furman* when it seemed headed toward abolition on its own is a story unto itself, one I have explored more fully elsewhere.⁹⁸ In the present discussion, it is not the cause of *Furman*'s backlash, but rather its effect on the Justices' decisionmaking that matters. Clearly, the Justices were moved by the nation's reaction to *Furman*; they said so themselves under the guise of an "evolving standards" doctrine that was completely beside the point. Politically, this makes perfect sense. In 1976, remaining true to *Furman*'s holding would have been hazardous to the Court's institutional authority. In the wake of *Furman*, legislators had threatened a constitutional amendment to reinstate the death penalty, and by 1976, they were close to having the numbers to pull something like that off.⁹⁹ Even a failed, but concerted, attempt to override the Court would have been a severe blow to its power and legitimacy. With public opinion favoring the death penalty 2 to 1, both political parties aligning on the issue, and the solicitor general asking the Court to overrule its 1972 decision, it is hard to imagine the Justices in *Gregg* doing anything other than what they did—retreat.¹⁰⁰

For swing Justices Stewart and White, the influence of extralegal context was again palpable. Justice Stewart, who wrote the Court's three-Justice plurality opinion in *Gregg*, reportedly felt betrayed by the abolitionist lawyers in *Furman*. They had led him to believe that the Court's ruling would put an end to the dying death penalty, not bring it back to life.¹⁰¹ Justice White, who authored a rival, three-Justice concurrence in *Gregg*, also thought the nation's backlash against *Furman* justified a different result.¹⁰² Once capital statutes were no longer dead letters, Justice White no longer cared much

98. Lain, *supra* note 27, at 63–64 (evaluating various explanations for the backlash against *Furman*).

99. See generally Richard Phalon, *Death Penalty Urged in 5 States; Some Legislators Are Uncertain*, N.Y. TIMES, July 1, 1972, at 10 (noting the stated intent of seventeen members of Congress to sponsor a constitutional amendment to reinstate the death penalty); *supra* note 67 and accompanying text (discussing the legislative response to *Furman*). This is not to say that all thirty-five states would support a constitutional amendment, just that enough had reinstated the death penalty to make the prospect of a constitutional amendment more than a mere theoretical possibility.

100. This is not to say that *Gregg* itself was inevitable. If, for example, the Justices had been inclined to reverse, one can imagine the extremely hostile sociopolitical context leading them to deny certiorari on the issue in the first place. See *infra* notes 378–83 and accompanying text (discussing the denial-of-certiorari option).

101. See WOODWARD & ARMSTRONG, *supra* note 66, at 432–33.

102. See *id.* at 433.

about the death penalty's administration, dismissively writing, "Mistakes will be made and discriminations will occur which will be difficult to explain."¹⁰³ For both Justices, then, the influence of extralegal context was once again pivotal in their resolution of the case.

C. *The Lessons of Furman and Gregg*

Ironically, in both *Furman* and *Gregg*, the litigant with the law on its side lost. In *Furman*, conventional sources of constitutional law supported the death penalty, but the Court still invalidated it. In *Gregg*, precedent finally cut against the death penalty, but the Court reinstated it anyway. Both cases make sense only when viewed in light of the larger historical context in which they were decided.

In the present analysis, *Furman* and *Gregg* are "easy" cases in the sense that the influence of extralegal context is relatively clear. *Furman's* holding did not rest on "evolving standards," so it is not subject to the claim that the Justices were following sociopolitical trends because that is what doctrine required them to do. *Gregg*, by contrast, did rest on "evolving standards," although only because the Justices first recognized the doctrine there. As such, *Gregg* too is particularly enlightening—what better indication of the Court's inherently majoritarian tendencies than its gratuitous adoption of majoritarian doctrine? In *Furman* and *Gregg*, then, it is easy to see how extralegal influences have shaped the Court's death penalty decisionmaking. More difficult to see is how extralegal influences have continued to do so since the Court adopted the explicitly majoritarian "evolving standards" doctrine. To that rabbit's hole the analysis turns next.

II. THE DEATH PENALTY FOR MENTALLY RETARDED AND JUVENILE OFFENDERS: LIES, DAMNED LIES, AND STATISTICS

The Supreme Court's 2002 decision in *Atkins v. Virginia*,¹⁰⁴ which invalidated the death penalty for mentally retarded offenders,¹⁰⁵ and its 2005 decision in *Roper v. Simmons*,¹⁰⁶ which invalidated the death

103. *Gregg v. Georgia*, 428 U.S. 153, 226 (1976) (White, J., concurring).

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

105. *Id.* at 321.

106. *Roper v. Simmons*, 543 U.S. 551 (2005).

penalty for juvenile offenders,¹⁰⁷ were among the most significant death penalty rulings of their decade. Both were “evolving standards” cases, as were the 1989 landmarks they overruled, *Penry v. Lynaugh*¹⁰⁸ and *Stanford v. Kentucky*.¹⁰⁹ As this Part demonstrates, the “evolving standards” doctrine did little, if anything, to constrain the Justices’ decisionmaking in either set of cases. In the end, change came when swing voters on the Court changed the way they *wanted* to rule—a turn profoundly influenced by developments having nothing to do with the law.

A. *Doctrine as an Agent of Change*

As this Section demonstrates, the “evolving standards” doctrine deserves neither the credit nor the blame for the results in *Penry* and *Stanford* on one hand, and *Atkins* and *Roper* on the other. In each of these cases, the Justices did not follow doctrine in any meaningful sense of the word. Doctrine followed them.

1. *Doctrine in the 1989 Decisions: Penry and Stanford.* The Supreme Court decided *Penry* and *Stanford* on the same day in 1989, although other than the arguable similarities between teenagers and the mentally retarded, the cases posed dramatically different doctrinal applications. *Penry* was an easy case on the “evolving standards” question. The Court had consistently held that state legislative judgments were “[t]he clearest and most reliable objective evidence of contemporary values,”¹¹⁰ and only two of the death penalty states exempted mentally retarded offenders from execution.¹¹¹ But the Justices in *Penry* had plenty of doctrinal room to rule the other way, if they had wanted to do so. Since the early 1900s, the Court had held that disproportionate punishments violated the Eighth Amendment,¹¹² and, as *Penry*’s dissenters noted, one could easily conclude that mentally retarded individuals, who by definition had “significantly subaverage” intellectual function, were not among

107. *Id.* at 568.

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

109. *Stanford v. Kentucky*, 492 U.S. 361 (1989), *abrogated by Roper*, 543 U.S. 551.

110. *Penry*, 492 U.S. at 331 (1989); *accord Stanford*, 492 U.S. at 369–70 (1989); *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality opinion).

111. *Penry*, 492 U.S. at 334.

112. *See Weems v. United States*, 217 U.S. 349, 367 (1910) (“[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.”).

the “worst of the worst” for whom death was appropriate.¹¹³ In 1989, the Court did not choose that doctrinal path because the death penalty for mentally retarded persons did not strike a majority of the Justices as grossly disproportionate or wrong. So long as the jury could consider evidence of mental retardation at sentencing, it was not inherently “cruel and unusual” to execute mentally retarded offenders.¹¹⁴

On the “evolving standards” question, *Stanford* was a harder case. In 1989, twelve of the thirty-seven death penalty states exempted juvenile offenders from execution, while the remaining twenty-five allowed it.¹¹⁵ Based on these numbers, *Stanford*’s majority rejected the claim that a national consensus had formed against the juvenile death penalty—over half of the death penalty states allowed it.¹¹⁶ But the Court in *some* prior cases had also considered non-death penalty jurisdictions in the state count,¹¹⁷ which, as *Stanford*’s dissenters pointed out, significantly changed the calculus. If one added the twelve death penalty states that exempted juvenile offenders to the thirteen non-death penalty states and the District of Columbia (which also had no death penalty), then the total number of jurisdictions that had legislatively precluded the death penalty for juvenile offenders became twenty-six—a slight majority.¹¹⁸ If, as the dissenters advocated, one also included Vermont, whose death penalty statute did not exempt juveniles but had been invalidated by

113. See *Penry*, 492 U.S. at 343–48 (Brennan, J., concurring in part and dissenting in part).

114. See *id.* at 322–28 (majority opinion); *id.* at 335–40 (opinion of O’Connor, J.); *id.* at 351 (opinion of Scalia, J.).

115. See *Stanford*, 492 U.S. at 370 n.2 (majority opinion).

116. *Id.* at 370–71.

117. *E.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 826 n.24 (1988) (plurality opinion) (“Almost every State, and the Federal Government, has set a minimum age at which juveniles accused of committing serious crimes can be waived from juvenile court into criminal court. The dissent’s focus on the presence of these waiver ages in jurisdictions that retain the death penalty but that have not expressly set a minimum age for the death sentence, distorts what is truly at issue in this case.” (citations omitted)); see also *Penry*, 492 U.S. at 334 (1989) (majority opinion) (“In our view, 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.”(emphasis added)). In others, the Court went the opposite way. *E.g.*, *Enmund v. Florida*, 458 U.S. 782, 789 (1982) (“Thirty-six state and federal jurisdictions presently authorize the death penalty. Of these, only eight jurisdictions authorize imposition of the death penalty solely for participation in a robbery in which another robber takes life.”); *Coker v. Georgia*, 433 U.S. 584, 594–95 (1977) (noting that only three of the thirty-five states that reinstated the death penalty authorized the punishment for rape of an adult woman).

118. See *Stanford*, 492 U.S. at 384 (Brennan, J., dissenting).

Furman and never amended, then the number became twenty-seven.¹¹⁹ If one added South Dakota, which had sentenced no one to death since *Furman*, the number became twenty-eight—and so on and so forth.¹²⁰ Whether state legislation supported the finding of a “national consensus” against the juvenile death penalty depended mostly on whether a Justice wanted it to.

Other doctrinally recognized indicators of “evolving standards” were equally indeterminate. Next to state legislation, the Justices in *Stanford* agreed that jury sentencing data was highly relevant in the “evolving standards” inquiry.¹²¹ They also agreed that death sentences for juvenile offenders were exceedingly rare,¹²² but disagreed over the direction that cut. While the dissenters argued that the rarity of juvenile death sentences reflected abhorrence for the practice,¹²³ the majority argued that “the very considerations which induce [the defendants] and their supporters to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed.”¹²⁴ Age was a mitigating factor, the majority reasoned, so the rarity of juvenile death sentences reflected careful application of the punishment, not societal rejection of it. Once again, interpretation of the data depended on the Justices’ perspectives. Was the shape in the picture a young beauty or an old hag?¹²⁵

In *Stanford*, even the standards to determine the nation’s “evolving standards” were a point of disagreement. Was international opposition to the juvenile death penalty relevant? What about opposition to the practice among respected organizations like the American Bar Association? Not surprisingly, *Stanford*’s dissenters answered yes to these questions while a plurality of the Justices

119. *Id.* at 384 n.1.

120. *Id.* at 384.

121. See *id.* at 373–74 (majority opinion) (considering jury sentencing data under “evolving standards” analysis); *id.* at 386–87 (Brennan, J., dissenting) (same); see also *Coker*, 433 U.S. at 596 (“[T]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.” (quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976))).

122. See *Stanford*, 492 U.S. at 373 (majority opinion); *id.* at 386–87 (Brennan, J., dissenting).

123. See *id.* at 386–87 (Brennan, J., dissenting).

124. *Id.* at 374 (majority opinion).

125. For those unfamiliar with the reference, see Optical Illusions, <http://www.beyondtheveil.net/illusions.html> (last visited Oct. 4, 2007).

answered no.¹²⁶ *Stanford's* plurality claimed the “evolving standards” inquiry was complete upon consideration of legislative and jury sentencing data,¹²⁷ a position inconsistent with the Court’s recognition of (and reliance on) broader sociopolitical indicators in prior “evolving standards” cases.¹²⁸ As the Justices themselves recognized, it was no coincidence that the majority’s result relied on crabbed indicators of a national consensus, while the dissent’s indicators all leaned the other way.¹²⁹ The problem with “evolving standards,” the plurality and dissent agreed, was their tendency to evolve toward a Justice’s personal views.¹³⁰

As in *Penry*, the Justices in *Stanford* also could have invalidated the juvenile death penalty on a proportionality rationale, sidestepping the “evolving standards” question entirely.¹³¹ Indeed, the Court in

126. Compare *Stanford*, 492 U.S. at 369 n.1 (majority opinion), and *id.* at 374–80 (opinion of Scalia, J.) (rejecting the relevance of indicators other than legislative enactments and sentencing data), with *id.* at 388–90 (Brennan, J., dissenting) (considering opposition to the juvenile death penalty among respected organizations and the international community).

127. See *id.* at 377 (opinion of Scalia, J.) (“A revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and application of the laws) that the people have approved.”).

128. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.31 (1988) (“We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual.”); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (“[T]he climate of international opinion concerning the acceptability of a particular punishment’ is an additional consideration which is ‘not irrelevant.’” (quoting *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977))); *Coker*, 433 U.S. at 596 n.10 (1977) (“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.”); *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (“The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”).

129. According to the majority, the dissenters worked “statistical magic,” in refusing to count non-death penalty states. See *Stanford*, 492 U.S. at 371 n.3. According to the dissenters, the plurality presented “a distorted view” of contemporary standards to arrive at a given result. *Id.* at 384 (Brennan, J., dissenting).

130. *Id.* at 379 (opinion of Scalia, J.) (criticizing the dissent for using the “evolving standards” analysis as “a shorthand reference to the preferences of a majority of this Court”); *id.* at 391 (Brennan, J., dissenting) (criticizing Justice Scalia’s “revisionist view” of “evolving standards” inquiry); see also *Thompson*, 487 U.S. at 865 (Scalia, J., dissenting) (“Of course, the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one’s own views.”).

131. *Stanford's* plurality opinion rejected this possibility, *Stanford*, 492 U.S. at 379 (opinion of Scalia, J.) (arguing that invalidating a punishment on the Court’s own view of proportionality “is to replace judges of the law with a committee of philosopher-kings”), but lacked a fifth vote to support its position, *id.* at 382 (O’Connor, J., concurring) (“In my view, this Court does have a constitutional obligation to conduct proportionality analysis.”).

*Thompson v. Oklahoma*¹³² had just struck down the death penalty for *some* juveniles—those fifteen and younger—the year before, relying heavily on the notion that juveniles were inherently less culpable than adults.¹³³ As the Justices in *Thompson* explained:

[L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.¹³⁴

In language and logic, what the Court had said in *Thompson* applied in *Stanford* too—but the claim did not prevail.¹³⁵ Once again, the Court did not choose this doctrinal path because in 1989, executing juvenile offenders did not strike a majority of the Justices as invariably disproportionate or wrong.

2. *Doctrine in the Post-2000 Decisions: Atkins and Roper.* When the Supreme Court overruled *Penry* in 2002 and *Stanford* in 2005, it was clear that a new chapter in the Court's Eighth Amendment death penalty jurisprudence had begun. "This is not your father's death penalty," observed Carol Steiker,¹³⁶ and she was right. The conservative Rehnquist Court was imposing the most significant death penalty restrictions since *Furman* was decided in 1972.¹³⁷ Yet the more things changed, the more they stayed the same.

132. *Thompson*, 487 U.S. 815.

133. *Id.* at 834–35.

134. *Id.* at 835; *see also id.* at 834 ("Youth is more than a chronological fact. . . [and] [o]ur history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults." (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982))).

135. *See Stanford*, 492 U.S. at 382 (O'Connor, J., concurring) (recognizing legitimacy of proportionality analysis, but rejecting the argument that the juvenile death penalty was invalid under that rationale).

136. Carol S. Steiker, *Things Fall Apart But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1476 (2002).

137. *See generally* JOHN F. DECKER, *REVOLUTION TO THE RIGHT: CRIMINAL PROCEDURE JURISPRUDENCE DURING THE BURGER-REHNQUIST ERA* (1992) (examining the Rehnquist and Burger Courts' conservatism on criminal justice matters across a variety of issues); Joseph L.

In both *Atkins* and *Roper*, the best explanation for the Court's ruling is that it went the way a majority of the Justices personally wanted it to go.

By sheer happenstance, the number of states forbidding the death penalty practices at issue in *Atkins* and *Roper* was the same. When the Supreme Court decided *Atkins* in 2002, just eighteen of the thirty-eight death penalty states exempted mentally retarded offenders from the death penalty—the same number that exempted juvenile offenders from the death penalty when the Court decided *Roper* in 2005.¹³⁸ In both cases, the Court arrived at a national consensus by adding the number of death penalty states that had exempted these offenders to the number of states that had no death penalty at all.¹³⁹ As in *Stanford*, changing the baseline changed the result. Under the 1989 methodology, only 47 percent of the states agreed with the Court's position in *Atkins* and *Roper*.¹⁴⁰ Under the methodology used in *Atkins* and *Roper*, thirty of the fifty states—a clear, but slight, majority—agreed that the class of offenders at issue in those cases should not be put to death. On the merits, neither methodology was obviously right or wrong.¹⁴¹ The problem was not

Hoffmann, *Narrowing Habeas Corpus*, in *THE REHNQUIST LEGACY* 156–83 (Craig M. Bradley ed., 2006) (discussing how the Chief Justice's views on federal habeas corpus reflected his substantive distaste for constraints on the death penalty).

138. See *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (“When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, 30 States 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.” (citation omitted)).

139. *Id.*

140. *Id.* at 609 (Scalia, J., dissenting) (“As in *Atkins v. Virginia*, the Court dutifully recites this test and claims halfheartedly that a national consensus has emerged since our decision in *Stanford*, because 18 states—or 47% of states that permit capital punishment—now have legislation prohibiting the execution of offenders under 18, and because all of four States have adopted such legislation since *Stanford*. Words have no meaning if the views of less than 50% of the death penalty states can constitute a national consensus.” (citations omitted)).

141. Considering states with no death penalty was a plausible position—states that had rejected the death penalty altogether by definition rejected it for mentally retarded and juvenile offenders, and it would be perverse to force a state to sacrifice its moral position in order to register its moral opposition to a particular death penalty practice. But excluding non-death penalty states was a plausible position as well—those states arguably had nothing to say about the choice they would make if they found the death penalty acceptable in the first place. Not even an appeal to precedent made one or the other methodology obviously right. In the past, the Court had gone both ways. See *supra* text accompanying note 117 (discussing state counting methods used in prior “evolving standards” cases).

the methodology per se; the problem was that not much had changed. By 1989's standards, there still was no consensus against the death penalty for mentally retarded and juvenile offenders—and by the Court's post-2000 standards, it could have invalidated the juvenile death penalty in 1989.

