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Lessons Learned from the Evolution of Evolving Standards

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LESSONS LEARNED FROM THE EVOLUTION OF “EVOLVING STANDARDS”

*Corinna Barrett Lain**

I.	THE EVOLUTION OF “EVOLVING STANDARDS OF DECENCY”	664
II.	LESSONS LEARNED	673

The notion of “cruel and unusual punishments”¹ in the twenty-first century embodies a number of different concepts. A punishment might be deemed “cruel and unusual” because it constitutes torture, or because it is grossly disproportionate to the crime, or perhaps because of the arbitrary and capricious way in which it is administered.² In this symposium contribution, I turn to yet another concept of “cruel and unusual punishments”—punishments that violate society’s “evolving standards of decency.”

Other doctrines under the Cruel and Unusual Punishments Clause may be problematic in practice, but none are as controversial in theory as the “evolving standards of decency” doctrine. Under the doctrine, a punishment violates the Cruel and Unusual Punishments Clause when a national consensus has formed against it, prohibiting a practice only after a majority of states have already done so on their own.³ Scholars have

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1. U.S. CONST. amend. VIII (“nor cruel and unusual punishments inflicted”).

2. I discuss each of these concepts below. *See infra* notes 9–40 and accompanying text.

3. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (invalidating juvenile death penalty upon finding that a national consensus had formed against it); *Atkins v. Virginia*, 536 U.S. 304 (2002) (invalidating death penalty for mentally retarded offenders upon same finding); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding juvenile death penalty upon finding of insufficient evidence of

bemoaned the notion of constitutional protection that caters to, rather than constrains, majority will for decades⁴—and the doctrine’s detractors are not just pointy-headed academics. In editorial after editorial, casual and not-so-casual observers alike have questioned the propriety of the Supreme Court rubber-stamping what most state legislatures do just because most state legislatures do it.⁵ Surely constitutional protection does not

a national consensus against it); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (upholding death penalty for mentally retarded offenders upon same finding); see also *Simmons*, 543 U.S. at 589 (O’Connor, J., dissenting) (“Laws enacted by the Nation’s legislatures provide the ‘clearest and most reliable objective evidence of contemporary values.’”(quoting *Penry*, 492 U.S. at 331)).

4. 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.”); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 88 n.200 (1989) (“The preferences of the majority should not determine the nature of the [E]ighth [A]mendment or of any other constitutional right.”); 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.”); Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL’Y 47, 63 (2008) (“What is the worth of a right good against the majority when that same majority interprets that right?”); John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1753–54 (2008) (“Leaving aside these methodological problems, the evolving standards of decency test also suffers from a deeper theoretical problem, in that it appears to make the rights of criminal defendants dependent upon public opinion.”).

5. Steve Chapman, *On Supreme Court’s Definition of Cruelty*, CHI. TRIB., Mar. 3, 2005, at C21 (“But the real flaw in the reasoning of both sides is the whole idea of deferring to public opinion. . . . It’s only when there is not a national consensus that the court has a reason to step in.”); Opinion, *A Welcome Death-Penalty Decision, But One with Cracks in Its Reasoning*, THE MORNING CALL (Allentown, Pa.) Mar. 3, 2005, at A12 (“But the Supreme Court must be wary of using the wishes of the majority to steer its interpretation of the Constitution. Part of the Constitution’s genius, after all, is that it protects individuals by preventing tyranny by the majority. Rights can never be submitted for a vote.”); Opinion, *Justices Out on a Limb: A Healthy Moral Decision on Juvenile Capital Punishment Arrives Via a Path Strewn with Logical and Legal Dangers*, THE PLAIN DEALER (Cleveland, Ohio) Mar. 4, 2005, at B8 (“Nor is it comforting to hear the [C]ourt majority cite the will of the people as a factor in this decision. The Supreme Court was not created to be responsive to public whim. Its members serve for life precisely so they are insulated against the vagaries of popularity.”); Debra J. Saunders, Editorial,

depend on whether a majority of states agree with it. Isn't putting limits on majority will what the Constitution is for?