In *Atkins*, the Court compensated for the weak state count by emphasizing “near misses” in other states, the direction of legislative change, and strong support for exempting mentally retarded offenders from the death penalty in those states that actually exempted them—all new (and problematic) considerations in the “evolving standards” inquiry.¹⁴² The dissenters had a field day,¹⁴³ but they were no better. By their count, it could not even be said that eighteen states backed the Court's position—eleven of those states had enacted legislation that was not retroactive, two had carved limited exceptions to the exemption, and five had changed their position in just the past year.¹⁴⁴ In manipulating doctrine, the Justices were equal opportunity offenders, but the dissenters were right about at least this: however defined, the state count in *Atkins* was closer to cases in which the Court had held there was *not* a national consensus than to cases in which the Court had held there *was*.¹⁴⁵ On a straight state count, *Atkins* had recognized the weakest “national consensus” in Supreme Court history.¹⁴⁶

In fairness, the majority in *Atkins* relied on other indicia to support its finding of a national consensus as well, but these added little to the mix. Death sentences were still a wash, but this time there was a twist—they were not that rare. As it turned out, around 10 percent of death row inmates were retarded.¹⁴⁷ This left the dissenters denying any revulsion to the death penalty for mentally retarded offenders, and the majority talking about execution rates instead.¹⁴⁸

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

143. See *id.* at 344–46 (Scalia, J., dissenting) (labeling majority's considerations as “absurd” and explaining why).

144. See *id.* at 342–44.

145. See *id.* at 343–44 (comparing state count in *Atkins* to prior “evolving standards” cases).

146. Justice Scalia caustically recognized the point, awarding the majority “the Prize for the Court's Most Feeble Effort to fabricate ‘national consensus.’” *Id.* at 347.

147. See Raymond Bonner & Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. TIMES, Aug. 7, 2000, at A1 (reporting estimate among experts as to percentage of mentally retarded on death row).

148. Compare *Atkins*, 536 U.S. at 316 (majority opinion), with *id.* at 346–47 (Scalia, J., dissenting).

The Court also looked to broader, more controversial indicia of public sentiment to support its finding, but these it relegated to a footnote.¹⁴⁹ Most of the same indicia were around in 1989¹⁵⁰—not even the majority purported to give them much weight.¹⁵¹

In the end, the Court's ruling in *Atkins*, like *Penry* and *Stanford*, boiled down to the Justices' proportionality views.¹⁵² In 2002, it just seemed wrong to execute people who were mentally retarded, for the very reasons the Court had rejected in 1989.¹⁵³ That said, the Court's proportionality discussion in *Atkins* also went somewhere new. According to the majority, the same diminished intellectual function that made mentally retarded offenders less culpable also made them poor witnesses and difficult clients—and that, in turn, put them at “special risk of wrongful execution.”¹⁵⁴ In dissent, Justice Scalia snorted back, “and I suppose a similar ‘special risk’ could be said to exist for just plain stupid people, inarticulate people, even ugly people.”¹⁵⁵ He was wrong in claiming that the Cruel and Unusual Punishments Clause had never before recognized a due process protection—witness *Furman*¹⁵⁶—but he was right in recognizing that the Court's reliability concerns were new. In the end, the dissent's opening barbs rang true: “Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.”¹⁵⁷ But that was true of the *dissenting* opinions, too.

149. See *id.* at 316–17 n.21 (majority opinion) (considering views of professional organizations, religious denominations, world community, and pollsters).

150. E.g., *Penry v. Lynaugh*, 492 U.S. 302, 334–35 (1989) (acknowledging substantial opposition to the death penalty for mentally retarded offenders in public opinion polls and professional organizations).

151. *Atkins*, 536 U.S. at 316–17 n.21 (“Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.”).

152. See *id.* at 348–49 (Scalia, J., dissenting) (calling the Court's proportionality rationale “the genuinely operative portion of the opinion”).

153. Compare *id.* at 318 (majority opinion) (“As discussed above, clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”), with *Penry*, 492 U.S. at 344 (Brennan, J., dissenting) (arguing that “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior” renders the death penalty disproportionate for mentally retarded offenders).

154. *Atkins*, 536 U.S. at 321.

155. *Id.* at 352 (Scalia, J., dissenting).

156. *Furman v. Georgia*, 408 U.S. 238, 256–57 (1972); see *supra* note 38 (discussing procedural nature of holding in *Furman*).

157. *Atkins*, 536 U.S. at 338 (Scalia, J., dissenting).

The Supreme Court's 2005 decision in *Roper v. Simmons* was more of the same in all but two respects. First, only four legislatures had abandoned the juvenile death penalty between 1989 and 2005, so even the considerations that had bolstered *Atkins*' finding of a national consensus cut the other way.¹⁵⁸ Again, none of this mattered because the linchpin of *Roper* was not the Court's national consensus finding, but its proportionality rationale. In 2005, it just seemed wrong to execute people who were not even adults at the time of their crime, for the same reasons the Court had found unpersuasive in 1989.¹⁵⁹

Second, *Roper* was unique in its heavy reliance on international opinion to support the ruling in the case.¹⁶⁰ The evidence was strong. In 2005, the United States was the only country in the world that officially sanctioned the juvenile death penalty.¹⁶¹ But it was also arguably irrelevant, at least as an indicator of the nation's "evolving standards." The global community had strongly opposed the juvenile death penalty in 1989 too, and the United States had invoked exceptions to a host of international treaties forbidding the practice.¹⁶² Thus, while the world had indeed uniformly rejected the juvenile death penalty, there was reason to doubt that international standards were indicative of the nation's own.

This is not to deny that international opinion mattered in *Roper*. It did. But the *reason* it mattered likely had more to do with politics than it did with the law. By 2005, the death penalty in general, and the juvenile death penalty in particular, had become an international embarrassment to the United States and a major stumbling block in foreign relations.¹⁶³ These were political concerns, not doctrinal ones,

158. See *Roper v. Simmons*, 543 U.S. 551, 611–12 (2005) (Scalia, J., dissenting).

159. Compare *id.* at 568–73 (majority opinion) (holding that the immaturity of juveniles renders them less culpable and therefore exempt from the death penalty), with *Stanford v. Kentucky*, 492 U.S. 361, 395–96 (1989) (Brennan, J., dissenting) (same). The Court in *Roper* even relied on *Thompson* for its result. *Roper*, 543 U.S. at 574 ("The logic of *Thompson* extends to those who are under 18." (citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988))).

160. See *Roper*, 543 U.S. at 575–78.

161. *Id.* at 575.

162. *Id.* at 622–23 (Scalia, J., dissenting) (arguing that the refusal of the United States to ratify international treaties barring the juvenile death penalty cut against the majority's argument, not in favor of it); *Stanford*, 492 U.S. at 390 (Brennan, J., dissenting) (discussing the juvenile death penalty's "rejection generally throughout the world" and three international human rights treaties prohibiting it).

163. See Felix Rohatyn, *The Shadow Over America: How Our Use of the Death Penalty Hurts Our Image Abroad*, NEWSWEEK, May 29, 2000, at 27 (discussing the damage to

but the Court was well aware of them. With the European Union and a host of other influential voices from the global community telling the Court that the juvenile death penalty created serious problems for the United States abroad, international opinion was going to inform the Justices' thinking no matter what its doctrine said.¹⁶⁴

In short, doctrine had little, if anything, to do with the Supreme Court's decision to overrule *Penry* and *Stanford* in *Atkins* and *Roper*. As was true in *Furman* and *Gregg*, change came when the way the Justices *wanted* to rule changed. Importantly, turnover in the Court's membership cannot account for the difference in the Justices' aggregate policy preferences. Between 1989 and 2002, the Court's membership did change—substantially so—but its ideological balance remained the same.¹⁶⁵ In the end, both *Atkins* and *Roper* came out the way they did because one or both of the Court's swing voters—Justices Kennedy and O'Connor—switched sides.¹⁶⁶

The question, again, is what led these Justices to change their minds, and in fairness, experience is one possibility. History has seen a number of Justices grow more progressive in their death penalty views as case after case exposed them to capital punishment's systemic irregularities. Justice Blackmun is probably the most famous

international relations caused by the United States's fealty to the death penalty, written by American ambassador to France); *see also infra* note 164 (citing briefs by various members of the international community).

164. The European Union, a group of former United States diplomats, and over a dozen Nobel Peace Prize laureates each submitted amicus briefs in *Roper* on this point. *See* Brief of the European Union and Members of the International Community as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1619203, at *6; Brief of President James Earl Carter, Jr. et al. as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636446, at *19; Brief of former U.S. Diplomats Morton Abramowitz et al. as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636448, at *7. One would imagine that the political influence of international opinion grew rather than diminished in the aftermath of 9/11.

165. Between 1989 and 2002, four Justices retired—Justices Brennan, Blackmun, White, and Marshall. In theory, the conservatives had a chance to gain a seat; three of the four retirees were liberals, and President Bush was able to appoint two new Justices, not one. Yet one of President Bush's "conservative" appointments was not—Justice Souter. As a result, the delicate ideological balance of the Court remained the same despite the turnover. Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 577–78 (2003) (discussing and charting the turnover from 1986 to the mid-1990s).

166. In *Atkins*, both Justices O'Connor and Kennedy changed their minds, and the vote was 6–3; thus, at least one of them was necessary for the majority. *Compare* *Atkins v. Virginia*, 536 U.S. 304, 305 (2002), *with* *Penry v. Lynaugh*, 492 U.S. 302, 306 (1989). In *Roper*, Justice Kennedy changed his mind, and the vote was 5–4. *Compare* *Roper*, 543 U.S. at 554, *with* *Stanford*, 492 U.S. at 362.

example of this phenomenon, although there are others.¹⁶⁷ In 1972, newly appointed Justice Blackmun was one of *Furman's* four dissenters.¹⁶⁸ By 1994, experience had convinced Justice Blackmun that the death penalty could never be fairly administered, leading to his highly publicized vow to never again “tinker with the machinery of death.”¹⁶⁹ Whether this sort of “on the job training” played a role in *Atkins* and *Roper* is difficult to say. Much easier to see is the role of extralegal context as an agent of change.

B. Extralegal Context as an Agent of Change

Between 1989 and 2000, the nation experienced a seismic shift in death penalty attitudes. By and large, this shift was not captured in the “evolving standards” doctrine; it was more a product of extralegal events than changes in state legislation or other doctrinal indicators. That said, there is reason to think that the same historical developments that moved the rest of the country moved the Court’s swing voters as well. Indeed, the most plausible explanation for the Supreme Court’s conflicting positions in *Penry* and *Stanford* on one hand, and *Atkins* and *Roper* on the other, is the dramatically different extralegal context in which the Justices’ decisionmaking occurred.

1. *The Extralegal Context of 1989.* When the Supreme Court decided *Penry* and *Stanford* in 1989, few institutional actors were willing to oppose (or even impose limits on) the death penalty, and the larger sociopolitical landscape makes it easy to see why. In the

167. Justice Powell is another example. In 1972, Justice Powell was one of *Furman's* dissenters. See *Furman v. Georgia*, 408 U.S. 238, 414 (1976) (Powell, J., dissenting). In 1991, he expressed regret over his prior voting record on the death penalty, openly expressing abolitionist views. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451–52 (1993).

168. *Furman*, 408 U.S. at 405 (Blackmun, J., dissenting).

169. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting), *denying cert. to* 998 F.2d 269 (5th Cir. 1993). Justice Blackmun went on to explain:

For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants “deserve” to die?—cannot be answered in the affirmative.

Id. at 1145 (citations omitted).

mid-1980s, support for the death penalty was at its highest recorded level in fifty years—75 percent.¹⁷⁰ Democrats favored the punishment 2 to 1, while Republicans favored it 7 to 1.¹⁷¹ Of those who said they supported the death penalty, the overwhelming majority professed to support it “very strongly.”¹⁷² By 1988, when *Penry* and *Stanford* were pending, support for the death penalty peaked. That year, a whopping 79 percent of the public supported the death penalty—the highest figure ever recorded, at least at that time.¹⁷³

In part, the 1988 spike in death penalty support may have reflected the country’s fascination with, and anticipation of, the highly publicized execution of serial killer Ted Bundy.¹⁷⁴ Yet it probably had more to do with the 1988 presidential election than anything else. That year, the death penalty became a wedge issue between the Republican and Democratic presidential candidates, a historic first.¹⁷⁵ While Republican nominee George H.W. Bush promised to expand the death penalty’s application,¹⁷⁶ Democrat Michael Dukakis took the opposite view. In the second presidential debate, Dukakis stated that he was opposed to the death penalty, and would be even for someone who (hypothetically) had raped and murdered his wife.¹⁷⁷ Some say the comment cost Dukakis the presidency.¹⁷⁸ If so, it was not

170. *7 in 10 Favor Death Penalty for Murder*, GALLUP REPS., Jan.–Feb. 1986, at 10.

171. *Id.*

172. *Id.*

173. *Public Support for Death Penalty is Highest in Gallup Annals*, GALLUP REPS., Jan. 1989, at 27; see also *infra* note 202 (discussing new historic high for death penalty support in 1994).

174. James Alan Fox et al., *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499, 510 (1990–91) (discussing the Ted Bundy trial and its possible effect on death penalty support); Hans Zeisel & Alec M. Gallup, *Death Penalty Sentiment in the United States*, 5 J. QUANTITATIVE CRIMINOLOGY 285, 295 (1989) (same).

175. See Hugo Adam Bedau, *The Death Penalty in America: Yesterday and Today*, 95 DICK. L. REV. 759, 760 (1991) (“During 1988, the world witnessed an unprecedented spectacle as our presidential election campaigns were polarized around this [death penalty] issue.”); Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 711–12 (1991) (discussing Bush’s strategy to make the death penalty a “central issue” in the 1988 election).

176. KIMBERLY J. COOK, *DIVIDED PASSIONS: PUBLIC OPINIONS ON ABORTION AND THE DEATH PENALTY* 33–34 (1998) (noting the Bush campaign promise in 1988 to expand the death penalty to drug kingpins).

177. Pierce & Radelet, *supra* note 175, at 711–12 (discussing the Dukakis death penalty question and describing it as “one of the most memorable (and damaging) questions of the campaign”).

178. See BANNER, *supra* note 43, at 276 (“Michael Dukakis was widely believed to have lost any chance of winning after he emphasized his opposition to capital punishment during a debate

the comment alone. Bush strategists helped with the infamous Willie Horton commercial, which used Dukakis's furlough program and lifelong opposition to the death penalty to paint him as dangerously "soft on crime."¹⁷⁹ The strategy worked. Dukakis lost and in exit polls, voters identified the death penalty as "very important" in their vote—more important, even, than political party lines.¹⁸⁰

In the wake of the 1988 election, politicians embraced the death penalty.¹⁸¹ In the 1990 gubernatorial elections, for example, incumbents across the country ran on the number of death warrants they had signed, while challengers ran on promises to execute more people, faster.¹⁸² Reporting on the phenomenon, *Time Magazine* wrote that year: "the new look in campaign commercials is to feature the candidate doing everything short of throwing a giant electrical switch."¹⁸³

against George Bush."); COOK, *supra* note 176, at 37 (discussing Bernard Shaw's question during the debate and describing Dukakis's response as "one of the most poorly handled in presidential debating history"); David Bruck, *Political and Social Misconceptions Fueling the Death Penalty*, 13 T.M. COOLEY L. REV. 863, 864 (1996) (describing the death penalty question as "the defining event of the 1988 Presidential campaign" which "may have cost [Dukakis] the election").

179. The commercial was entitled, "Weekend Passes" and began with the narrator saying, "Dukakis not only opposes the death penalty, he allowed first-degree murderers to have weekend passes from prison." The commercial then showed a picture of Willie Horton, who was black, and told of how he kidnapped a young (white) couple, raping the woman and stabbing the man. As it did so, it flashed the words, "kidnapping," "stabbing," and "raping" on the screen. DAVID C. ANDERSON, *CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE* 230–32 (1995); *see also* COOK, *supra* note 176, at 36 (discussing the commercial and the claim that it was deliberately used to emphasize black-on-white crime).

180. *See* Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, in *THE DEATH PENALTY IN AMERICA* 90, 92 (Hugo Adam Bedau ed., 1997).

181. Andrew H. Malcolm, *Society's Conflict on the Death Penalty Stalls Procession of the Condemned*, N.Y. TIMES, June 19, 1989, at B10 ("[A]ware of the electoral fate last fall of Gov. Michael S. Dukakis, the Democratic Presidential nominee who opposed the death penalty, many politicians embrace capital punishment.").

182. *See* Michael Oreskes, *The Political Stampede on Executions*, N.Y. TIMES, Apr. 4, 1990, at A16 ("From one end of the country to the other, political candidates this year are competing to persuade voters that if elected, they would be more vigorous, more vigilant and more relentless than their opponents in the application of the death penalty."); *see also* Bright & Keenan, *supra* note 8, at 769–72 (making the same point); Richard Cohen, *Playing Politics with the Death Penalty*, WASH. POST, Mar. 20, 1990, at A19 (same).

183. Richard Lacayo, *The Politics of Life and Death*, TIME, Apr. 2, 1990, at 19; *see also id.* (reporting campaign spokesman's statement that "[m]aybe the next step will be scratch-and-sniff ads, so voters can sample the smell of the death chamber").

Elsewhere as well, strong public support for the death penalty in the mid- to late-1980s had a palpable effect on the political climate. At the federal level, Congress reinstated the death penalty after doing without it since *Furman* was decided in 1972.¹⁸⁴ At the state level, governors (correctly) saw executive clemency as political suicide and acquiesced in the push to hasten, rather than delay, the execution process.¹⁸⁵ The numbers tell the tale. In the seven-year period from 1977 to 1983, there were eleven executions.¹⁸⁶ In the next seven-year period—from 1984 to 1990—there were 132.¹⁸⁷

By the mid-1980s, even judicial resistance to the death penalty had become politically hazardous. In 1986, then-California Governor George Deukmajian publicly warned California Supreme Court Chief Justice Rose Bird and two of her colleagues that he would oppose them in the next retention election if they did not stop blocking executions.¹⁸⁸ When they ignored him, he carried out the threat. Deukmajian opposed the retention of Bird and her colleagues, and all three were successfully targeted for defeat in campaign commercials urging voters to “cast three votes for the death penalty.”¹⁸⁹ The campaign was a historic first and the message was clear: state court judges who stood in the death penalty’s way did so at their own peril.¹⁹⁰

In fairness, the nation’s strong support for the death penalty in the mid- to late-1980s was no anomaly; it was part of the same “tough on crime” mood that produced mandatory minimums, three strikes

184. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (relevant section codified at 21 U.S.C. § 848(e) (2000)).

185. See Hugo Adam Bedau, *Background and Developments, in THE DEATH PENALTY IN AMERICA*, *supra* note 180, at 17–19 (discussing the politicization of the death penalty and declining use of executive clemency). See generally Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289 (1993) (documenting the trends).

186. See Liebman, *supra* note 8, at 2061 (charting data).

187. *Id.*

188. Bright & Keenan, *supra* note 8, at 760–61.

189. Judith Michaelson, *Mix of Entertainment with Returns Wins Viewer Vote*, L.A. TIMES, Nov. 6, 1986, at 1; see Bright & Keenan, *supra* note 8, at 760–61; Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency*, 9 HASTINGS WOMEN’S L.J. 27, 41–43 (1998).

190. It would not be the last time that members of the state judiciary lost their seats for reversing in death penalty cases. In time, even judicial candidates would use support for the death penalty to win election campaigns. See Haney, *supra* note 189, at 41–42 (discussing incidents in which judicial resistance to the death penalty was politically punished and the phenomenon of judges campaigning on support for the death penalty).

legislation, and “truth in sentencing” policies during this time.¹⁹¹ And what was driving the hard-line attitudes? The massive crack cocaine epidemic that hit American cities in the mid-1980s is a good bet.¹⁹² The country imposed a 100 to 1 sentencing differential to punish crack and powder cocaine in the 1987 federal guidelines,¹⁹³ reinstated the federal death penalty for drug kingpins in 1988,¹⁹⁴ and declared “war on drugs” in 1989.¹⁹⁵ The reaction was understandable. With crack came addicts and with addicts came crime, often violent. In the mid- to late-1980s, urban homicides soared—and the perpetrators were almost exclusively juveniles.¹⁹⁶ From 1985 to 1990, the juvenile murder rate increased *105 percent*,¹⁹⁷ with the murder rate among black juveniles rising at a rate seven times that of whites in the late 1980s and early 1990s.¹⁹⁸ It did not go unnoticed. Media coverage of the phenomenon fed public fears about urban crime and the

191. DAVID GARLAND, *THE CULTURE OF CONTROL* 142 (2001) (discussing these and other punitive measures of the late 1980s and early 1990s as signifying a punitive and populist turn in contemporary society); Faye A. Silas, *The Death Penalty: The Comeback Picks Up Speed*, 71 A.B.A. J. 43, 52 (1985) (“The public’s increased support for capital punishment parallels its get-tough attitude on crime.”).

192. For an excellent discussion of the history of the crack epidemic, see *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* (Craig Reinerman & Harry G. Levine eds., 1997); see also Steven V. Roberts, *Illegal Drugs Are an Issue No Politician Can Resist*, N.Y. TIMES, May 22, 1988, at 149 (discussing the impact of the drug abuse epidemic on the national political scene).

193. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1287 (1995) (discussing the 100 to 1 crack-cocaine ratio in the Anti-Drug Abuse Act of 1986 and the 1987 Federal Sentencing Guidelines that followed it).

194. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (relevant section codified at 21 U.S.C. § 848(e) (2000)).

195. See SAMUEL WALKER, *POPULAR JUSTICE* 227 (1998).

196. Understanding how the nation’s crack cocaine epidemic led to juvenile homicides is easy enough. Crack was bought and sold by the hit, so the market required a high number of transactions. Transactions required sellers, and juveniles were a natural choice—they were risk lovers, cheap labor, and without many other options. Guns provided a ready means of alternative dispute resolution, which led to their quick proliferation into the community. The result was an unprecedented rise in juvenile murders in the mid-to late-1980s. Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10, 19–32 (1995) (discussing the phenomenon of youth homicides in late 1980s).

197. See FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, *UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES—1985*, at 172 (1986) (reporting arrests of juveniles for murders and nonnegligent manslaughters at 1,134); FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, *UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES—1990*, at 182 (1991) (reporting same at 2,331); see also Blumstein, *supra* note 196, at 16–20 (comparing juvenile homicide rates from the mid-1980s through 1992).

198. Barry C. Feld, *Legislative Exclusion of Offenses*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE* 109 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

(predominantly black) juveniles who perpetrated it,¹⁹⁹ fueling a punitive populism that dominated the last half of the 1980s. The end result was a crackdown on crime in general, and on juvenile crime in particular.²⁰⁰

Admittedly, the sociopolitical context of 1989 was not as punitive as it would be in the 1990s, when juveniles were dubbed “superpredators”²⁰¹ and death penalty support hit new historic highs.²⁰² And admittedly, even in 1989 some aspects of the larger sociopolitical context cut the other way. For example, during this time, substantial majorities professed to oppose the death penalty for mentally retarded offenders,²⁰³ and a number of prominent organizations opposed the juvenile death penalty, which had been controversial for decades.²⁰⁴ But in 1989, it was no surprise that the Justices were disinclined to act even when they *arguably* had the room to do so.²⁰⁵ Given the extremely punitive public mood and the death penalty’s salience as a political issue, it is hard to imagine the Court imposing *any* significant restraints on the death penalty at this

199. See, e.g., Anastasia Toufexis, *Our Violent Kids*, TIME, June 12, 1989, at 52; Mortimer B. Zuckerman, *Meltdown in Our Cities*, U.S. NEWS & WORLD REP., May 29, 1989, at 74.

200. See Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 365–67 (1999) (discussing skyrocketing juvenile homicide rates in the late 1980s, mass media depiction of perpetrators as urban black males, and the resulting “crack down” on youth crime).

201. *Id.* at 366, 372.

202. David W. Moore, *Americans Firmly Support Death Penalty*, GALLUP POLL MONTHLY, June 1995, at 23 (noting the historic high of 80 percent support for the death penalty in 1994); David W. Moore, *Majority Advocate Death Penalty for Teenage Killers*, GALLUP POLL MONTHLY, Sept. 1994, at 2 (describing 60 percent support for the juvenile death penalty in a 1994 poll).

203. Sandra Torrey, *High Court to Hear Case on Retarded Slayer*, WASH. POST, Jan. 11, 1989, at A6 (discussing 1988 Harris poll results revealing that 71 percent of those asked thought retarded persons should not be executed).

204. *Stanford v. Kentucky*, 492 U.S. 361, 388–89 (1989) (Brennan, J., dissenting) (listing a number of organizations opposing the juvenile death penalty); *Dooming of Boy Brings Protests*, N.Y. TIMES, Jan. 7, 1962, at 81 (noting public controversy over execution of fifteen-year-olds and notion that “a child has not reached a degree of intellectual and emotional development that would qualify him as fully responsible for his acts”).

205. Whether a majority, or even substantial plurality, of the public would have supported such reform is an open question. Given the fact that mentally retarded defendants were in fact being sentenced to death in substantial numbers, see Bonner & Rimer, *supra* note 147, there was at the very least a disconnect between the public’s stated position and its position in practice. Moreover, most people supported the juvenile death penalty in public opinion polls at that time. Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It’s Getting Personal*, 83 CORNELL L. REV. 1448, 1466 (1998) (describing poll results showing 57 percent of the public supported the juvenile death penalty in 1989).

time, let alone telling the country it could not execute its burgeoning population of juvenile murderers.²⁰⁶

The Supreme Court's death penalty rulings outside the "evolving standards" context in the mid- to late-1980s amply demonstrate the point. Across a variety of doctrinal settings, the Court almost invariably rejected the death penalty claims it considered at this time.²⁰⁷ Indeed, some of the most important death penalty decisions since *Furman* and *Gregg—McCleskey v. Kemp*,²⁰⁸ *Teague v. Lane*,²⁰⁹ *Coleman v. Thompson*,²¹⁰ among others²¹¹—were all decided within a year or two of 1989. In these and other cases, the Supreme Court rejected evidence of racial discrimination in the imposition of death,²¹²

206. Given the fact that *Stanford* was itself a close 5–4 decision, one might debate the point. Yet there is reason to believe that even Justices personally inclined to extend protection in hostile sociopolitical climates would (wisely) decline the opportunity to do so. See *infra* note 291 (discussing the plausibility of the hypothesis that had Justice Powell not retired, *Stanford* would have come out the other way, and concluding that the more likely scenario is that the Court would not have granted certiorari).

207. Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 90 (1992) (noting that in the 1989 term, the Supreme Court heard ten death penalty cases, eight of which were defeats for the defendant and two of which were minor victories for the defendant decided on narrow grounds); Welsh S. White, *Patterns in Capital Punishment*, 75 CAL. L. REV. 2165, 2175–76 nn.40 & 45 (1987) (describing that "[b]etween 1976 and 1983, the Court reversed all but one of the [seventeen] 'significant' death sentences it reviewed," and that from 1983 to 1987, it reversed a death sentence in only eight cases, always on narrow grounds).

208. *McCleskey v. Kemp*, 481 U.S. 279, 280 (1987) (rejecting the argument that racial disparities in the administration of the death penalty warrant its elimination altogether); see also William Bowers, Note, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 L. & SOC'Y REV. 157, 158 (1993) ("The Court's ruling in *McCleskey* meant that the kind of evidence that would suffice to save *McCleskey's* job could not save his life.").

209. *Teague v. Lane*, 489 U.S. 288, 290 (1989) (denying retroactivity for new constitutional rulings on habeas corpus). In *Teague*, the prosecutor used all ten peremptory challenges to strike blacks from the jury. While the defendant was pursuing habeas appeals, the Supreme Court decided *Batson v. Kentucky*, 476 U.S. 79, 80 (1986), invalidating the use of peremptory challenges on the basis of race. The question in *Teague* was whether the defendant, whose conviction was final, could benefit from a retroactive application of *Batson*. The answer was no. *Teague*, 489 U.S. at 294–96.

210. *Coleman v. Thompson*, 501 U.S. 722, 725 (1991) (finding that incompetence of an attorney on habeas does not excuse procedural default).

211. E.g., *Payne v. Tennessee*, 501 U.S. 808, 809 (1991) (legitimizing use of victim impact evidence in capital sentencing); *Walton v. Arizona*, 497 U.S. 639, 643, 649 (1990) (holding that "especially heinous, cruel or depraved" provides sufficient guidance in death sentencing); *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (holding that reasonable interpretations of existing precedent, though later determined to be wrong, are not subject to challenge on collateral review).

212. See *McCleskey*, 481 U.S. at 280.

weakened the right to counsel,²¹³ sanctioned the death penalty for accomplices who neither killed nor intended to kill,²¹⁴ restored death qualification of jurors,²¹⁵ and, perhaps most importantly, erected seemingly impenetrable barriers to habeas corpus review, disempowering federal courts from overturning even the most dubious of death sentences.²¹⁶ Little wonder commentators accused the Supreme Court of “deregulating death” in the 1980s²¹⁷—the Court’s concern at this time was not fair death penalty procedures, but fast and unobtrusive ones.

Even *Thompson v. Oklahoma*, the Court’s 1988 decision barring the death penalty for fifteen-year-olds, was consistent with this trend.²¹⁸ Although *Thompson* has come to stand for the proposition that executing juveniles fifteen and younger is unconstitutional, the Court’s holding in the case was actually much weaker than that. In *Thompson*, the Court held that states could not execute fifteen-year-olds *unless* their legislatures made a conscious choice to do so, explicitly inviting the states to override its prohibition.²¹⁹ None did,²²⁰ perhaps because only 2 percent of juvenile death sentences were imposed on offenders fifteen and younger.²²¹ In retrospect, then, *Thompson* was like the few other death penalty cases that went the

213. See *Murray v. Giarratano*, 492 U.S. 1, 7 (1989) (rejecting claim that death row inmates are entitled to right to attorney in collateral proceedings); *Burger v. Kemp*, 483 U.S. 776, 781 (1987) (rejecting ineffective assistance of counsel claim in which the attorney failed to develop and present mitigating evidence at the sentencing phase of a capital trial).

214. See *Tison v. Arizona*, 481 U.S. 137, 147 (1987).

215. See *Lockhart v. McCree*, 476 U.S. 162, 174 (1986).

216. See *supra* note 209 and accompanying text; see also Kenneth Williams, *The Deregulation of the Death Penalty*, 40 SANTA CLARA L. REV. 677, 681–95 (2000) (discussing the various mechanisms to prohibit capital defendants from federal habeas review of their death sentences).

217. E.g., Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 305 (1983) (discussing the quartet of cases in 1982 as a signal from the Supreme Court that it was no longer interested in regulating the death penalty).

218. *Thompson v. Oklahoma*, 487 U.S. 815, 817 (1988). *Thompson* is discussed *supra* text accompanying notes 132–34.

219. *Id.* at 858–59 (O’Connor, J., concurring) (ruling that states may not execute juveniles fifteen and younger under a capital statute that specifies no minimum age for juvenile executions and concluding, “[T]he approach I take allows the ultimate moral issue at stake in the constitutional question to be addressed in the first instance by those best suited to do so, the people’s elected representatives.”).

220. Victor L. Streib, *Perspectives on the Juvenile Death Penalty in the 1990s*, in CHILD, PARENT AND STATE: LAW AND POLICY READER 646, 650 (S. Randall Humm et al. eds., 1994).

221. *Thompson*, 487 U.S. at 815 (describing Department of Justice statistics).

defendant's way at this time—it took from the states something few would miss.²²²

In sum, the Supreme Court's decisions in *Penry* and *Stanford* were part of a larger jurisprudential trend that was exceedingly hostile to death penalty challenges—and that trend was, in turn, part of a larger *sociopolitical* trend moving the same way. With public support for the death penalty at record highs, unprecedented political pressure to back it, and a war on drugs (and juvenile murderers) to fight, the Court's rulings in *Penry* and *Stanford* were just as one might expect. But times would change, and what seemed right to the swing Justices in 1989 would come to strike them as altogether wrong.

2. *The Post-2000 Extralegal Context.* The *extralegal* context of *Atkins* and *Roper* was dramatically different from what it was when the Supreme Court decided *Penry* and *Stanford* in 1989, although it is difficult to pinpoint the exact timing of that change. At the very least, events in the late 1990s were key to the transformation.²²³ In late 1998, Northwestern University School of Law brought considerable publicity to the issue of wrongful capital convictions by placing twenty-eight exonerated former death row inmates on stage while hosting a national conference on the topic.²²⁴ Several months later, in early 1999, journalism students at Northwestern discovered, and then proved, that Illinois death row inmate Anthony Porter—a mentally

222. See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 401 (1988) (prohibiting execution of the insane); Bryan Lester Dupler, *Another Look at Evolving Standards: Will Decency Prevail Against Executing the Mentally Retarded?*, 52 OKLA. L. REV. 593, 609 (1999) (“The Eighth Amendment question posed in *Ford* was almost academic (except to Mr. Ford), and thus easy for the Court to answer.”).

223. This is not to deny the existence of important events in the early-to mid-1990s that cut against the death penalty, even as support for the practice peaked. See Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 21–39 (2002) (discussing events before the late-1990s that contributed to the large-scale cultural change in death penalty attitudes).

224. *Id.* at 41–42 (discussing media attention given to conference); James S. Liebman, *The New Death Penalty Debate: What's DNA Got to Do With It?*, 33 COLUM. HUM. RTS. L. REV. 527, 537 (2002) (“Every observer of the current death penalty scene has his or her favorite candidate for the event most responsible for igniting the current capital punishment debate. Mine is a November 1998 conference held at Northwestern University.”); Gary Graham, *They're on Death Row but Should They Be*, NEWSWEEK, June 12, 2000, at 26, 31 (discussing the conference and the “stunning photo op” of so many exonerated death row inmates on one stage).

retarded man with an IQ of 51—was factually innocent.²²⁵ Porter's exoneration was their *third*, and again brought substantial publicity to the issue of wrongful capital convictions.²²⁶ Shortly thereafter, the *Chicago Tribune* ran a five-part series on Illinois' capital punishment system, portraying a process too riddled with errors and inadequacies to warrant confidence in its outcomes.²²⁷ But all that was just the beginning. The tectonic realignment of the political landscape would come the following year.

Profoundly disturbed by the *Tribune's* articles and the fact that exonerations in Illinois outnumbered its executions in the modern death penalty era, Illinois Governor George Ryan announced in January 2000 that he was imposing a moratorium on executions in the state.²²⁸ The move was a historic first, and especially significant because Ryan was no bleeding-heart liberal. He was a Republican and lifelong death penalty supporter; indeed, as a legislator, he had helped draft the Illinois death penalty statute.²²⁹ In hindsight, it is hard to overestimate the impact of Ryan's announcement. The Illinois moratorium not only sent shock waves across the country, but also ignited a national debate about the death penalty, launching a moratorium movement.²³⁰

That said, the Illinois moratorium was not the only catalyst of change in 2000. That year, the book *Actual Innocence* hit the shelves,

225. Pam Belluck, *Class of Sleuths to Rescue on Death Row*, N.Y. TIMES, Feb. 5, 1999, at A16.

226. Stephen B. Bright, *The Politics of Capital Punishment: The Sacrifice of Fairness for Executions*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 127, 141 (James R. Acker et al. eds., 2d ed. 2003); Liebman, *supra* note 224, at 539.

227. Ken Armstrong & Steve Mills, *Failure of the Death Penalty in Illinois*, CHI. TRIB., Nov. 14–18, 1999.

228. See Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1 (reporting the event while noting that in the modern death penalty era, Illinois has executed twelve and exonerated thirteen from death row).

229. Kirchmeier, *supra* note 223, at 44–45; Bruce Shapiro, *Rethinking the Death Penalty: Politicians and Courts Are Taking Their Cues from Growing Public Opposition*, THE NATION, July 22, 2002, at 14–15.

230. Kirchmeier, *supra* note 223, at 43–47 (describing the Illinois moratorium as “[t]he single event that established the Moratorium Movement as a significant movement” and discussing events in its wake); William Claiborne & Paul Duggan, *Spotlight on Death Penalty: Illinois Ban Ignites a National Debate*, WASH. POST, June 18, 2000, at A1 (“When Gov. George Ryan (R) announced on Jan. 31 that he was imposing a moratorium on executions in Illinois, little did he know he was igniting a national debate on capital punishment unsurpassed in intensity since the United States Supreme Court allowed reinstatement of the death penalty in 1976.”). For excellent discussions of the moratorium movement, see generally Kirchmeier, *supra* note 223, and Liebman, *supra* note 224.

chronicling the sagas of the wrongfully convicted and the reasons the criminal justice system had failed them.²³¹ By all accounts, *Actual Innocence* was an enormously influential book; indeed, its haunting narratives were instrumental in causing conservative commentator George Will to publicly express his own doubts about the death penalty's efficacy and fairness.²³² Also in 2000, Columbia researcher James Liebman published a study showing that two out of every three capital cases were reversed for serious error,²³³ and the Department of Justice released a study showing strong racial disparities in the administration of the death penalty at the federal level.²³⁴ Both received extensive publicity in the popular press and added to the public's already eroding confidence in the capital punishment system.²³⁵

And there was more. The year 2000 was a presidential election year, and the Republican Party nominee was then-Texas Governor George W. Bush. Bush's candidacy mattered because Texas was the undisputed capital of capital punishment among the states, and Bush

231. JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED* (2000).

232. Liebman, *supra* note 224, at 539-40 (characterizing the publication of *Actual Innocence* as the second catalyzing event of 2000 and discussing its impact, including but not limited to the proliferation of innocence projects in many states); George Will, *Innocent on Death Row*, WASH. POST, Apr. 6, 2000, at A23.

233. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (2000).