On the flip side of the "evolving standards" debate are the textualists, who claim that the Eighth Amendment's prohibition against "cruel *and unusual* punishments" justifies protection that follows majority preferences.⁶ After all (the argument goes), if a punishment is not unusual—if it has not been rejected by a majority of jurisdictions—then it cannot be "cruel and unusual."⁷ By this view, explicitly majoritarian Eighth Amendment doctrine is simply a reflection of explicitly majoritarian Eighth Amendment text.

So stated, the "evolving standards" debate ends a stalemate. Majoritarian protection may not make sense as a matter of constitutional theory, but it makes sense as a matter of constitutional text. As such, the legitimacy of the "evolving standards" doctrine stands largely as a given—an unfortunate given for some, but a given nonetheless.

European Justice Rules Top U.S. Court, S.F. CHRON., Mar. 3, 2005, at B9 ("Kennedy also cited a 'national consensus' in America against the juvenile-death penalty as a reason to overturn it. I must ask: Since when has the [C]ourt issued rulings based on what average folks think?"); Robert Weisberg, Op-Ed., *Cruel and Unusual Jurisprudence*, N.Y. TIMES, Mar. 4, 2005, at A21 ("Of course, this approach raises the perfectly reasonable question of how the scope of the Bill of Rights, which was designed to limit the powers of legislative majorities, could depend in part on the decisions of those very majorities.").

6. Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1200 (2006) (arguing that a consensus among three-fourths of the states satisfies this requirement: "Of course, even if a punishment is 'cruel,' it must also be 'unusual' to trigger scrutiny under the Eighth Amendment."); William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355, 1414 (2005) (recognizing textualists' claim that "the term 'unusual' provides a unique license for judicial appeals to changing convictions and practices"); Jacobi, *supra* note 4, at 1098 ("A response to this criticism [of majoritarian protection] is that, while this may be true of constitutional interpretation generally, the phrase 'cruel and unusual' necessitates an inquiry into social mores and practices to determine what is unusual.").

7. *See Penry*, 492 U.S. at 351 (Scalia, J., dissenting) ("If [a punishment] is not unusual, that is, if an objective examination of laws and jury determinations fails to demonstrate society's disapproval of it, the punishment is not unconstitutional even if out of accord with the theories of penology favored by the Justices of this Court.").

Yet it need not be so. In the discussion that follows, I explore the evolution of the “evolving standards” doctrine to make a point about its legitimacy and Supreme Court decisionmaking under the Cruel and Unusual Punishments Clause more generally. In Part I, I trace the origins of the doctrine to its present state. In Part II, I turn to lessons learned from the evolution of “evolving standards,” questioning the textual defense of the doctrine and the constraining power of law itself. I conclude that while the “evolving standards” doctrine is problematic, it is not the crux of the problem. Supreme Court decisionmaking in the death penalty arena will reflect “evolving standards of decency” whether the doctrine says so or not.

I. THE EVOLUTION OF “EVOLVING STANDARDS OF DECENCY”

One of the wonderful things about the Supreme Court’s jurisprudence under the Cruel and Unusual Punishments Clause is that before the 1970s, there was so little of it. The Supreme Court decided only six cases under the Clause in the first 175 years of its existence, and the first of these came almost 100 years after the Bill of Rights was ratified.⁸ Being an expert on the Eighth Amendment—something that today requires the skills of a doctrinal Houdini—was at one time not so difficult to do.

In part, this simplistic state of doctrinal affairs was due to the fact that the Framers thought the words “cruel and unusual punishments” were intended only as a prohibition on torture when they copied them from the English Declaration of Rights of 1689.⁹ As it turns out, they were wrong about that—the phrase “cruel and unusual punishments” in the English Declaration of

8. See Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 9 (2007).

9. See *Harmelin v. Michigan*, 501 U.S. 957, 979–85 (1991) (discussing in depth commentary from the First Congress, state ratification debates, contemporary observers, and early common law that the Framers understood the Cruel and Unusual Punishments Clause to prohibit “certain modes of punishment,” particularly torture). See also *infra* note 10.