234. U.S. DEPT' OF JUSTICE, *THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000)* (Sept. 12, 2000).

235. See, e.g., Raymond Bonner & Marc Lacey, *Pervasive Disparities Found in the Federal Death Penalty*, N.Y. TIMES, Sept. 12, 2000, at A18 (discussing the 2000 Justice Department report finding "significant racial and geographical disparities" in the administration of the death penalty at the federal level, and opining that it will likely result in more calls for a moratorium on the federal death penalty); Raymond Bonner & Marc Lacey, *U.S. Plans Delay in First Execution in Four Decades*, N.Y. TIMES, July 7, 2000, at A1 (discussing the Clinton administration's decision to postpone the first federal execution in forty years, in part because of "concerns about racial and geographic disparities in death penalty cases"); David Broder, *Serious Flaws Revealed in Death Penalty Study*, WASH. POST, June 18, 2000, at B7; Fox Butterfield, *2 of 3 Death Sentences End Up Overturned: Study Blames Incompetent Lawyers, Overzealous Police in Successful Appeals*, N.Y. TIMES, June 12, 2000, at A1 (predicting that the study will likely intensify already growing debate over the death penalty); Marc Lacey & Raymond Bonner, *Reno Troubled by Death Penalty Statistics*, N.Y. TIMES, Sept. 13, 2000, at A17 (reporting Attorney General Janet Reno's comments that she is "sorely troubled" by a Department of Justice study finding stark racial disparities in the federal death penalty); see also Jonathan Simon, *Why Do You Think They Call It CAPITAL Punishment? Reading the Killing State*, 36 LAW & SOC'Y REV. 783, 787 (2002) ("Perhaps more than any study in a generation," the Liebman study has demonstrated how social science techniques can affect public discourse).

was largely responsible for it.²³⁶ In his six years as governor of Texas, Bush signed the death warrants for 152 executions—more than half of the state’s total in the modern death penalty era and more than any other governor in the last twenty-five years.²³⁷ Bush’s candidacy thrust the Texas capital punishment system into the spotlight, and the criticism that followed was scathing. While Bush, dubbed “the nation’s busiest executioner,”²³⁸ claimed confidence in the death penalty’s administration in Texas, media scrutiny revealed the same systemic failures that plagued Illinois.²³⁹ Indeed, when it came to the state’s tolerance for outrageously inept—even sleeping—lawyers, the death penalty’s problems in Texas were worse.²⁴⁰ In the end, the issue did not keep Bush from winning the election (despite losing the

236. Bright, *supra* note 5, at 10 (“In just six years, then-Governor Bush presided over 152 executions. While no other state executed more than 80 people between the resumption of capital punishment in 1976 and the end of 2000, the Lone Star State executed 236 during this period.”).

237. *Id.*; see also John Harwood, *Death Reconsidered—Despite McVeigh Case, Curbs on Executions Are Gaining Support*, WALL ST. J., May 22, 2001, at A1 (stating that Bush’s 152 executions in Texas was the most of any governor in the past 25 years); Jim Yardley, *Texas Set to Shift in Wake of Furor on Death Penalty*, N.Y. TIMES, June 1, 2001, at A1 (noting that Texas has executed 246 people since 1976, more than half during Bush’s term as governor there).

238. Steve Mills et al., *Flawed Trials Lead to Death Chamber—Bush Confident in System Rife With Problems*, CHI. TRIB., June 11, 2000, at N1; see also Derrick Z. Jackson, *Bush’s Death Factory*, BOSTON GLOBE, Oct. 25, 2000, at A17.

239. Mills et al., *supra* note 238 (commencing a two-part series investigating the administration of capital punishment in Texas); see also Kirchmeier, *supra* note 223, at 59–61 (discussing media attention on the death penalty as an issue in Bush’s campaign); John Harwood, *Bush May be Hurt by Handling of Death-Penalty Issue*, WALL ST. J., Mar. 21, 2000, at A28 (noting impression of cavalier indifference from Bush regarding the death penalty, and discussing the possible effect on upcoming election).

240. See Paul Duggan, *Death Sentence Reinstated in ‘Sleeping Lawyer’ Case*, WASH. POST, Oct. 28, 2000, at A13 (discussing the “sleeping lawyer” case in Texas and how Bush defended the case on the basis that the defendant had the benefit of judicial review); Paul Duggan, *George W. Bush: The Record in Texas: Attorneys’ Ineptitude Doesn’t Halt Executions*, WASH. POST, May 12, 2000, at A1 (relaying three Texas cases in which a lawyer slept during the trial and others in which lawyers had extensive disciplinary records or drug and alcohol addictions, while noting that Bush vetoed a bill that would have improved the quality of legal representation to indigent capital defendants); Bob Herbert, *The Death Factory*, N.Y. TIMES, Oct. 2, 2000, at A27 (lamenting the “consistently unjust and unquestionably inhumane manner in which Texas sends its prisoners to their doom” and “defense lawyers who slept through the trials, who were addicted to alcohol or drugs, who knew nothing about trying capital cases and who did virtually nothing on behalf of their clients”); Henry Weinstein, *Texas Fights Ruling of Legal Incompetence*, L.A. TIMES, Jan. 2, 2002, at A6 (noting that a Texas sleeping-lawyer case “became nationally prominent during the 2000 presidential election” as “a symbol of the troublesome way capital trials are handled in the Lone Star State,” particularly because Bush defended the state’s procedures).

popular vote),²⁴¹ but it did add to the negative publicity that the death penalty was receiving elsewhere, fueling momentum for reform.

The convergence of all of these events in 2000 resulted in a sudden and dramatic change in the script of the death penalty debate. The problem of wrongfully convicted capital defendants was hardly new—granted, DNA testing was becoming more available, but it had been used to exonerate death row inmates since 1993.²⁴² What was new was the nation's reaction. Media attention to the issue played a key role. The death penalty was not just the topic *du jour* of the *New York Times*, *Washington Post* and major news magazines.²⁴³ It was on the radio, in television dramas, on the evening news²⁴⁴—it was even on *The Oprah Winfrey Show*, the highest-rated television talk show in American history.²⁴⁵ In each of these forums, the issue was not the morality of killing people who kill, but the quality of justice people

241. Gore won the nation's popular vote by just over 500,000 ballots, but lost on electoral votes (271 to 266) when he lost the state of Florida. PUB. DISCLOSURE DIV., FED. ELECTION COMM'N, OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS 1 (2000), <http://www.fec.gov/pubrec/2000presgeresults.htm> (last visited Oct. 4, 2007). For a provocative discussion of the Supreme Court's resolution of the election and its historical import, see generally Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001).

242. As of 2000, at least ninety-five people had been released from death row since 1976 based on erroneous conviction, but in only ten of those cases was the person's innocence proven by DNA testing. Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 733–34 (2000); see also *id.* at 733–39 (discussing the impact of DNA testing on the moratorium movement). Kirk Bloodsworth was the first of these ten, exonerated in 1993. *Kirk Bloodsworth*, N.Y. TIMES, Feb. 25, 2003, at F5.

243. Citations for this proposition are too numerous to list, even for a law review article. For those interested in a sampling of the literature, however, see Death Penalty Information Center, *Articles on the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=132&scid=17> (last visited Oct. 4, 2007) (listing nearly two hundred articles and news programs on the death penalty between 2000 and 2006, and noting attention to the issue by CNN, ABC News, and PBS, among other media outlets).

244. See *id.*

245. *The Oprah Winfrey Show: Death Penalty Controversy* (ABC television broadcast Sept. 28, 2000), available at http://www.oprah.com/tows/pastshows/tows_2000/tows_past_20000928.jhtml. See generally Press Release, KingWorld, Oprah Winfrey Signs with King World Productions for New Three-Year Contract to Continue as Host and Producer of "The Oprah Winfrey Show" Through 2010–2011 (Aug. 5, 2004), available at http://www.kingworld.com/release/oprah_winfrey.html (describing *The Oprah Winfrey Show* as "[t]he most-successful, highest-rated talk show in global television history").

were entitled to when their lives were at stake.²⁴⁶ Louis Billionis captured the move best when he wrote:

[R]egardless of what you think of the morality of the death penalty in the abstract, you ought to conclude that our capital punishment system is deeply flawed. The current system sentences innocent people to die for crimes they did not commit. It sentences similarly situated defendants differently, and differently situated defendants the same, for reasons that good people rightly denounce: the color of the accused's skin; the color of the victim's skin; the socioeconomic status of the accused or of the victim; poor lawyering that none of us would tolerate in a case that struck closer to home; the vicissitudes of prosecutors, jurors, and judges; and the sheer arbitrariness of good luck and bad.²⁴⁷

The new death penalty debate, like the old one in 1972, was about *fairness*.²⁴⁸ And events over the next several years—more high-profile exonerations,²⁴⁹ the discovery of error-ridden crime labs in Oklahoma and Texas,²⁵⁰ and additional studies confirming the death penalty's frailties, just to name a few²⁵¹—would keep it that way.

246. See Graham, *supra* note 224, at 27–34 (“Whether you’re for or against the death penalty, it’s hard to argue that it doesn’t need a fresh look.”); Wendy Kaminer, *The Switch*, N.Y. TIMES, July 7, 2002, at E7 (comparing the public’s attitude toward the death penalty in 2002 to its attitude ten years ago); Toni Locy, *Push to Reform Death Penalty Growing*, U.S.A. TODAY, Feb. 20, 2001, at 5A (noting that the death penalty debate has shifted from whether executions are moral to ensuring they are fair).

247. Louis D. Billionis, *The Unusualness of Capital Punishment*, 26 OHIO N.U. L. REV. 601, 606–07 (2000).

248. *Id.* at 607 (“The message is conservative because its sympathies lie directly with basic American values of rudimentary fairness, equality, and decency, not with the murderers who incidentally benefit from the position.”); see Lain, *supra* note 27, at 37 (noting that abolitionists in the late 1960s and early 1970s were opposed to the death penalty despite the fact that it benefited criminals, not because of it).

249. See Francis X. Clines, *Furor Anew with Release of Man Who Was Innocent*, N.Y. TIMES, Feb. 11, 2001, at A23 (discussing Earl Washington’s exoneration in Virginia).

250. See Nick Madigan, *Houston’s Troubled DNA Crime Lab Faces Growing Scrutiny*, N.Y. TIMES, Feb. 9, 2003, at L20 (discussing scandals in methodology, record keeping, and absence of safeguards against contamination in the Houston crime lab); *Police Chemist Accused of Shoddy Work Is Fired*, N.Y. TIMES, Sept. 26, 2001, at A16 (discussing “flawed casework analysis” in Oklahoma’s crime lab involving death penalty cases).

251. See Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at L1 (discussing Ryan’s blanket commutation in Illinois and the findings of a three-year study of the death penalty in Illinois revealing more problems with fairness in death sentencing); see also Editorial, *Even in This Case*, WASH. POST, May 12, 2001, at A24 (discussing prosecutorial blunders in the Timothy McVeigh case and questioning the extent of flaws in cases in which no one is looking).

The result was a virtual explosion in support for death penalty reform at the state and federal level. While Congress passed the Innocence Protection Act²⁵² (and President Bush begrudgingly signed it),²⁵³ states considered a variety of proposals to restrict, suspend, study—even abolish—the death penalty within their borders.²⁵⁴ Most popular was the call for a moratorium on executions. By 2004, over thirty-four hundred grassroots organizations advocated statewide moratoriums, as did at least sixty municipalities, including Atlanta, New York City, Baltimore, Philadelphia, and San Francisco.²⁵⁵ Only one state, Maryland, actually halted executions²⁵⁶ (at least before *Atkins* and *Roper* were decided),²⁵⁷ although several came close and another, New Hampshire, was a governor's signature shy of abolishing the death penalty altogether.²⁵⁸ Calls for reform enjoyed greater success. By 2001, twenty-three of the thirty-eight death penalty states adopted new procedural protections for capital

252. The Innocence Protection Act is Title IV of the Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004) (Innocence Protection Act to be codified at 18 U.S.C. §§ 3600, 3600A; 42 U.S.C. §§ 14163, 14163a–e).

253. Harwood, *supra* note 237 (noting the lack of support from the White House for the Innocence Protection Act, but also that Bush advisers said the president “would probably have to sign” the measure if passed).

254. See Kirchmeier, *supra* note 223, at 44–47 (discussing the various measures proposed and enacted by state legislatures in the wake of the Illinois moratorium announcement); Locy, *supra* note 246, at 5A (discussing and categorizing various state legislative proposals for death penalty reform as of 2001).

255. Charles S. Lanier & James R. Acker, *Capital Punishment, the Moratorium Movement, and Empirical Questions: Looking Beyond Innocence, Race, and Bad Lawyering in Death Penalty Cases*, 10 PUB. POL'Y & L. 577, 584 (2004); see Kirchmeier, *supra* note 223, at 47.

256. Lanier & Acker, *supra* note 255, at 580 (discussing the Maryland governor's decision to impose a moratorium in 2002 and the new governor's decision to lift it in 2003).

257. Laura Mansnerus, *Panel Seeks End to Death Penalty for New Jersey*, N.Y. TIMES, Jan. 3, 2007, at A1 (noting New Jersey's 2006 decision to impose a moratorium on executions, and that eight other states have likewise suspended executions, most due to court decisions); see also Adam Liptak & Terry Aguayo, *After Problem Execution, Governor Bush Suspends Death Penalty in Florida*, N.Y. TIMES Dec. 16, 2006, at A11. *But cf.* Terry Aguayo, *Executions to Resume in Florida*, N.Y. TIMES July 19, 2007, at A21 (noting that Governor Crist, who succeeded Bush in January 2007, signed an order resuming executions after the seven-month moratorium).

258. See Kirchmeier, *supra* note 223, at 47 (noting that although the New Hampshire abolition measure was vetoed, it was the first legislative vote to abolish the death penalty since 1976).

defendants.²⁵⁹ By 2005, virtually all of them had, including die-hard death penalty states like Texas, Virginia, and Florida.²⁶⁰

Outside the realm of state legislation, the nation's growing discomfort with the death penalty was also manifest. Between 2000 and 2005, public support for the death penalty hit new post-*Furman* lows, as did death sentences, as did executions. In 2000, death penalty support hit its lowest level since 1981—sixty-six percent.²⁶¹ It would remain that low over the next several years, no doubt driven by record-low crime rates²⁶² and concerns about the fallibility and fairness of capital cases.²⁶³ Not even the terrorist attacks of 9/11 resulted in a resurgence of death penalty support.²⁶⁴

259. Brooke A. Masters, *Executions Decrease for the 2nd Year: Va., Texas Show Sharp Drops Amid a National Trend*, WASH. POST, Sept. 6, 2001, at A1; see also Kirchmeier, *supra* note 223, at 111–12 (discussing states that in 2001 alone enacted protections for capital defendants).

260. Between 2000 and 2005, thirty-six of the thirty-eight death penalty states enacted some sort of death penalty reform measure. See THOMAS P. BONCZAR & TRACY L. SNELL, CAPITAL PUNISHMENT, 2004, at 2–3 (Bureau of Justice Statistics, Bulletin No. NCJ 211349, Nov. 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf>; American Bar Association, *Death Penalty Moratorium Implementation Project: State-by-State Profiles of Activities in Capital Jurisdictions*, www.abanet.org/moratorium/states.html (last visited Sept. 11, 2007); see also Paul Duggan, *Texas Legislators Review Use of Death Penalty: National Criticism During Presidential Campaign Reverberates in a Spate of Bills*, WASH. POST, May 14, 2001, at A3 (attributing death penalty reform in Texas to negative publicity about Texas' death penalty system during the 2000 presidential campaign); Toni Locy, *Push to Reform Death Penalty Growing Advocates*, U.S.A. TODAY, Feb. 20, 2001, at 5A (discussing and listing the states considering death penalty reform proposals, including Virginia and Texas).

261. Frank Newport, *Support for Death Penalty Drops to Lowest Level in 19 Years, Although Still High at 66%*, GALLUP NEWS SERVICE, Feb. 24, 2000 (on file with the *Duke Law Journal*).

262. See Ted Gest, *The Evolution of Crime and Politics in America*, 33 MCGEORGE L. REV. 759, 764–67 (2002) (discussing the reasons why crime has fallen from the national agenda, including record-low crime rates); Lydia Saad, *Fear of Conventional Crime at Record Lows*, GALLUP NEWS SERVICE, Oct. 22, 2001 (on file with the *Duke Law Journal*) (noting that the previous year's violent crime rate drop was the largest one-year decline ever recorded, that from 1993–2000 crime fell nearly 50 percent, and that Americans were worried less about crime in 2001 than in the previous thirty years); see also *Death Penalty*, GALLUP NEWS SERVICE, Aug. 31, 2007 (on file with the *Duke Law Journal*) (reporting death penalty support in 2000 at 66 percent, in 2001 at 67 percent, in 2002 at 71 percent, in 2003 at 69 percent, and in 2004 at 68 percent).

263. See Harwood, *supra* note 237, at A1 (attributing the drop in death penalty support to scandals in capital cases, falling murder rates, and declining public fear of violent crime); Dahlia Lithwick, *The Dying Death Penalty?*, WASH. POST, Feb. 11, 2007, at B2 (discussing the steadily declining state and public support for capital punishment); Newport, *supra* note 261.

264. George H. Gallup, Jr., *The Death Penalty: American Views Over Time*, GALLUP NEWS SERVICE, Oct. 29, 2002 (on file with the *Duke Law Journal*) (comparing support for the death penalty before and after the 9/11 terrorist attacks).

Death sentences and executions similarly fell in the wake of 2000's developments. By 2004, death sentences were more than 50 percent lower than they were a decade earlier,²⁶⁵ and by 2005, they had dropped to below one hundred—the lowest year-end figure since *Furman* was decided in 1972.²⁶⁶ Executions fell by almost as much—40 percent—and, most tellingly, they fell sharply in Virginia and Texas, where political commitment to the practice was strongest.²⁶⁷ Taken together, these developments revealed a nation deeply ambivalent about the death penalty at the time the Supreme Court decided *Atkins* and *Roper*. Even staunch conservatives like Oliver North, Pat Robertson, and Bill O'Reilly publicly expressed death penalty doubts during this time.²⁶⁸

Against this backdrop, death penalty practices that were relatively controversial when support for capital punishment was strong became targets of reform, and the execution of mentally retarded and juvenile offenders easily fit into that category. Death row's most famous exonerated inmates—Anthony Porter and Earl Washington—were both mentally retarded, so it was easy to see how public concern for innocents on death row translated into support for exempting these offenders from the death penalty.²⁶⁹ By 2002, even fervent death penalty supporters had distanced themselves from the death penalty for mentally retarded offenders, including President Bush and his brother, Florida Governor Jeb Bush.²⁷⁰ Granted, twenty

265. In 2004, there were 125 death sentences imposed, compared to 314 in 1994, 318 in 1995, and 320 in 1996. James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *FORDHAM L. REV.* 1607, 1659–60 (2006).

266. *Id.* at 1660 (noting 2005's all-time low in the post-*Furman* years of ninety-six death sentences).

267. Masters, *supra* note 259, at A1. See generally FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 87 (2003) (noting that executions are the “best overall measure of political commitment to a fully operational capital punishment system”); John H. Culver, *State Politics and the Death Penalty: From Furman to McCleskey*, 12 *J. CRIME & JUST.* 1, 1 (1989) (arguing that executions require commitment from the state legislature, governor, and judiciary and that if any of these institutional actors resists the death penalty, the death penalty will not be carried out).