Rights was not about torture after all,¹⁰ proving that even the Framers could get questions of original intent wrong. Nevertheless, the Framers thought the phrase was about torture, or at least the Supreme Court thought that the Framers thought it was about torture.¹¹ Thus, the earliest interpretation of the Cruel and Unusual Punishments Clause was that it prohibited torturous punishments—“burning at the stake, crucifixion, breaking on the wheel, or the like”¹²—sanctions marked by the gratuitous infliction of pain. Under this interpretation of the Clause, the words “cruel” and “unusual” were read as one, prohibiting punishments that were unusually cruel.

The problem with this reading—if one could call it a problem—was that by 1789, when the Eighth Amendment was ratified, the use of torture had pretty much died out on its own.¹³

10. See Steven A. Blum, *Public Executions: Understanding the “Cruel and Unusual Punishments” Clause*, 19 HASTINGS CONST. L.Q. 413, 446–47 (1992) (discussing origins of the English Cruel and Unusual Punishments Clause and concluding: “But what the British actually intended is significantly less important than what the American Framers thought the British had intended. Unquestionably, the Framers had the [torturous] Bloody Assizes in mind.”); Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*,” 57 CAL. L. REV. 839 (1969) (arguing that the Framers thought the Cruel and Unusual Punishments Clause prohibited torture, but that they misinterpreted the English Bill of Rights of 1689).

11. See *supra* note 10; see also *infra* note 13. Two scholars have questioned the Framers’ understanding of cruel and unusual punishments; thus, the Supreme Court’s comprehension of the Framers’ understanding may be wrong. See Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119, 122–23 (2004) (arguing that “unusual” refers to selective or irregular application of harsh penalties); John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1767 (2008) (arguing that the Framers thought “cruel and unusual” meant “contrary to long usage”).

12. *In re Kemmler*, 136 U.S. 436, 446 (1890). *Accord* *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878) (“Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.”).

13. See Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 997 (1978) (“Moreover, as long as the Court took for granted that the clause extended only to punishments that the Framers thought cruel in 1789, there was little need to invoke it; for there was little danger that an American

Thus, while the Supreme Court heard a few claims of torture under the Clause (three, to be exact: death by public shooting,¹⁴ death by electrocution,¹⁵ and so-called “death by installments”¹⁶), there was not much for the Court to say. So what if the Cruel and Unusual Punishments Clause prohibited torture. Society had already moved past that, making the Eighth Amendment’s Cruel and Unusual Punishments Clause a virtual dead letter in constitutional law.

In 1910, the Supreme Court revived the Cruel and Unusual Punishments Clause with the venerable decision *Weems v. United States*.¹⁷ *Weems* involved a fifteen-year sentence of *cadena temporal*—hard labor while chained at the ankles and wrists—for the crime of forging a public document.¹⁸ The punishment itself was clearly not torture, but just as clearly, it seemed torturous—unusually cruel—in light of the crime. What would bend, clear constitutional meaning or the Justices’ sense of fairness? In a five-to-two decision,¹⁹ the Court explained:

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. This is peculiarly true of constitutions. . . . The [Cruel and Unusual Punishments Clause] may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public

legislature would authorize the rack, the wheel, or drawing and quartering as criminal punishments.”). *See also* Granucci, *supra* note 10, at 842 (“Since the ‘barbarities’ of Stuart England were not used often in America, the clause was rarely invoked in the courts.”).

14. *See Wilkerson*, 99 U.S. 130, 135 (upholding death by public shooting).

15. *See In re Kemmler*, 136 U.S. at 447 (upholding death by electrocution).