268. Steven A. Holmes, *Look Who's Questioning the Death Penalty*, *N.Y. TIMES*, Apr. 16, 2000, at 3; Kirchmeier, *supra* note 223, at 53; Liebman, *supra* note 224, at 532–33.

269. See *supra* notes 225, 249 and accompanying text; see also Steiker, *supra* note 136, at 1482–83 (noting that *Atkins*, although unthinkable five years earlier, was possible not just because of state legislation developments but because of erosion of public confidence in the death penalty as a whole).

270. See Raymond Bonner, *President Says the Retarded Should Never Be Executed*, *N.Y. TIMES*, June 12, 2001, at A28; *Jeb Bush Signs Bill Barring Executing the Retarded*, *N.Y. TIMES*, June 13, 2001, at A30. Even the governor of Texas, when he vetoed legislation to end the death

states still authorized the execution of mentally retarded offenders in 2002.²⁷¹ Yet only a few of those states, all in the South, were actually using it—and there too it was fading fast.²⁷² Even Virginia was in the midst of abandoning the practice when the Supreme Court granted certiorari in *Atkins*.²⁷³

The same was true for the juvenile death penalty. Despite its doctrinal difficulties, the Supreme Court's decision in *Roper* did in fact abolish a practice that had pretty much died out on its own. Even in the 1990s, when public support for the juvenile death penalty peaked, there were only around ten juvenile death sentences per year.²⁷⁴ By 2001, there were just seven, and in the two years before *Roper*—2003 and 2004—the annual tally was *two*.²⁷⁵ Not even Washington beltway sniper Lee Boyd Malvo received a death sentence, and he was tried in Virginia just to maximize the chance that he would.²⁷⁶ To be sure, the drop in juvenile death sentences was partly attributable to a whopping 70 percent decline in juvenile homicides over the previous decade; fewer juvenile homicides meant fewer death-eligible juvenile offenders.²⁷⁷ But changing public attitudes also played a part. By 2001, over two-thirds of those asked

penalty for mentally retarded offenders in 2001, justified his veto by claiming that there were already safeguards to prevent execution of the mentally retarded and that “Texas had not executed a mentally retarded person.” Raymond Bonner, *Ban on Execution of the Retarded is Vetoed in Texas*, N.Y. TIMES, June 18, 2001, at A1.

271. See *supra* text accompanying note 138.

272. See *Atkins v. Virginia*, 536 U.S. 304, 316 n.20 (2002); Linda Greenhouse, *Citing ‘National Consensus,’ Justices Bar Death Penalty for Retarded Defendants*, N.Y. TIMES, June 21, 2002, at A1 (noting that the Supreme Court initially agreed to hear a North Carolina case on this issue, but North Carolina abolished the death penalty for mentally retarded offenders in the meantime so the Justices dismissed the appeal).

273. See Greenhouse, *supra* note 272, at A1 (noting that the Virginia Senate voted unanimously to abolish the death penalty for mentally retarded offenders but the Virginia House decided to delay any action until after the Supreme Court had decided *Atkins*).

274. See Victor L. Streib, *Emerging Issues in Juvenile Death Penalty Law*, 26 OHIO N.U. L. REV. 725, 739 (2000) (noting at the turn of the twenty-first century that juvenile death sentences remained about ten per year).

275. See VICTOR STREIB, REPORT ON THE STATUS OF THE JUVENILE DEATH PENALTY 9 (2005), available at http://www.law.onu.edu/faculty_staff/faculty_profiles/coursematerials/streib/juvdeath.pdf (reporting juvenile death sentences in the first years of the twenty-first century).

276. Henri E. Cauvin, *Malvo’s Age Was the Deciding Factor*, WASH. POST, Dec. 24, 2003, at A1.

277. See Howard N. Snyder, *Juvenile Arrests 2001*, JUV. JUST. BULL., Dec. 2003, at 1 (reporting decline in juvenile arrest rate for murder from 1993 to 2001).

opposed the juvenile death penalty,²⁷⁸ and only two states in the Union—Virginia and Texas—actively embraced it. Together, these two states accounted for over 75 percent of all juvenile offender executions in the modern death penalty era.²⁷⁹

As was true in the late 1980s, it was not difficult to see the influence of these developments on the Justices' post-2000 death penalty views. Off the bench, a number of Justices expressed concerns about the death penalty's fairness and fallibility, including swing voter Justice O'Connor.²⁸⁰ On the bench, the impact of extralegal context on the Justices' views was evident as well. In *Atkins*, for example, the Court specifically mentioned death row exonerations of the mentally retarded and doctrinally incorporated the reliability concerns raised by those cases.²⁸¹ In *Roper*, the Court explicitly acknowledged the influence of international opinion on the case, despite its dubious doctrinal relevance.²⁸² Once again, these decisions were consistent with the Court's death penalty rulings elsewhere. Across a variety of doctrinal contexts, the Court's post-2000 cases demonstrated a renewed interest in regulating the imposition of death.²⁸³ The public had lost confidence in the death penalty's administration, and the Court's shift from *deregulating* to *reregulating* in this area left little doubt that many of the Justices felt the same way.

278. *Death Penalty*, GALLUP NEWS SERVICE, Aug. 31, 2007 (on file with the *Duke Law Journal*) (reporting 2002 poll showing that 69 percent of those asked were against the death penalty for juvenile offenders).

279. See Victor L. Streib, *Executing Juvenile Offenders: The Ultimate Denial of Juvenile Justice*, 14 STAN. L. & POL'Y REV. 121, 125–26 (2003) (discussing the imposition of juvenile death sentences predominantly in the South).

280. In 2001, Justice O'Connor stated in a public address, "If statistics are any indication, the system may well be allowing some innocent defendants to be executed . . ." *Justice O'Connor on Executions*, N.Y. TIMES, July 5, 2001, at A16; see also Liebman & Marshall, *supra* note 265, at 1673–75 (discussing comments by Justices Stevens, Ginsburg, and O'Connor).

281. See *Atkins v. Virginia*, 536 U.S. 304, 320 n.25 (2002) ("[W]e cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. These exonerations have included at least one mentally retarded person who unwittingly confessed to a crime that he did not commit.").

282. See *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005); *supra* text accompanying note 162.

283. See, e.g., *Rompilla v. Beard*, 125 S. Ct. 2456, 2469 (2005) (finding ineffective assistance of counsel when an attorney failed to find and introduce mitigating evidence); *Miller-El v. Dretke*, 125 S. Ct. 2317, 2336 (2005) (reversing state's acceptance of race-neutral reason for racial preemptory challenges); *Deck v. Missouri*, 125 S. Ct. 2007, 2014–15 (2005) (finding violation of due process when a defendant was visibly shackled during the sentencing phase of his capital trial without special circumstances warranting the use of restraints); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (invalidating death eligibility determinations made by judges as opposed to juries).

In sum, *Atkins* and *Roper* are easy to understand in light of the larger sociopolitical context in which they were decided. Indeed, had the Justices *not* prohibited the death penalty for mentally retarded and juvenile offenders, the Court may well have suffered more damage to its institutional image than it did from exposing its “intellectually embarrassing Eighth Amendment jurisprudence.”²⁸⁴ At the end of the day, *Atkins* and *Roper* proved Victor Hugo right—“Greater than the tread of mighty armies is an idea whose time has come.”²⁸⁵

C. *The Lessons of Atkins and Roper*

Thus far, I have argued that the Supreme Court’s move from *Penry* and *Stanford* on one hand, to *Atkins* and *Roper* on the other, had little to do with doctrine and much to do with the dramatically different extralegal context in which those cases were decided. Changes outside the “evolving standards” framework provide the most plausible explanation for the Justices’ *inclination* to rule differently in the two sets of cases, which is what drove the different results. Broken down and discussed in detail, the argument is hardly revolutionary. Yet put together, it leads to two rather radical recognitions, neither of which are fully appreciated in death penalty scholarship.

The first is a causal disconnect between majoritarian doctrine and majoritarian results. Although the numbers did not add up in *Atkins* and *Roper* (at least as the Court had previously counted them), the Justices still managed to “get it right.” That is, the Court’s ruling in both cases was consistent with the dominant sociopolitical norms of its time.²⁸⁶ The point is mildly ironic—these decisions

284. Robert Weisberg, Op-Ed., *Cruel and Unusual Jurisprudence*, N.Y. TIMES, Mar. 4, 2005, at A21 (“In *Roper*, the court exposed its somewhat intellectually embarrassing Eighth Amendment jurisprudence. But it did so in order to overcome the greater embarrassment of one last specific, egregious category of capital punishment.”); see also Adam Liptak, *Another Step in Reshaping the Capital Justice System*, N.Y. TIMES, Mar. 2, 2005, at A13 (noting the prediction that had *Roper* gone the other way, “it would have been another Abu Ghraib. The outcry around the world would have been simply astounding.”).

285. VICTOR HUGO, HISTOIRE D’UN CRIME: CONCLUSION: LA CHUTE 649 (1893).

286. This was particularly apparent in the commentary on *Roper*. See, e.g., Craig M. Bradley, *The Right Decision on the Juvenile Death Penalty*, TRIAL, June 2005, at 60 (“Although the Court’s claim that standards of decency have evolved significantly in that period is less than compelling, the result seems right.”); Editorial, *Too Young to Die: The Supreme Court Rightly Spares Teenage Killers*, PITTSBURG POST-GAZETTE, Mar. 7, 2005, at A14 (“Fair arguments can be made against the majority opinion by Associate Justice Anthony M. Kennedy, but he ends

reflected prevailing sentiment, even though they made little sense under a doctrine that was supposed to reflect prevailing sentiment.

In light of this disconnect, it is tempting to conclude that the Court's "evolving standards" doctrine just needs some refinement—and to some extent this is true. State legislatures are about the last institutional actors to reflect changes in cultural norms (especially where protections for capital defendants are concerned) so it makes little sense to focus on them as the primary indicators of "evolving standards."²⁸⁷ Likewise, it makes little sense to focus on jury sentencing data because no one seems to know how many opportunities juries have to impose the death sentence at issue.²⁸⁸ Naturally, a more robust evaluation of the nation's "evolving standards" would require consideration of other indicators as well—the views expressed by grassroots and professional organizations, public opinion poll participants, and the popular press are just a few that come to mind. But at the end of the day, no doctrinal realignment will catch everything. Doctrine can never capture the impact of crime levels, death penalty politics, media attention—even Southern exceptionalism²⁸⁹—on the Justices' death penalty decisionmaking. Simply put, doctrine can neither *define* nor *confine* the zeitgeist that these considerations, among others, construct. Somewhere out there is a sociopolitical context that has nothing to do

up in the right place."); Editorial, *A Welcome Death Penalty Decision, but One with Cracks in its Reasoning*, THE MORNING CALL (Allentown, Pa.), Mar. 3, 2005, at A12 (noting that *Roper* was less than convincing in its reasoning, but its ruling was correct).

287. See William J. Bowers et al., *Too Young for the Death Penalty: An Empirical Examination of Community Conscience and the Juvenile Death Penalty from the Perspective of Capital Jurors*, 84 B.U. L. REV. 609, 619–20 (describing state legislatures as a "cauldron of political motivations" especially susceptible to crass politicization of criminal justice issues, making them a "dubious barometer" of a national consensus); Lain, *supra* note 27, at 23 ("As is often the case with penal prohibitions, support for officially discarding death penalty statutes [in the 1960s] tended not to materialize until well after those statutes already had been discarded in practice.").

288. See Raeker-Jordan, *supra* note 1, at 513–46 (discussing the various ways that jury decisionmaking is systematically channeled to return death sentences); *Stanford v. Kentucky*, 492 U.S. 361, 387 n.3 (1989) (Brennan, J., dissenting) ("Capital sentences for juveniles would presumably be more unusual still were capital juries drawn from a cross-section of our society, rather than excluding many who oppose capital punishment—a fact that renders capital jury sentences a distinctly weighted measure of contemporary standards." (citation omitted)).

289. See AUSTIN SARAT & CHRISTIAN BOULANGER, *THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES* 102–06 (2005) (discussing the legacy of racism in the administration of the death penalty in the South, the South as a "negative reference group" on the death penalty, and the resulting effect on death penalty attitudes outside the South).

with doctrine, and it affects the Justices' thinking just as it affects that of the public at large.

Recognizing the first point leads to a second, more radical recognition—majoritarian doctrine does not constrain the Supreme Court's decisionmaking, but *nondoctrinal* majoritarian influences do. This one is a veritable rabbit's hole, but broken down (again), it looks like this: the "evolving standards" doctrine legitimates—even mandates—decisions mirroring sociopolitical context, but it is ineffectual; doctrine does nothing to keep the Justices from ruling however they are otherwise inclined to rule.²⁹⁰ The Justices rule the way they want to, not the way they have to, *but* sociopolitical context nevertheless influences the way they want to rule. In short, the disconnect between majoritarian doctrine and majoritarian results is explained by the very sociopolitical context that doctrine is supposed to be reflecting in the first place. The "evolving standards" doctrine can go, but the majoritarian influence of sociopolitical context is here to stay.

Importantly, the claim that sociopolitical influences are inevitable is not to claim that any particular decision is inevitable. Sociopolitical context is always present, but the *amount* of influence it has—and whether that influence plays a pivotal role—will vary. In short, sociopolitical context *can* play a pivotal role, as it appeared to do in the three sets of decisions examined in this Article, but it need not do so; whether it makes a difference will depend on a host of other decisionmaking influences as well. For example, one can imagine a different ideological balance on the Court resulting in different (or no) rulings in any of these decisions, precipitating a different turn of events in its wake.²⁹¹ As Barry Friedman has explained, "The Court did not have to decide the cases the way it did,

290. Concededly, this is a generalization in light of just three sets of cases, but I believe it is a fair one given the inherently muddled nature of the doctrine. As I have already alluded, the Justices have engaged in the same doctrinal manipulation in other "evolving standards" cases as well. See *supra* note 117 and accompanying text.

291. For example, others have attributed the result in *Stanford* to the retirement of Justice Powell in 1987, who had at least expressed doubts about the validity of the juvenile death penalty. See Victor L. Streib, *Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of Atkins v. Virginia*, 33 N.M. L. REV. 183, 187 (2003). Under this theory, had Powell not retired, *Stanford* would have come out the other way. As I argue generally in Part III.A.2.c, the more likely scenario is that the Justices would not have taken certiorari on the juvenile death penalty issue in 1989 given the extremely punitive mood at the time. Of course, *if* they had taken *Stanford* and had ruled the other way, one can imagine a massive outcry over the decision.

but we now have an explanation why it might have.”²⁹² Of course, this still leaves the question of *when* sociopolitical context is most likely to play a pivotal role and *where*, in the grand scheme of Supreme Court decisionmaking, its influence is most likely to be felt. To those issues, and the political science models I use to explore them, the analysis turns next.

III. A WHOLE NEW WORLD:²⁹³ CULTURE, POLITICAL SCIENCE, AND SUPREME COURT DECISIONMAKING

In this Part, the discussion turns to a focused, albeit broader, examination of the ways that larger social and political forces influence how the Supreme Court decides death. First I use political science models of Supreme Court decisionmaking to explore how sociopolitical context can influence the Court outside the realm of doctrine. Then I bring the analysis full circle, showing how extralegal majoritarian forces led to the adoption of majoritarian doctrine itself.

A. *The Influence of Sociopolitical Context on Supreme Court Decisionmaking*

Given my claim that doctrine does not drive the Court’s “evolving standards” decisions (at least those examined in this Article),²⁹⁴ it makes sense to consult political science scholarship for an idea of how sociopolitical context might influence the Court outside the realm of doctrine. In the legal world, the influence of doctrine is by and large a given.²⁹⁵ There may be few doctrinaire legal

292. Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1302 (2004).

293. ALADDIN (Disney 1992). Special thanks to my helpers, Julia Rose and Jessica Lain, for bringing this reference to my attention.

294. Space constraints required that I focus on just six cases in this Article, but as noted elsewhere, there is reason to think these cases are consistent with the Court’s larger “evolving standards” jurisprudence. *See supra* note 290.

295. *See, e.g.*, HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL 314 (1999) (“[T]he legal model is still the lifeblood of most legal scholars’ thinking about the law.”); Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, in SUPREME COURT DECISION-MAKING 15, 17 (Cornell W. Clayton & Clayton Howard Gillman eds., 1999) (“Although the definition of the traditional ‘legal model’ and the degree of professional adherence to it can be debated, what cannot is that precedent, stare decisis, and formalism continue to be the way most law students experience law and the way judges describe what they do in written opinions.”); Paul Schiff Berman, *The Cultural Life of Capital Punishment: Surveying the Benefits of a Cultural Analysis of Law*, 102 COLUM. L. REV. 1129, 1133 (2002) (“Although formalism is out of favor, most legal scholarship and law

formalists running about, but, as Howard Gillman has aptly recognized, “The entire structure of legal education and the nature of the judicial process in the United States is premised on the assumption that, one way or the other, law matters.”²⁹⁶ In the world of political science, by contrast, the assumption is just the opposite. Political scientists long have maintained that Supreme Court decisionmaking is largely independent of legal rules, principles, and precedents,²⁹⁷ providing a wealth of knowledge (or at least discussion) about Supreme Court decisionmaking outside the world of law.

For years, political scientists have documented the Supreme Court’s majoritarian tendencies.²⁹⁸ In legal academia, a small, but growing group of scholars have recognized this data (or at least the general trend), while acknowledging that the mechanisms at work are not yet well understood.²⁹⁹ This is where political science models of Supreme Court decisionmaking can help. The models are not limited to death penalty decisionmaking and thus are broader than the purpose for which I use them, but they provide a decent starting point

school courses continue to be focused on legal doctrine and concerned with arguments attempting either to justify or reform legal rules.”); Richard A. Posner, *The Supreme Court 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 49 (2005) (lamenting the fact that legal scholarship “continues to pretend that the Justices are engaged in a primarily analytical exercise that seeks ‘correct’ answers to technical legal questions”); Ross Makenzie, *Judge Roberts Played the Senators Like a Stradivarius*, RICH. TIMES-DISPATCH, Sept. 22, 2005, at A17 (quoting then-Judge Roberts as saying in his confirmation hearings, “The ideal in the American justice system is epitomized by the fact that judges—justices—do wear black robes, and that is meant to symbolize the fact that they’re not individuals promoting their own particular views, but . . . doing their best to interpret the law, to interpret the Constitution according to the rule of law.” (omission in original)). Admittedly, a minority of legal theorists do not share this view.

296. Howard Gillman, *What’s Law Got to Do with It? Judicial Behaviorists Test the ‘Legal Model’ of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 466 (2001); see also MELTSNER, *supra* note 40, at 188 (“American legal education is overwhelmingly concerned with discussion of legal cases and their implications.”).

297. See Gillman, *supra* note 296, at 466–67.

298. See Friedman, *supra* note 12, at 322–23 (discussing and listing empirical research confirming that constitutional law largely reflects majoritarian sentiment and that when there is a discrepancy, it is the law that typically comes into line).