16. *See Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (upholding repeated attempts at execution so long as state did not intend lingering death); *Id.* at 474 (Burton, J., dissenting) (lamenting majority’s affirmation of “death by installments”).

17. 217 U.S. 349, 382 (1910).

18. *Id.* at 359, 363–64.

19. *Id.* at 357 n.1 (Only seven Justices heard arguments for this case; Justice Moody was absent due to an illness, Justice Lurton had not taken his seat yet, and Justice Brener died before the opinion was delivered. The majority consisted of Justices McKenna, Harlan, Day, and Chief Justice Fuller. The dissenters were Justices White and Holmes.).

opinion becomes enlightened by a humane justice.²⁰

Ours was a living constitution, the Court was saying, which justified recognizing an interpretation of the Cruel and Unusual Punishments Clause that the Framers had not: a punishment also could be cruel and unusual because it was grossly disproportionate to the crime.²¹

In the present discussion, *Weems* was an incredibly important case not only because it unmoored the Cruel and Unusual Punishments Clause from its original meaning, but also because of the proportionality case that would follow it.²² At the time, the Supreme Court's 1958 decision in *Trop v. Dulles*²³ could not have seemed like the groundbreaking decision it became. After all, it was just the next proportionality case following *Weems*.²⁴ *Trop* involved a soldier's expatriation—complete loss of United States citizenship—as a punishment for his wartime desertion of his post for a day.²⁵ As in *Weems*, the Court found the punishment to be grossly excessive in light of the crime and thus invalidated it under the Eighth Amendment.²⁶ Having only *Weems* to rely on as precedent, the Court in *Trop* explained:

[W]hen the Court was confronted with a punishment of [twelve] years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.²⁷

Importantly, the Supreme Court in *Trop* was just paraphrasing

20. *Id.* at 373, 378.

21. *See id.* at 367.

22. *See id.*

23. 356 U.S. 86 (1958).

24. *Id.* at 100.

25. *Id.* at 87–88.

26. *Id.* at 103.

27. *Id.* at 100–01 (citations omitted).

Weems, echoing its embrace of a progressive, living constitution.²⁸ In neither of these cases was the Court advocating the use of contemporary standards in and of themselves as a substantive Eighth Amendment doctrine.²⁹

Then came *Furman*. Decided in 1972, *Furman v. Georgia*³⁰ has to be the strangest death penalty case in history, and there are plenty to choose from. For trivia buffs, it is also the longest decision in Supreme Court history, spanning a grand 233 pages in the official reports.³¹ *Furman*, as most everyone knows, is the case that struck down the death penalty (at least until the Supreme Court brought it back).³² As I have discussed in detail elsewhere, every shred of then-existing doctrine pointed away from the result in *Furman*; the Justices invalidated the death penalty because they *wanted* to, not because they had to.³³ The problem became justifying as a matter of law what five Justices had decided as a matter of principle, and that is where the decision's length comes into play.³⁴ In the absence of any plausible legal theory to get the Justices where they wanted to go, they each went their own way, writing nine separate opinions with each of the five concurrences garnering only one vote.³⁵ As Norman Finkel so aptly described it, "*Furman* has the feel of an anthology desperately in need of an editor."³⁶ The decision was an unmitigated doctrinal disaster, and I say that with great fondness for its result.

For the purpose of this discussion, what mattered in *Furman* was that two concurring Justices—Justices Brennan and Marshall—made a bold doctrinal move in suggesting that a punishment could be "cruel and unusual" for no reason other

28. *Id.*

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

30. 408 U.S. 238 (1972).

31. *See Lain, supra* note 8, at 10–11.

32. *See Furman*, 408 U.S. at 239–40. *See also infra* note 40 (discussing revival of death penalty in 1976).

33. *See Lain, supra* note 8, at 9–18.

34. *Id.* at 11.

35. *See Furman*, 408 U.S. at 239–40.

36. NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 172 (1995).

than that it had become unpopular.³⁷ Quoting *Trop* out of context, Justices Brennan and Marshall contended for the first time that the notion of “evolving standards of decency” was not just an interpretive principle reflecting the progressive nature of a living constitution, but a substantive prohibition under the Cruel and Unusual Punishments Clause as well.³⁸ When society rejected a punishment (and one could plausibly say that about the death penalty in the wake of the 1960s abolition movement),³⁹ then that punishment was no longer consistent with the “evolving standards of decency” embodied in the Cruel and Unusual Punishments Clause and was therefore unconstitutional.⁴⁰

Given *Furman*’s particularly inhospitable legal context—truly, the Justices were grasping for straws—and the particularly hospitable social and political context in which the case was decided, this innovation is not hard to understand. Still, only two Justices propounded the “evolving standards” theory in *Furman* and thus the case would come to stand for something else—a prohibition against the arbitrary and capricious imposition of death, which Justices Brennan and Marshall had also signed onto.⁴¹ The notion of “evolving standards of decency” as a substantive component of the Cruel and Unusual Punishments Clause would remain dormant until four years later, when the Supreme Court brought the death penalty back.

The 1976 landmark *Gregg v. Georgia*⁴² not only revived the death penalty and ushered in the modern era of Supreme Court jurisprudence under the Cruel and Unusual Punishments

37. See *Furman*, 408 U.S. at 270 n.10, 277–306 (Brennan, J., concurring); *id.* at 332–72 (Marshall, J., concurring).

38. See *Furman*, 408 U.S. at 270 (Brennan, J., concurring); *id.* at 327, 329 (Marshall, J., concurring).

39. See Lain, *supra* note 8, at 19–41 (discussing historical context of *Furman*).

40. See *Furman*, 408 U.S. at 269–306 (Brennan, J., concurring); *id.* at 329–32 (Marshall, J., concurring).

41. See *id.* at 281–306 (Brennan, J., concurring); *id.* at 342–71 (Marshall, J., concurring); see also Lain, *supra* note 8, at 14–15 (discussing concurring opinions in *Furman* and emerging rationale for the ruling).

42. 428 U.S. 153 (1976).

Clause, but it also completed the evolution of the “evolving standards” doctrine. Few scholars have looked closely at what the Court did on that score, but I submit the inquiry is well worth our attention. Coming into the decision, the Justices were once again in a doctrinally tight spot. *Furman* had held (to the extent it had held anything) that the arbitrary and capricious imposition of death violated the Eighth Amendment—and in a due process decision the year before *Furman*, the Court had held that standards guiding discretion in the imposition of death were not required because they provided “no protection against the jury determined to decide on whimsy or caprice.”⁴³ For the Court to hold, as it did in *Gregg*, that the same standards that provided no protection against whimsy or caprice could now be relied on to provide protection against whimsy and caprice was not exactly its best foot forward. And the Court did not start there; that was where it ended.⁴⁴ Instead, the Justices in *Gregg* started with what was quite possibly the best argument they had—“evolving standards of decency.”

Why the plurality in *Gregg* would have been drawn to the notion of “evolving standards” as a substantive doctrine requires some knowledge of the larger social and political backdrop against which the case was decided. Between 1972, when the

43. *McGautha v. California*, 402 U.S. 183, 207 (1971). The entirety of the quote is worth noting:

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

Id. (citation omitted).

44. 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.”). Interestingly, the Justices in *Gregg* acknowledged *McGautha* only by the vague reference, “some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate . . .” *Id.* at 193. Indeed “some” had, including four of the plurality Justices in *Gregg*. See *Lain*, *supra* note 8, at 57–58 & n.336 (comparing holdings and voting patterns in *McGautha* and *Gregg*).