299. See, e.g., *id.* at 322 (“Although the mechanisms operating here are not altogether clear, the notion [outside the legal academy] is that popular will might operate as a constraint on judicial decisionmaking, and not vice versa. Methodological work on the relationship between popular opinion and judicial review is somewhat trickier than elsewhere, and the theory underlying it is itself of rougher design.”); Friedman, *supra* note 292, at 1294 (“The mechanism by which [judicial outcomes align with popular opinion] is imperfectly understood . . .”); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 5 (1996) (noting that scholars who have questioned the Supreme Court’s countermajoritarian capacity “constitute a distinctly minority position”).

for conceptualizing the avenues by which sociopolitical context might influence the Justices' death penalty decisionmaking in non-doctrinal ways.

Before embarking on this discussion, a few disclaimers are in order (I am, after all, a lawyer). First, the purpose of the models is limited. They say nothing about how the Court *should* behave, an important question but one that is beyond the scope of this project.³⁰⁰ Second, my explanation of the models is limited. I do not purport to fully explore the contours of these models; my aim is to sketch their basic insights in order to highlight the avenues by which extralegal sociopolitical influences might come into play.³⁰¹ Finally, the lesson of the models is limited. They cannot conclusively establish that sociopolitical context influenced the Justices in any given case. With the availability of case conference notes, one can verify that the phenomenon occurs (as in *Furman* and *Gregg*),³⁰² but the models themselves cannot provide that verification, nor can they definitively say *why* sociopolitical context matters when it does.

What the models provide is a framework for thinking about these questions that is virtually unexplored in legal scholarship, a springboard for understanding how, outside the conduit of doctrine, social and political forces can influence how the Supreme Court decides death. As this Section discusses, the models illuminate at least three mechanisms by which sociopolitical context might affect the Justices' death penalty decisionmaking: it can influence the Justices' personal policy preferences (consciously or subconsciously), it can influence their ability to pursue those preferences, and it can influence their interest in deferring to institutional values like federalism and separation of powers.

300. My aim is to explain why these decisions are majoritarian when they make no sense under majoritarian doctrine. This is a behavioral question, not a normative one. That said, my focus here is admittedly a reflection of my view of the relative importance of the two inquiries—*ought* implies *can*.

301. Indeed, at least one of these models, the attitudinal model, did not even recognize the influence of sociopolitical context, at least in its original rendition. *See infra* Part III.A. At this time, the models, and the field itself, appear to be in a state of relative flux. *See infra* text accompanying note 352. Whether one ultimately agrees with any or all aspects of the attitudinal model or its newfound competitors is a completely separate question that would require a much more detailed discussion.

302. *See supra* text accompanying notes 64–65.

1. *The Attitudinal Model.* The attitudinal model has provided the dominant political science explanation of Supreme Court decisionmaking for the last several decades.³⁰³ Indeed, it has so dominated the field that commentators have dubbed it “Courts 101” and considered it more a matter of common sense than political theory.³⁰⁴ In the discussion that follows, I first lay out the model, then I evaluate its plausibility in the death penalty context, and then finally I use the model to highlight the avenues by which *nondoctrinal* sociopolitical forces tilt the Court’s death penalty decisionmaking in a majoritarian direction.

a. *About the Model.* The basic insight of the attitudinal model is that Supreme Court Justices decide cases according to their *a priori* policy preferences rather than any fidelity to the rule of law.³⁰⁵ In Jeffrey Segal and Harold Spaeth’s oft-quoted explanation from 1993, “Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.”³⁰⁶ According to the model, Supreme Court decisions are just the aggregate result of the Justices pursuing their own ideological notions of right and wrong, and the law is just the language in which they do it—a proposition supported by an impressive body of empirical evidence.³⁰⁷ Across a number of different doctrinal contexts, the attitudinal model enjoys a significantly higher degree of success in predicting case outcomes than the so-called “legal model” that law school academics spend so much time researching and writing about.³⁰⁸

303. See generally Clayton, *supra* note 295, at 15–30 (discussing the historical development of the attitudinal model).

304. See Gillman, *supra* note 296, at 466.

305. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

306. *Id.* at 63.

307. E.g., SPAETH & SEGAL, *supra* note 295, at 287–315 (presenting empirical evidence to support the claim that traditional legal considerations have little to no impact on Supreme Court decisionmaking); Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 *LAW & SOC. INQUIRY* 89, 94–95 (2005) (noting the “impressive volume of empirical evidence” supporting the attitudinal model and that the model predicts judicial outcomes “far better than can lawyers, judges, and law professors who seek to apply and analyze the traditional tools or sources of legal and judicial practice”); Friedman, *supra* note 12, at 273 (noting that attitudinal models are able to predict over 70 percent of votes based on ideology, and in some cases, like search and seizure cases, they correctly predict votes almost 90 percent of the time).

308. See generally SEGAL & SPAETH, *supra* note 305.

The attitudinal model attributes the Justices' ability to vote their personal policy preferences to at least three circumstances. First, the Justices enjoy judicial independence. Supreme Court Justices have life tenure, insulating them from the overt political pressures that constrain the other, electorally accountable branches.³⁰⁹ Second, the Justices sit at the top of the judicial hierarchy, which again, gives them enormous latitude to decide cases more or less as they wish.³¹⁰ As Justice Jackson famously said of the Court, "We are not final because we are infallible, . . . we are infallible . . . because we are final."³¹¹ Finally (and perhaps most importantly), the Justices interpret text that is, at least much of the time, inherently indeterminate. The Constitution is written in broad terms, and the questions presented to the Court are never "easy." No answer is obviously right or obviously wrong;³¹² it is a choice, and to borrow from Erwin Chemerinsky, "The Court can be criticized for the choices it makes but not for making choices."³¹³

Taken together, these three factors create a decisionmaking landscape in which the Justices can pretty much decide any case any way they want. According to the attitudinal model, that is exactly what the Justices do. Under the model, the law might frame the debate but the law does not decide it. In the end, the legal

309. *See id.* at 69–71.

310. *See* William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 172 (1996) (noting that Supreme Court Justices have tremendous latitude to vote policy preferences because they are not subject to a higher authority and can only be reversed by constitutional amendment).

311. *Brown v. Allen*, 344 U.S. 443, 540 (1953).

312. *See* Posner, *supra* note 295, at 40 ("[I]t is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly."). The fact that there is no obviously right or wrong methodology for deciding constitutional questions only adds to the indeterminacy of the constitutional questions themselves. *See infra* notes 318–19 and accompanying text.

313. Erwin Chemerinsky, *The Supreme Court 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 62 (1989). Even precedent is, according to the Justices, "not an inexorable command." *Crawford v. Washington*, 541 U.S. 36, 75 (2004) (Rehnquist, C.J., concurring). Indeed, the notion of precedent as a constraint on the Court has grown so weak that the term "super precedent" has emerged, which as far as I can tell, is just precedent that binds the Justices' decisionmaking in a way that precedent was supposed to in the first place. *See* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1204–10 (2006) ("Super precedents are the doctrinal, or decisional, foundations for subsequent lines of judicial decisions (often but not always in more than one area of constitutional law).").

justification of a particular decision is, using Peter Gabel's eloquent descriptive, "basically a lot of posturing baloney."³¹⁴

To be clear, the attitudinal model does not contend (at least according to most of its proponents) that the law is completely irrelevant. Doctrine does not decide cases, but it does shape the rhetoric in which cases are considered and decided—and that rhetoric may, in turn, set the stage for and inspire future debates.³¹⁵ In that sense, the law matters. What the law does not do—and cannot do—according to the attitudinal model, is *constrain* the Justices' decisionmaking.³¹⁶ It does not and cannot keep the Justices from ruling however they are otherwise inclined to rule.

Importantly, the attitudinal model does not necessarily mean that the Justices decide cases based on unabashed policy preferences. A more sophisticated version of the model posits that the Justices' ideological leanings seep into the interpretive process itself.³¹⁷ Like the constitutional questions at issue, there is no self-evidently correct answer to the question of how to interpret the Constitution.³¹⁸ Once again, the Justices must make a choice, and this version of the model contends that they intuitively choose the interpretive theory or

314. Peter Gabel, *Founding Father Knows Best: The Search by the Framed for the Intent of the Framers*, in *THE BANK TELLER AND OTHER ESSAYS ON THE POLITICS OF MEANING* 139, 141 (2000) (discussing critical legal studies' stance on law).

315. See Barry Friedman, *Taking Law Seriously*, 4 *PERSP. ON POL.* 261, 266 (2006) (discussing the impact of opinions in framing future legal disputes, even if the law does not determine votes). In the intellectual property world, this phenomenon is known as "doctrinal feedback," but the same term could be applied more broadly. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *YALE L.J.* 882, 884–85 (2007).

316. See Friedman, *supra* note 315, at 267; Gillman, *supra* note 296, at 471.

317. See Feldman, *supra* note 307, at 108–10.

318. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 7–8 (2005) (noting that judges all use the same basic interpretive devices, but differ in the sources they emphasize); Cornell Clayton, *Law, Politics, and the Rehnquist Court: Structural Influences on Supreme Court Decision Making*, in *THE SUPREME COURT IN AMERICAN POLITICS* (Clayton Howard Gillman & Cornell W. Clayton eds., 1999) (discussing four major approaches to constitutional adjudication while noting that the Justices have not made an official choice among these). Indeed, even within a chosen interpretive theory, discretion reigns—and that is just as true for methodologies purporting to eliminate value-laden choices as for those that openly embrace them. *E.g.*, BREYER, *supra* note 318, at 115–31 (discussing defects in originalism as formalist interpretive methodology); CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT WING COURTS ARE WRONG FOR AMERICA* 133–42 (2005) (discussing discretion and deviation in Justice Scalia's use of originalism); Chemerinsky, *supra* note 313, at 91 (noting that attempts to constrain discretion in Supreme Court decisionmaking through interpretive methodologies have proven "unworkable in practice").

theories that take them where they want to go.³¹⁹ The result is a Freudian version of the basic model—the Justices do not *think* they are voting their policy preferences, even though they are.³²⁰ They may be consciously (and conscientiously) behaving as neutral interpreters of the law, but according to the attitudinal model, their interpretation of the law is colored by their ideological identities and policy preferences.³²¹

b. The Attitudinal Model in the Death Penalty Context. The attitudinal model provides a good start for understanding Supreme Court decisionmaking in the death penalty context. In the “evolving standards” cases discussed in this Article, the Justices almost certainly voted their personal preferences—and their votes in other death penalty cases are consistent with the same pattern. Across a variety of doctrinal settings, the Court’s most ideologically conservative members have routinely voted in favor of the death penalty, while the Court’s most ideologically liberal members have routinely voted against it. Justice Rehnquist’s voting record on the death penalty provides a prime example. Between 1972 and 1987, Justice Rehnquist voted to affirm the death sentence in all but two of the thirty-three capital cases he heard; in four of those cases, he was even the lone dissenter.³²² The voting records of Justices Scalia and Thomas, considered “the most passionate pro–death penalty Justices on the Court,”³²³ are likewise sharply skewed toward affirming death sentences, just as the voting records of Justices Brennan and Marshall, the Court’s self-declared abolitionists, uniformly go the other way.³²⁴

319. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 155 (1999) (“[A] judge is rather more likely to pick the theory that points where he or she wants to go anyway, than to pick a theory and reluctantly find that it leads to conclusions he or she would have preferred to avoid.”).

320. See generally SIGMUND FREUD, *THE EGO AND THE ID* (1923) (articulating the complex and dynamic relationship between the conscious and subconscious mind).

321. Feldman, *supra* note 307, at 110.

322. See BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 243 (1987); see also Editorial, *No Need for the Execution Express*, N.Y. TIMES, Oct. 3, 1989, at A22 (characterizing Rehnquist’s views on the death penalty as “ghoulish”).

323. Elaine Cassel, *Did the Beltway Sniper Case Influence the Supreme Court’s Recent Decision to Decline to Review the Juvenile Death Penalty?* FINDLAW.COM, Feb. 6, 2003, http://writ.news.findlaw.com/commentary/20030206_cassel.html.

324. See BEDAU, *supra* note 49, at 138–39 (noting that Justices Brennan and Marshall maintained since *Furman* that the death penalty was per se unconstitutional); Steiker & Steiker,

Granted, the attitudinal model may be particularly well suited for explaining the Court's "evolving standards" cases; the doctrine in these cases is so hopelessly muddled that it practically invites the Justices to rule as they wish. But there is little reason to think doctrinal clarity would make much difference in this area—it did not make a difference in *Furman* and *Gregg*. When the Court decided *Furman*, Eighth Amendment doctrine was both coherent and clear; it just did not support the Court's ruling.³²⁵ The same was more or less true when the Court decided *Gregg*.³²⁶ Indeed, even the messy "evolving standards" doctrine did not spring forth as a series of contradictions—to the extent the doctrine is indeterminate, it is because the Justices made it that way. In short, the problem with the "evolving standards" doctrine is not the rule of law, nor is the solution a law of rules. No matter what the doctrine looks like, the Justices are likely to more or less decide death the way they want. But how, the question remains, does that tilt the Court's decisionmaking in a majoritarian direction?

c. The Attitudinal Model and Sociopolitical Context. The attitudinal model's emphasis on personal preferences illuminates several avenues by which sociopolitical context can influence the Justices' death penalty decisionmaking. The first is the judicial selection process. If the attitudinalists are even partly right and the Justices' personal views do affect Supreme Court decisionmaking, then the results in death penalty cases depend largely on who those Justices are. And that recognition, in turn, points to the political appointment process as one way that larger sociopolitical context influences the Court. Supreme Court Justices are not popularly elected, but the political actors who put them on the bench are—and those actors, presumably, more or less reflect the public's views.³²⁷ Of

supra note 83, at 427 (noting that abolitionist Justices Brennan and Marshall contended in every death penalty case that the death sentence was unconstitutional, while Justices Scalia and Thomas, just like former Chief Justices Burger and Rehnquist, consistently vote to end regulation of the death penalty altogether).

325. See *supra* notes 26–39 and accompanying text. This is not to say that the *constitutional text* at issue in *Furman* was coherent and clear, just that there was little to no legal support for the result in the case.

326. Taken together, *Furman* and *McGautha* pointed towards one result—just not the one the Court took. See *supra* notes 73–79 and accompanying text.

327. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 613–14 (1992) (“As vacancies occur, presidents fill them with judges whose views are at least somewhat similar to their own and, more important, to the views of the people who elected them.”); see also

course, implicit in this theory is the assumption that presidents nominate, and senators confirm, candidates whose ideology is similar to their own, and history is replete with appointment “mistakes” in which that was not the case.³²⁸ In practice, however, the appointment process has put substantial pressure on presidents to nominate ideological moderates over ideological matches anyway (at least unless the president controls the Senate)—the closer a nominee is to having mainstream political values, the better chance the nominee has of getting confirmed, rather than “borked.”³²⁹

Under the attitudinal model, the judicial selection process is the primary explanation for the Supreme Court’s majoritarian tendencies,³³⁰ but it is possible to see other avenues by which majoritarian social and political forces can affect the Justices’ policy preferences as well. To the extent the Justices are deciding cases based on their policy preferences, those preferences have to come from somewhere. By and large, that somewhere is the panoply of norms, assumptions, expectations—even prejudices—that define a given place and time.³³¹ The Justices live in a particular cultural

Chemerinsky, *supra* note 313, at 82 (“Presidential appointments assure that the Court’s ideology, over time, will reflect the general sentiments of the majority in society.”).

328. See Jason DeParle, *In Battle to Pick Next Justice, Right Says Avoid a Kennedy*, N.Y. TIMES, June 27, 2005, at A1 (discussing Justices who have disappointed the presidents who appointed them, including Justices Brennan, Blackmun, Stevens, Souter, and Kennedy); Lain, *supra* note 47, at 1367–68 (quoting President Eisenhower as saying the appointment of Chief Justice Warren was “the biggest damn fool mistake” he ever made).

329. See EDWARD LAZARUS, CLOSED CHAMBERS 248, 248–50 (1998) (discussing the failed confirmation of Robert Bork and its impact on the judicial selection process). The nomination fight over Judge Bork was so salient that it resulted in an addition to the English language: “bork,” which means “to attack (a candidate or public figure) systematically, esp. in the media.” Dictionary.com, <http://dictionary.reference.com/browse/bork> (last visited Oct. 4, 2007).

330. See Mishler & Sheehan, *supra* note 310, at 171 (“The conventional explanation of the relationship between public opinion and Supreme Court decisions is that the influence of public opinion is indirect—that it is mediated largely through the impact of public opinion on presidential elections and the subsequent effects of presidential appointments on the ideological composition of the Court.”); Helmut Norpoth & Jeffrey Segal, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711, 716 (1994) (“It is not that the justices pay keen attention to public opinion but that they have been chosen by a president (with the advice and consent of the Senate) who presumably shares the public’s views.”).

331. Oliver Wendell Holmes arguably made the point best when he wrote in 1881, “The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.” OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881); see also Feldman, *supra* note 307, at 122 n.37 (“Of course, the justices’ political preferences or ideologies, emphasized by the attitudinal approach, do not

context, and that context creates an outer boundary of normative possibilities, at least for the Court as a whole.³³² In 1896, to take a famous example, it is hard to imagine the Justices ruling other than they did in *Plessy v. Ferguson*.³³³ At the time, the egalitarianism embodied in *Brown v. Board of Education*³³⁴ was simply not within the Court's culturally defined realm of possibilities.³³⁵ One need only consider the methods of execution authorized two hundred years ago, and the crimes for which execution was considered appropriate, to make the same point in the death penalty context.³³⁶ Culture itself sets limits on the possible policy preferences that a majority of the Justices might favor. Those limits are somewhat capacious and very much subconscious, but they are there.

Within these limits is another, less capacious avenue of sociopolitical influence—the pull of dominant public opinion. Supreme Court Justices are members of society, and as such, are naturally influenced by the same events that shape the rest of the public's views.³³⁷ As Chief Justice Rehnquist explained twenty years ago:

bubble up from within their pristine souls. Rather, the justices develop their political views within the context of widespread contemporary political trends.”)

332. See Feldman, *supra* note 307, at 100 (“Individuals are simultaneously empowered and constrained because they live and participate in communal or cultural traditions. . . . We are able to see to the limits of our respective horizons, but no farther. . . . [W]hile we cannot see beyond our horizon, our horizon constantly edges along, gradually moving this way or that.”); Lawrence M. Friedman, *Coming of Age: Law and Society Enters an Exclusive Club*, 1 ANN. REV. L. SOC. SCI. 1, 10 (2005) (“In some ways, people are like animals born and raised in zoos; they are not aware that their world of cages and enclosures is highly artificial, that their range of behavior is limited by conditions they did not create for themselves. . . . This is true for legal behavior as much as for any other form of behavior.”). The claim is less true for individual Justices. See *infra* text accompanying notes 341–44.

333. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

334. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

335. This is not to say that such egalitarianism was outside the realm of possibilities for any individual Justice, just for the Court as a whole. After all, the vote in *Plessy* was 7–1. See *Plessy*, 163 U.S. at 540.