Court decided *Furman*, and 1976, when the Court decided *Gregg*, support for the death penalty made a sharp rebound, marking one of the most dramatic backlashes to a Supreme Court decision the nation has ever seen. By 1976, thirty-five states had passed new death penalty statutes,⁴⁵ death sentences had hit the highest year-end figure ever recorded,⁴⁶ and public opinion polls showed support for the death penalty at a ratio of two-to-one—a twenty-five-year high.⁴⁷ Why this was so is a story all unto itself, and one I have explored in depth elsewhere.⁴⁸ For the purpose of the present discussion, the point is that the Supreme Court was under tremendous pressure to find a way to make the death penalty work as a matter of constitutional law—and the one thing the Justices in *Gregg* could say and still pass the laugh-out-loud test was that the ruling had society’s “evolving standards of decency” on its side. And that is exactly what the plurality in *Gregg* did.

The Justices in *Gregg* began their analysis where Justices Brennan and Marshall left off, recognizing “an assessment of contemporary values” as a key component of Eighth Amendment protection.⁴⁹ They then pointed out that contemporary standards supported the constitutionality of the death penalty, finding particularly persuasive the fact that thirty-five states had passed new death penalty statutes in *Furman*’s wake.⁵⁰ Never mind the fact that the litigants had not made the “evolving standards” argument (and understandably so, as it had only been floated once and had commanded only two of the Justices’ votes).⁵¹ And

45. See *Gregg*, 428 U.S. at 179–80 (listing and discussing new death penalty statutes).

46. See Lain, *supra* note 8, at 48–49 (discussing surge in death sentences in the wake of *Furman* and an all-time high of 298 death sentences in 1975). The fact that some states had passed mandatory death penalty statutes in response to *Furman* undoubtedly skewed this figure.

47. See *id.* at 49 (discussing public opinion polling data in the wake of *Furman*).

48. See *id.* at 46–55 (discussing backlash to *Furman* and explanation for it).

49. See *Gregg*, 428 U.S. at 173.

50. See *id.* at 179–81.

51. Thirty-five pages of the petitioner’s thirty-six page brief were addressed to the arbitrariness with which the death penalty continued to be

never mind the fact that the argument was a complete non sequitur—“evolving standards” was not the reason the Court had struck down the death penalty in *Furman*, so it was hard to see how it could have been the reason to bring the death penalty back in *Gregg*. Indeed, it was hard to see how comporting with “evolving standards” could ever be reason enough to *validate* a punishment—at most, it simply removed one basis for declaring the punishment unconstitutional. In short, the plurality in *Gregg* not only formally adopted the “evolving standards” doctrine, but it did so while turning the doctrine completely on its head.

Over the years, the “evolving standards” doctrine has become famous for doctrinal manipulation. In some cases, the Supreme Court considers only death penalty jurisdictions when counting states; in others, it does not.⁵² In some cases, the Court considers legislative and sentencing trends in its analysis; in others, it does not.⁵³ In some cases, the Court considers the views of

administered (as one would expect), and the last page argued that the death penalty was an excessive punishment. See Brief for Petitioner, *Gregg v. Georgia*, 428 U.S. 153 (1976) (No. 74-6257), 1976 WL 178713. The respondent’s ninety-three page brief likewise makes no mention of the argument. See Brief for Respondent, *Gregg v. Georgia*, 428 U.S. 153 (1976) (No. 74-6257), 1976 WL 181754; see also LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 103 (1992) (noting that attorneys in *Gregg* tried to avoid “evolving standards” argument).

52. Compare *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (“[Thirty] States prohibit the juvenile death penalty, comprising [twelve] that have rejected the death penalty altogether and [eighteen] that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.”), with *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989) (“Of the [thirty-seven] States whose laws permit capital punishment, [fifteen] decline to impose it upon 16-year-old offenders and [twelve] decline to impose it on 17-year-old offenders. This does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual.”).