336. Past methods of execution have included stoning, drowning, boiling, drawing and quartering, and burning at the stake. See Brennan, *supra* note 1, at 327–28. Crimes for which execution has been authorized include prostitution, adultery, gluttony, witchcraft, false prophesy, and gathering sticks on the Sabbath day. *Id.* (discussing these and other features of the death penalty in the past).

337. See Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 192 (1998) (“[Judges] are part of society, and thus are unlikely to interpret the Constitution in ways that radically depart from contemporary popular opinion.”); Lain, *supra* note 47, at 1368 (“The Court is a part of contemporary society, and so we can (and should) expect its decision making to be naturally influenced by contemporary societal norms.”).

The judges of any court of last resort, such as the Supreme Court of the United States, work in an insulated atmosphere in their courthouse where they sit on the bench hearing oral arguments or sit in their chambers writing opinions. But these same judges go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events. . . . Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.³³⁸

Whether the Justices' views of right and wrong are influenced by what others think or by the events that shape what others think, the result is the same—they are, as a whole, unlikely to stray far from the prevailing sentiments of their time.³³⁹ This is not to deny that the Justices tend to favor elite values,³⁴⁰ nor is it to say where on the spectrum of dominant public opinion a particular Justice's policy preferences will lie. The point is that *in the aggregate*, the Justices' views will tend to loosely reflect public opinion because they, too, are part of the public.

The point merits qualification. Justices on the extreme ends of the ideological spectrum are not only less reflective of mainstream public opinion, but also more rigid in their views.³⁴¹ As a result, they are less likely to be influenced by changes in dominant public opinion,³⁴² a phenomenon amply demonstrated in the death penalty context. In 1976, it did not matter to Justices Brennan and Marshall that the country had decisively rejected *Furman*; come what may, they voted in *Gregg* to finish what they had started in 1972.³⁴³ Likewise, Justice Scalia's comments in 2002 show that his archconservative views have remained largely unaffected by the revelation of innocents on death row:

338. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986); see also Friedman, *supra* note 12, at 325 ("The Justices live on this planet and typically are aware of what happens on it.").

339. See Mishler & Sheehan, *supra* note 310, at 173–74 (discussing both direct and indirect avenues of influence).

340. See Klarman, *supra* note 337, at 189–92 (discussing the systematic bias of Justices toward culturally elite values).

341. See Mishler & Sheehan, *supra* note 310, at 177–78.

342. *Id.*

343. See *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

I think the question, if I got it correctly, was do I think the death penalty is immoral because it will—I have to say—it will inevitably lead at some point to the condemnation of someone who is innocent. Well, of course it will. I mean, you cannot have any system of human justice that is going to be perfect. . . . I don't think that the system becomes immoral because it cannot be perfect. . . . That's the best we can do in any human system, so I don't think you can judge the validity of any criminal law system on the basis of whether now and then it might make a mistake.³⁴⁴

On both sides of the political spectrum, one can expect Justices holding “ultra” views to be relatively impervious to change, even in the face of powerful changes around them.

That said, rigidity in many (if not most) of the Justices has thus far not equated to rigidity on the Supreme Court as a whole. Despite the efforts of a good many presidents, the ideological composition of the Court has remained remarkably balanced for decades, and there is a good chance it will more or less stay that way.³⁴⁵ On this ideologically balanced Court, the moderate, swing Justices are the ones shaping the Supreme Court's decisionmaking—and they *are* affected by changing social, political, and cultural norms. Later research on the attitudinal model indicates that moderates on the Court are more responsive to changes in public mood than their more ideologically committed colleagues, and that the effect of public opinion on these Justices is substantial.³⁴⁶ These findings are consistent with comments Justices Kennedy and O'Connor have

344. Antonin Scalia, Address at A Call For Reckoning: Religion and the Death Penalty (Jan. 25, 2002) (transcript available at <http://web.telia.com/~u15509119/scalia.htm>).

345. See Steiker, *supra* note 136, at 1489 (“From 1976 on, the struggle between the poles has persisted, despite changing membership, and the meliorist middle has continued to dominate”); see also *supra* note 329 and accompanying text (discussing the pressure from the judicial selection process after Bork to put moderates on the Court). To the extent a given vacancy on the Court has the possibility of shifting this delicate balance of power, one would expect the pressure to appoint a moderate to be even more intense. Concededly, this would not be the case if the president and senate are aligned.

346. See Mishler & Sheehan, *supra* note 310, at 189–93 (“[M]oderate justices are more consistently responsive to fluctuations in the public mood than either their liberal or conservative justices. . . . [T]he results strongly support the hypothesis that public opinion exerts significant direct effects upon some, though certainly not all Supreme Court justices.”). As originally articulated, the attitudinal model maintained that the Justices' policy preferences were immutable, see *id.*, although outside the realm of ideologues, it is unclear why that presumption makes sense. To the extent that the empirical work referenced here has not led to a widely accepted refinement of the attitudinal model, perhaps it should.

made,³⁴⁷ and they support the validity of the explanation for *Atkins* and *Roper* posited in Part II. Since the 1989 decisions, conservative appointments have pushed the Court's median Justice slightly to the right,³⁴⁸ yet the Court's post-2000 death penalty decisions have been remarkably progressive, mirroring the public mood.³⁴⁹ As *Atkins* and *Roper* both illustrate, public opinion need not affect most, or even several, of the Justices to affect the Court's decisionmaking—even an impact on one Justice's attitudes may bring substantial change.³⁵⁰

In sum, the attitudinal model highlights several channels by which sociopolitical context can affect the Justices' death penalty decisionmaking—one grounded in the judicial appointments process, others grounded in the formation of the Justices' policy preferences themselves. But the attitudinal model is not the only political science account of Supreme Court decisionmaking, and these are not the only mechanisms by which sociopolitical forces can tilt the Court's decisionmaking in a majoritarian direction.³⁵¹

2. *The New Institutional Model.* In just the last decade, developments in the political science arena have brought a revolution in thought about Supreme Court decisionmaking. The result is several “new institutionalist” models of the phenomenon, models that focus less on the individual Justices and more on the institution in which they operate.³⁵² In this Section, the analysis (again) introduces the

347. See SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 166 (Craig Joyce ed., 2003) (“[R]eal change, when it comes, stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory—in court or legislature—that is not a careful by-product of an emerging social consensus. Courts, in particular, are mainly reactive institutions.”); DeParle, *supra* note 328 (quoting Justice Kennedy as stating, “In the long term, the court is not antimajoritarian—it’s Majoritarian.”).

348. See Lee Epstein, Jack Knight & Andrew D. Martin, *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783, 796 (2003) (“[The] key median position, occupied by (relative moderates) Justices White and Souter for much of the 1986–93 term period, now appears to belong chiefly to (relative conservatives) Kennedy and O’Connor. Accordingly, under the attitudinal model, we might anticipate policies produced by today’s Justices to reflect a more right-of-center orientation than they did some seven years ago.”).

349. See *supra* note 283 and accompanying text (discussing the Supreme Court’s reregulation of the death penalty across a variety of doctrinal contexts).

350. See *supra* note 166 and accompanying text.

351. One need not fully agree with the attitudinal model to appreciate the purpose for which I use it. So long as policy preferences are at least *partly* driving the Justices’ votes (and the evidence is strong that they do), the attitudinal model sheds light on the avenues by which the influence of sociopolitical context comes into play.

352. See Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in *SUPREME COURT*

models; then evaluates their plausibility in the death penalty context, and then uses them to explore additional ways that sociopolitical forces might push the Court toward majoritarian death penalty rulings for reasons wholly independent of majoritarian doctrine.

a. *About the Models.* The new institutionalist models differ in their accounts of Supreme Court decisionmaking, but share the same basic insight—that the Court’s institutional setting influences the Justices’ policy preferences and ability to pursue those preferences.³⁵³ According to the models, the Court’s institutional setting influences the Justices’ policy preferences by adding another preference to the mix: fidelity to institutional norms. As Herman Pritchett explained in 1969, before the “new” institutionalists were new:

[P]olitical scientists who have done so much to put the “political” in “political jurisprudence” need to emphasize that it is still “jurisprudence.” It is judging in a political context, but it is still judging; and judging is something different from legislating or administering. Judges make choices, but they are not the “free” choices of congressmen.³⁵⁴

According to the new institutionalist models, institutional virtue is its own reward, so concerns like federalism, separation of powers—even fidelity to legal precedent—should be considered alongside the

DECISION-MAKING, *supra* note 295, at 65, 66 (noting that new institutionalists “shift their focus away from the long-standing question of how institutions are affected by the personal characteristics of judges and toward the question of how judges are affected by the institutional characteristics within which they are embedded”); Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING, *supra* note 295, at 1, 3–7 (outlining three broad camps of “new institutionalism” and explaining their features).

353. I do not detail the various models in part because it is at times difficult to tell the difference between them (especially when it comes to the influence of political setting) and in part because their differences are not key to the analysis. That said, the new “historical” institutionalists appear to come closest to recognizing the point I make in this Section, although the match is not a perfect one and the precise contours of their analysis are unclear. See generally Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936 (1996) (discussing the new institutionalist models).

354. C. Herman Pritchett, *The Development of Judicial Research*, in FRONTIERS OF JUDICIAL RESEARCH 27, 42 (Joel B. Grossman & Joseph Tanenhaus eds., 1969); see also Clayton, *supra* note 295, at 32 (explaining that “it is not so easy to see how [the new institutionalist approach] differs from the old public law” and noting claims by others that the new institutional models are simply a return to traditional political science and its focus on courts as institutions).

Justices' personal policy preferences.³⁵⁵ As the new institutionalists point out, Supreme Court Justices do not *always* vote their policy preferences. Sometimes they vote against those preferences, and say so.³⁵⁶ In any given case, institutional norms might work for or against a Justice's personally preferred outcome. The point is that they are a consideration—and one the Justices profess to care deeply about.³⁵⁷

The new institutionalists also maintain that the Court's institutional setting imposes *constraints* on the Justices' ability to pursue their policy preferences. Under the new institutionalist models, the Supreme Court is "the least dangerous branch" for a reason: it is utterly helpless to accomplish anything on its own.³⁵⁸ The Court needs the support of the executive and/or legislative branches to make its rulings count, yet these institutional actors have preferences too, and those preferences may lead them to override,

355. See Clayton, *supra* note 295, at 32 ("[N]ew . . . institutionalists "seek to explain judicial decision-making as a process in which judicial values and attitudes are shaped by judges' distinct professional roles, their sense of obligation, and salient institutional perspectives."); Gillman & Clayton, *in* SUPREME COURT DECISION-MAKING, *supra* note 295, at 5 ("[T]he justices' behavior might be motivated . . . by a sense of duty or obligation about their responsibilities to the law and the Constitution and by a commitment to act as judges rather than as legislatures or executives.").

356. In the death penalty context, the dissenters' opinions in *Furman* provide a prime example. *Furman v. Georgia*, 408 U.S. 238, 375 (Burger, C.J., dissenting) ("If we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes."); *id.* at 405 (Blackmun, J., dissenting) ("I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty . . ."); see also Feldman, *supra* note 307, at 111–16 (discussing Supreme Court decisionmaking when conflict arises between institutional values and policy preferences and citing cases as examples); Posner, *supra* note 295, at 50 ("Justices occasionally, and sometimes credibly, issue express disclaimers that a particular outcome for which they voted is one they would vote for as a legislator.").

357. *E.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992) ("The legitimacy of the Court would fade with the frequency of its vacillation."); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.").

358. Alexander Hamilton considered the judiciary to be the "least dangerous" branch because it

has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

THE FEDERALIST NO. 78 (Alexander Hamilton); see also Friedman, *supra* note 292, at 1277 ("Courts may declare all they wish, but the population must go along.").

undermine, or just ignore the Court's rulings instead.³⁵⁹ Moreover, other institutional actors have at their disposal a host of Court-curbing measures designed to bring any errant Court into line—and the Justices know it.³⁶⁰ According to the new institutionalist models, the result of these dynamics is that the Justices will pursue their policy preferences only to the extent they think they can do so without triggering retaliation.³⁶¹ The amount of this constraint will vary depending upon the salience of the issue and the strength and solidarity of other institutional actors,³⁶² but it is there. The so-called “independent judiciary” is not so independent after all.

b. The New Institutional Models in the Death Penalty Context.

The new institutionalist models provide a generally plausible explanation for the Court's death penalty decisionmaking, although their reliance on institutional values as an independent policy preference is less helpful. Concededly, institutional values have been a prominent theme in the Court's death penalty cases. In the 1991 landmark *Coleman v. Thompson*,³⁶³ for example, the Court began its opinion with the famous line, “This case is about federalism.”³⁶⁴ The

359. See Gillman, *supra* note 352, at 69 (discussing “separation of powers games” where Congress may reverse the Court's interpretation of a statute, initiate the amendment process to overturn a constitutional interpretation, undermine rather than enforce a decision, or assault the Court's personnel or jurisdiction).

360. See MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 178 (2005) (relaying Justice Kennedy's recognition that “if judges went too far, the political system would slap them down”); Friedman, *supra* note 12, at 313–14 (“Although amending the Constitution is difficult, the political branches retain a broad arsenal of weapons to use against a troublesome judiciary. Judges may be impeached, jurisdiction may be stripped, courts may be packed, and judicial budgets may be cut. . . . It is true that the other branches rarely deploy these weapons against the judiciary—at least in recent memory—but the doctrine of anticipated reaction holds that the political branches can both keep the powder dry and the judiciary in check.”).

361. See Gillman, *supra* note 352, at 69 (“[The new institutionalist model] assumes that justices will bargain or retreat in the face of a challenge or will adopt insincere positions on the merits in order to avoid a conflict with powerholders who are in a position to thwart the will of the Court.”).

362. For an excellent discussion of this dynamic in the criminal procedure arena, see Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Procedure Jurisprudence*, 94 GEO. L.J. 1385, 1388–94 (2006), discussing the “political regimes” approach to understanding Supreme Court decisionmaking and the limited circumstances in which the Court can engage in counterregime behavior.

363. *Coleman v. Thompson*, 501 U.S. 722 (1991).

364. *Id.* at 726; see also *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (plurality opinion) (“[T]he deference we owe to the decisions of state legislatures . . . is enhanced where the

problem with that statement (and explanation of the decision) is that *any* death penalty case is “about federalism” if the Court wants it to be.³⁶⁵ When the Court affirms a death sentence, it invokes federalism; when it reverses, the Court ignores it. Federalism only matters sometimes, and, as a voluminous body of scholarship has established, the times it matters most are when the Justices’ policy preferences go the same way.³⁶⁶ This is not to deny that the Justices have institutional values, nor is it to deny that those values might clash with (and even outweigh) others that the Justices hold dear.³⁶⁷ But it does call into question why one should take the Justices any more seriously when they invoke federalism or separation of powers than when they invoke Eighth Amendment doctrine. As a decisionmaking construct, neither seems to be doing much intellectual work.

The new institutionalists’ recognition of the *constraints* imposed by the Justices’ institutional setting is an altogether different matter. Here the models do help explain the dynamics at play in the Supreme Court’s death penalty decisionmaking. In *Furman*, for example, the Justices had ample political room to rule as they did given the death penalty’s weak support among other institutional actors and the public at large.³⁶⁸ In *Gregg*, by contrast, the Justices had none of that room—thirty-five states had reinstated the death penalty, both political parties supported the practice, and the solicitor general was asking the Court to overrule its 1972 decision.³⁶⁹ Under those circumstances, it is hard to imagine the Court in *Gregg* ruling any other way than it did. The same holds true for the Court’s 1989 and

specification of punishments is concerned” (citing *Gore v. United States*, 357 U.S. 386, 393 (1958))).

365. This is particularly true given that most death penalty appeals reach the Court through habeas review. See Hoffmann, *supra* note 137, at 155, 163 (discussing the interconnection between federalism, habeas corpus, and the death penalty).

366. For a nice sampling of the literature, see Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1101 n.6 (2006).

367. See *supra* note 356 and accompanying text (acknowledging the existence of credible conflicts between the Justices’ institutional and personal values). In *Furman*, this conflict was *probably* more true in Justice Blackmun’s case and less in Chief Justice Burger’s case. Compare *Furman v. Georgia*, 408 U.S. 238, 375 (1972) (Burger, C.J., dissenting) (“If we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes.”), with *id.* at 405 (Blackmun, J., dissenting) (“I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty . . .”).

368. See *supra* Part I.A.2 (discussing *Furman*’s extralegal context).

369. See *supra* Part I.B.2 (discussing the extralegal context of *Gregg*).

post-2000 death penalty decisions concerning mentally retarded and juvenile offenders. In 1989, the death penalty was a highly salient issue and enjoyed exceptionally strong public and political support, which created a particularly inhospitable climate for imposing death penalty protections in this area.³⁷⁰ After 2000, by contrast, death penalty support among other institutional actors (and the public at large) substantially softened, allowing the Court room to regulate in this area.³⁷¹ All this makes sense—the death penalty is an issue the public cares about, which means other institutional actors will care about it too. In the death penalty context, then, one can easily see how the Court’s institutional setting might affect the Justices’ *choices*, regardless of whether it affects their *preferences* in the first instance.

c. The New Institutional Models and Sociopolitical Context.

The new institutionalist models explicitly recognize one avenue of sociopolitical influence—the Court’s institutional setting. Indeed, half the point of these models is that the Court’s institutional setting will keep it within the mainstream positions of other institutional actors, if only to avoid retaliation from those actors and the public at large. Note that dominant public opinion plays into that dynamic in several different ways. First, other institutional actors are publicly accountable, even if the Court (technically) is not, which means that these actors will enforce Supreme Court decrees only to the extent they do not deviate too far from dominant public opinion.³⁷² Likewise, these actors will retaliate against the Court only when doing so does not itself provoke public backlash.³⁷³ Finally, the Supreme Court remains vulnerable to retaliation directly from the public as well, such as when a ruling results in massive resistance at the ground level.³⁷⁴ In light of these constraints, the new institutionalist models turn the conventional understanding of the Court on its head—in theory, the

370. See *supra* Part II.B.1 (discussing the extralegal context of 1989).

371. See *supra* Part II.B.2 (discussing the post-2000 extralegal context).

372. See Merrill, *supra* note 165, at 628.

373. See Friedman, *supra* note 12, at 324.

374. The massive backlash against *Brown v. Board of Education*, 347 U.S. 483 (1954), in the South is one example. See Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 97–118 (1994) (examining the backlash against *Brown* and its effect on the civil rights movement).

Supreme Court cabins majoritarian sentiment, but in practice, majoritarian sentiment cabins the Supreme Court.³⁷⁵

Three qualifications on the point merit mention. First, the Court's institutional constraints will, again, matter more to the moderate, swing Justices than to their ideologically rigid colleagues, as comments made by Justices O'Connor and Kennedy tend to demonstrate.³⁷⁶ Second, the insights of the attitudinal model would suggest that these same considerations are simultaneously affecting the Justices' *preferences*, so it may well be that the Court rarely bumps up against its institutional constraints. Indeed, one of the hardest questions in this area may be whether sociopolitical context *subconsciously* constrains the Justices' preferences before it *consciously* constrains their choices.³⁷⁷ Finally, to the extent the Justices do feel institutionally constrained, they may deal with that constraint by avoiding the issue altogether.³⁷⁸ The Justices' certiorari votes on the juvenile death penalty are a prime (although admittedly speculative) example. In 2002, four Justices dissented from the Court's denial of certiorari in the original *Stanford* case, writing, "We should put an end to this shameful practice."³⁷⁹ The following year, the same four Justices could have forced the Court to grant certiorari on the juvenile death penalty, but chose not to.³⁸⁰ Why? One possibility is that the Malvo trial was underway, generating public

375. I credit Barry Friedman for recognizing the point. Friedman, *supra* note 12, at 322 ("Although the mechanisms operating here are not altogether clear, the notion is that popular will might operate as a constraint on judicial decisionmaking, and not vice versa.").

376. See, e.g., Sandra Day O'Connor, *Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust*, 36 CT. REV. 10, 13 (1999) ("As judges, court administrators and attorneys, we all rely on public confidence and trust to give the courts' decisions their force. We don't have standing armies to enforce opinions, we rely on the confidence of the public in the correctness of those decisions. That's why we have to be aware of public opinions and of attitudes toward our system of justice, and it is why we must try to keep and build that trust."); see also TUSHNET, *supra* note 360, at 178 (relaying remarks by Justice Kennedy).

377. See Gillman & Clayton, *supra* note 352, at 3 ("[O]ne of the most interesting questions that can be explored is whether the experience of unfettered freedom is a function of the tendency of relevant players to pursue only those agendas that do not trigger the potential constraints that are latent in every context.").

378. See Friedman, *supra* note 292, at 1282 (raising the possibility that the Justices can simply deny certiorari review while noting that existing attitudinal studies have not taken this consideration into account). For an excellent discussion of the Justices' decisionmaking in the certiorari context, see generally H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991).

379. *In re Stanford*, 537 U.S. 968, 972 (2002) (Stevens, J., dissenting from denial of certiorari). Justice Stevens was joined by Justices Souter, Ginsburg, and Breyer. *Id.* at 968.

380. *Hain v. Mullin*, 537 U.S. 1173, 1173 (2003) (denying certiorari).

interest in and support for the juvenile death penalty.³⁸¹ When even Malvo's life was spared (in Virginia, no less),³⁸² the Court's institutional constraints subsided—and coincidentally or not, the Justices granted certiorari in *Roper* the following month.³⁸³

Although the new institutionalist models explicitly recognize one avenue of sociopolitical influence (the Court's institutional constraints), they allow for two others as well. The first is premised on the notion that the Justices value institutional esteem. Supreme Court Justices do not get year-end bonuses, nor can they work their way into a higher position on the judicial ladder. What, then, do they find rewarding? Public applause of their decisions beats public censure, and there is anecdotal evidence that the Justices do in fact care about how the Court is depicted in the popular press.³⁸⁴ Once again, those Justices holding swing voting positions appear to be most concerned about the Court's public persona, giving an entirely new meaning to the term, "Greenhouse effect."³⁸⁵ In short, the Justices may not "follow the election returns,"³⁸⁶ but there is reason to believe that those holding pivotal positions tend to favor rulings that enhance the Court's reputational standing.

The second avenue of influence imaginable (although not specifically recognized) under the new institutionalist models goes back to the notion of institutional values such as federalism, separation of powers, and the like. As already noted, the main problem with using these values to explain Supreme Court decisionmaking is that they only matter sometimes.³⁸⁷ The new

381. See Maria Glod & Tom Jackman, *Malvo Indicted as an Adult: Teen Sniper Suspect Eligible for Execution*, WASH. POST, Jan. 23, 2003, at B1; Cassel, *supra* note 323.

382. See Cauvin, *supra* note 276; Tom Jackman, *Malvo Is Spared Death Penalty; Jury Gives Teen Life Sentence for His Role in Sniper Slayings*, WASH. POST, Dec. 24, 2003, at A1.

383. *Roper v. Simmons*, 540 U.S. 1160, 1160 (2004) (granting certiorari).

384. E.g., WOODWARD & ARMSTRONG, *supra* note 66, at 218 (discussing Justice White's expressed fear in the *Furman* conference that the Court's pending decision in *Roe* would result in the Justices' being "portrayed as allowing convicted killers to live, and sentencing unborn babies to die").

385. The "Greenhouse effect" refers to the claim that Justices Kennedy and O'Connor have cared about their image in the press—and in particular, their image with *New York Times* reporter Linda Greenhouse, who principally reports on the Court. Mark Tushnet, *Understanding the Rehnquist Court*, 31 OHIO N.U. L. REV. 197, 200–01 (2005) (discussing the so-called "Greenhouse effect").

386. See Mishler & Sheehan, *supra* note 310, at 171 (referring to early twentieth century cartoonist Mr. Dooley's claim that the Court "follows th' illection returns").

387. See *supra* notes 365–67 and accompanying text.

institutionalist models correctly point out that when the Justices' institutional and personal values clash, institutional considerations at times prevail, but they provide no insight as to why or when that happens. Here, considering the influence of sociopolitical context enriches the new institutionalist models, providing at least one explanation of how the Justices resolve the conflict. Institutional values like federalism are more about *when* to intrude on states' rights than *whether*, and sociopolitical context can play an important role in determining when the Justices will think intervention is warranted. Indeed, it is precisely when a state has deviated far from the national norm that the Justices are most likely to find its position patently offensive and suppress it, notwithstanding any general preference for deference.³⁸⁸ After all, it is a whole lot easier for the Justices to defer to the states (or Congress or anyone else) when they are not of the opinion that some grave injustice has occurred. Importantly, that opinion does not come from nowhere; it is informed by the prevailing sensibilities of the time.³⁸⁹ Thus, while considering federalism and other institutional values does a poor job of explaining the Supreme Court's death penalty decisionmaking, considering sociopolitical context does a nice job of explaining, at least in part, when the Court is most likely to override its institutional concerns.

Taken together, the attitudinal and new institutionalist models provide a host of channels by which sociopolitical context can influence the Justices' death penalty decisionmaking. Again, this is not to say that sociopolitical context will always play a pivotal role. On some issues (perhaps even most), extralegal context may make no difference at all.³⁹⁰ Nor is this to deny that the Court can act in a *slightly* countermajoritarian fashion. It can, under limited circumstances and usually at great cost to itself.³⁹¹ The point is that sociopolitical context places outer bounds on the Court's ability to do

388. For a fitting illustration of this phenomenon, see Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 50–77 (2000) (discussing the role of egregious facts and outlier positions of Southern states in developing the Supreme Court's first criminal procedure protections, which were in the capital context); see also Klarman, *supra* note 299, at 16–17 (discussing the Court's use of judicial review to suppress regional outliers).

389. See *supra* notes 331–40 and accompanying text.

390. Examples include when the issue is not salient or when political regime power is not consolidated.

391. *Furman* is the quintessential example. For a detailed discussion of *Furman* in this light, see Lain, *supra* note 27, at 46–55; see also Lain, *supra* note 47, 1364–65 (recognizing the same phenomenon in the criminal procedure context).

anything more than that, and more generally pushes the Justices' decisionmaking in a majoritarian direction. The strength of that push will vary from case to case, but the models discussed suggest that in the death penalty context, the influence of sociopolitical context is a strong one. Indeed, as the last Section demonstrates, the influence of sociopolitical context is even responsible for the "evolving standards" doctrine itself.

B. The Influence of Sociopolitical Context on the "Evolving Standards" Doctrine

Although the Supreme Court in *Gregg* was first to recognize "evolving standards" as a substantive Eighth Amendment doctrine, it did not pull the idea from thin air. Indeed, the evolution of the "evolving standards" doctrine shows that in the chicken-and-egg question of which came first, majoritarian doctrine is much more the result of majoritarian influences than the cause of them.

1. *The Birth of "Evolving Standards."* The genesis of the "evolving standards" doctrine was the Supreme Court's 1910 decision in *Weems v. United States*,³⁹² which first recognized the Eighth Amendment's proportionality principle.³⁹³ In *Weems*, the Court considered a twelve-year sentence of *cadena temporal*—hard labor while chained at the ankles and wrists—for the crime of forging a public document.³⁹⁴ Even in 1910, the punishment struck the Justices as preposterous, but the Court had yet to interpret the Eighth Amendment as prohibiting anything more than torture and thus it ostensibly provided no relief.³⁹⁵ Given the choice between following the law or changing it, the Justices chose the latter, explaining:

Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. . . .

. . . The [cruel and unusual punishments] clause . . . may be therefore progressive, and is not fastened to the obsolete, but may acquire

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

393. *Id.* at 367 ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

394. *Id.* at 358. Interestingly, the case came to the Court from the Philippine Islands. *See id.*

395. *See id.* at 368–71.

meaning as public opinion becomes enlightened by a humane justice.³⁹⁶

Nearly fifty years later, the Court in *Trop v. Dulles*³⁹⁷ echoed that sentiment, citing *Weems* for the proposition that the Cruel and Unusual Punishments Clause should be interpreted in accordance with “the evolving standards of decency that mark the progress of a maturing society.”³⁹⁸ In both cases, the Court was embracing the idea of a living constitution, not advocating explicitly majoritarian constitutional protection.³⁹⁹ Then came *Furman*.

In three ways, *Furman* reflects the influence of sociopolitical context on the Supreme Court’s death penalty decisionmaking. First, and on the most general level, sociopolitical context was responsible for transforming the Cruel and Unusual Punishments Clause from a dead letter in constitutional law to a powerful source of constitutional protection. Before the 1960s abolition movement, the constitutionality of the death penalty was a given. The first law review article to question the death penalty’s constitutionality was not published until 1961,⁴⁰⁰ and it was not until 1965 that the American Civil Liberties Union (ACLU) recognized the death penalty as presenting a civil liberties issue.⁴⁰¹ Even the NAACP Legal Defense Fund (LDF),⁴⁰² which launched the litigation campaign that culminated in *Furman*, did not begin to systematically attack the death penalty’s constitutionality until 1967.⁴⁰³

Second, sociopolitical context influenced *how* the Court’s newly derived Eighth Amendment protections took shape. It is no coincidence that in 1972, the Justices in *Furman* invalidated the death

396. *Id.* at 373, 378 (citing *Ex parte Wilson*, 114 U.S. 417, 427 (1885)).

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

398. *Id.* at 100–01.

399. *See id.*; *Weems v. United States*, 217 U.S. 349, 373 (1910).

400. *See* MELTSNER, *supra* note 25, at 23.

401. *Id.* at 55.

402. The NAACP and the NAACP Legal Defense Fund (also known as “Legal Defense and Educational Fund”) are two separate and distinct organizations; indeed, they were often at odds with one another, which eventually led to litigation over name rights. The Legal Defense Fund won on a theory of laches. For an insightful account of the relationship between the two organizations, see MELTSNER, *supra* note 40, at 99–104, 112.

403. The LDF did not initiate its litigation-based “moratorium strategy” until 1967, though it had been systematically distributing “last aid kits” since the mid-1960s. *See generally* EPSTEIN & KOBYLKA, *supra* note 54, at 53. For a fascinating account of the evolution and execution of that strategy by one of the players, see MELTSNER, *supra* note 40, at 106–67.

penalty based on the arbitrary and capricious manner in which it was administered.⁴⁰⁴ Egalitarianism, particularly before the law, was the overriding theme of the 1960s, and it colored the country's death penalty debate as well.⁴⁰⁵ Contemporary magazine and newspaper articles complained about racial and economic discrimination in the imposition of death,⁴⁰⁶ the ACLU and LDF attacked the death penalty's constitutionality because of it,⁴⁰⁷ and the amicus briefs in *Furman* attested to it.⁴⁰⁸ In retrospect, it is little wonder that the Justices in *Furman* invalidated the death penalty because it was being inequitably applied. Egalitarian themes drove the 1960s criminal procedure revolution, so it only made sense that they would influence the Justices' death penalty views too.⁴⁰⁹

Finally, sociopolitical context is the reason the "evolving standards" doctrine emerged from the Court's opinions in *Furman* and *Gregg*. *Furman* marks the first time a Justice claimed that a punishment could be "cruel and unusual" for no reason other than that it had become unpopular, although the Court's ruling did not rely on that rationale.⁴¹⁰ Given *Furman*'s particularly hospitable sociopolitical context (and particularly inhospitable legal context),⁴¹¹

404. See *supra* note 37 and accompanying text.

405. See Lain, *supra* note 27, at 28–31 (discussing 1960s egalitarianism and its impact in *Furman*).

406. E.g., *Death Row: A New Kind of Suspense*, NEWSWEEK, Jan. 11, 1971, at 23–24 (noting that "[t]o be sure, disproportionate numbers of blacks are arrested for capital crimes[,] [b]ut that does not sufficiently explain the inordinately high percentage of Negroes on death row"); *Death Row Survives*, N.Y. TIMES, May 6, 1971, at 42 ("The death penalty is, in practice, inflicted only on the black, the brown and the poor."); *The Ultimate Question*, THE NATION, May 17, 1971, at 610 (noting that only "abject, unknown, friendless, poor, rejected specimens of the human race" are sentenced to death and that "the character of the condemned constitutes one of the best arguments for abolition"); see also PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, *supra* note 42, at 143 ("The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.").

407. See Lain, *supra* note 27, at 30.

408. See *id.* (discussing and quoting amicus briefs).

409. See Lain, *supra* note 47, at 1385–1420 (discussing the influence of egalitarianism on 1960s criminal procedure revolution).

410. Justices Brennan and Marshall adopted this view, but the other three Justices in *Furman*'s majority—Justices Stewart, White, and Douglas—were unwilling to go that far. See Lain, *supra* note 27, at 17–18 (comparing the Justices' rationales in *Furman*). Chief Justice Burger called out the doctrinal move in his dissent. See *Furman v. Georgia*, 408 U.S. 238, 388 (1972) (Burger, C.J., dissenting) ("[T]he Court up to now has never actually held that a punishment has become impermissibly cruel due to a shift in the weight of accepted social values; nor has the Court suggested judicially manageable criteria for measuring such a shift in moral consensus.").

411. See *supra* Part I.A.

the innovation is not hard to understand. In *Gregg*, the Court formally adopted the “evolving standards” doctrine introduced in *Furman*, using the same theory to affirm the death penalty’s constitutionality as had been used to attack it four years earlier.⁴¹² As discussed in Part I, the move made little doctrinal sense; it did nothing to address the arbitrariness in death sentencing that *Furman* had found constitutionally offensive.⁴¹³ The Justices in *Gregg* adopted the doctrine because they *wanted* to rule the way they did, and it took them where they wanted to go. In this respect, *Gregg* is the ultimate example of the influence of sociopolitical context, for in *Gregg* extralegal majoritarian influences led to the adoption of majoritarian doctrine itself.

2. *The Evolution of “Evolving Standards.”* The influence of extralegal context pervades the Supreme Court’s later “evolving standards” cases as well. In *Atkins*, the Court’s incorporation of reliability concerns was almost certainly a nod to the nation’s concern for innocents on death row.⁴¹⁴ In *Roper*, the Court’s heavy reliance on international opinion was more likely a reflection of political concerns than doctrinal ones.⁴¹⁵ In more subtle ways, too, one can see how larger social and political forces bleed into doctrinal developments in this area. It is no coincidence, for example, that the Court’s application of the “evolving standards” doctrine was exceedingly narrow in 1989, just as the Court’s post-2000 applications of the doctrine have been more expansive than ever before.⁴¹⁶ Once one acknowledges that larger social and political forces influence the way the Court decides death, one should expect those same forces to influence the way doctrine develops as well.

In the end, then, scholarship lamenting the majoritarian nature of the “evolving standards” doctrine has it exactly backwards. Problematic doctrine is not to blame for majoritarian influences. Rather, majoritarian influences are to blame for problematic doctrine.

412. See *supra* note 70 and accompanying text.

413. See *supra* note 72 and accompanying text.

414. See *supra* note 281 and accompanying text.

415. See *supra* note 162 and accompanying text.

416. See *supra* notes 126–28, 142 and accompanying text.

CONCLUSION

The death penalty context presents the quintessential case for the Supreme Court's countermajoritarian function, yet the Eighth Amendment "evolving standards of decency" doctrine renders the Court's role a majoritarian task. Recognizing the problem, death penalty scholars have sharply criticized the "evolving standards" doctrine, but their criticism misses the mark. The "evolving standards" doctrine is a red herring when it comes to the Supreme Court's problematic protection in this area due to two rather radical recognitions that have thus far gone largely unappreciated in death penalty scholarship.

The first is a disconnect between the Court's majoritarian rulings and the doctrine that supposedly drives them. The rulings are consistent with majoritarian doctrine, but not the result of it. Doctrine does little, if anything, to keep the Justices from ruling however they are otherwise inclined to rule.

The second is more radical yet: majoritarian doctrine does not constrain the Justices' decisionmaking, but *nondoctrinal* majoritarian influences do. Using political science models of Supreme Court decisionmaking, one can imagine a host of avenues by which larger social and political forces might push the Justices toward majoritarian death penalty decisions for reasons wholly independent of majoritarian death penalty doctrine. The Court can get rid of the "evolving standards" doctrine, but the influence of sociopolitical context is here to stay.

For death penalty reformers, the implications of the analysis are heartening. State legislatures tend to be the last to reflect larger social change,⁴¹⁷ so it is good news that the chief doctrinal measure of "evolving standards"—state legislation—does not much matter. What matters more is changing basic attitudes, which in turn suggests that reformers should "think small," to borrow from Scott Sundby's work.⁴¹⁸ Educational campaigns help. Grassroots organizations help. Even litigation helps, some—not because the law matters, but because it educates those who cross its path.

For constitutional theorists, the implications of the analysis are troubling. If the Court's majoritarian tendencies in the death penalty

417. See *supra* note 287 and accompanying text.

418. See Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1972 (2006).

context are endemic, then the obstacle to countermajoritarian decisionmaking that has garnered all the scholarly attention—doctrine—is a superficial one at best. And that recognition, in turn, calls into question conventional assumptions about the Court's countermajoritarian capacity that undergird most normative justifications for judicial review.⁴¹⁹ Ultimately, the question is why, if the Justices lack the capacity and inclination for countermajoritarian decisionmaking, they wield power in a democratic form of government. That said, those pondering the question can at least console themselves that in the end, it all more or less works out—the Justices' decisions are about the same as those a national majority would make on its own.⁴²⁰

The question remains whether the Eighth Amendment's text—as opposed to doctrine—requires, invites, or perhaps just allows the Court to act on its majoritarian inclinations in a way that other constitutional provisions do not, but that is an altogether different discussion that I leave for another day. The point here is a more modest one, a reminder of what most lawyers know full well but tend to forget. The Supreme Court is a product of its time, and the norms of that time—whether or not formally incorporated into doctrine—play a powerful role in how the Court decides death.

419. See *supra* note 12 and accompanying text.

420. Concededly, for the death row inmates who would have been executed had not the Court stepped in, the Court's intervention mattered. The point is a larger one, drawing on the Court's majoritarian tendencies in a majoritarian political system.