53. Compare *Roper*, 543 U.S. at 564, 566 (“In the present case, too, even in the [twenty] States without a formal prohibition on executing juveniles, the practice is infrequent. . . . Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it. This fact, coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation, and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects.”) (citation omitted), with *Stanford*, 492 U.S. at 374 (“To the

professional organizations and international opinion; in others, it does not.⁵⁴ We are accustomed to seeing the accusation that “evolving standards of decency” is just a cover for the policy preferences of a majority of the Justices.⁵⁵ But what we rarely, if ever, see is a discussion about manipulation in the birth of the doctrine itself. What might the evolution of the “evolving standards” doctrine add to the discussion?

II. LESSONS LEARNED

Four insights emerge from examining the evolution of “evolving standards.” I discuss each in turn, beginning with the most modest point and moving in increasingly large concentric circles.

First, the “evolving standards” doctrine may be plausible as a matter of constitutional text, but the closer one looks, the clearer it becomes that the textual defense of the doctrine is a house of cards. Constitutional text has little, if anything, to do with the reason we have an “evolving standards” doctrine. The doctrine

contrary, it is not only possible, but overwhelmingly probable, that the very considerations which induce petitioners and their supporters to believe that death should *never* be imposed on offenders under [eighteen] cause prosecutors and juries to believe that it should *rarely* be imposed. This last point suggests why there is also no relevance to the laws cited by petitioners and their *amici* which set 18 or more as the legal age for engaging in various activities, ranging from driving to drinking alcoholic beverages to voting.”)

54. *Compare Roper*, 543 U.S. at 578 (“It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . .”), *with Stanford*, 492 U.S. at 369 n.1 (“We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant.” (citation omitted)).

55. *See, e.g., Roper*, 543 U.S. at 608 (Scalia, J., dissenting) (“Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.”); *Atkins v. Virginia*, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting) (“[T]he Court’s assessment of the current legislative judgment regarding the execution of defendants like petitioner more resembles a *post hoc* rationalization for the majority’s subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency.”); *id.* at 338 (Scalia, J., dissenting) (“Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.”).

exists because the Justices needed it, not because constitutional text invited or in some sense required it. Necessity is the mother of invention, so the adage goes, and that is no less true of legal doctrine than anything else.

Indeed, if the evolution of “evolving standards” shows anything, it shows that the words “cruel and unusual” are susceptible to a number of plausible meanings. Conditioning constitutional protection on majoritarian sentiment may be one way to interpret the Eighth Amendment’s prohibition against “cruel and unusual punishments,” but it is not the only way, or even a particularly sensible way, to do so. In short, we ought to stop thinking about the “evolving standards” doctrine as a necessary byproduct of majoritarian Eighth Amendment text. The words “cruel and unusual” are not necessarily majoritarian, and in any event, when it comes to the “evolving standards” doctrine, text is largely—if not wholly—beside the point.

Second, and as a corollary of the first, the evolution of the “evolving standards” doctrine is a potent reminder of the limits of law as a constraint on Supreme Court decisionmaking under the Cruel and Unusual Punishments Clause. The cases that paved the road to “evolving standards” as a substantive doctrine show the Justices time and again rejecting the result that a cold reading of the law would provide in favor of what they thought was right. This was *Weems* and the birth of the proportionality principle. This was *Furman* and the repudiation of a death penalty administered in an arbitrary and capricious fashion. And this was *Gregg*, albeit as an example of the Justices’ knowledge that what was “right” depended in part on what public opinion would allow. Liberals, conservatives, moderates—all are guilty of bending the law to suit their purposes, and of course, the “evolving standards” doctrine is not unique in this regard. The point is bigger than “evolving standards of decency” and is as obvious as it is easily forgotten: Supreme Court Justices do not follow doctrine, doctrine follows them. The law may guide the Justices (when they want it to, depending on other institutional values and the strength of their personal policy

preferences),⁵⁶ and it inevitably frames the debate, but it is difficult to conclude that something as malleable as law—particularly of the constitutional variety—prevents the Justices from going where at least five of them want to go.

That leads me to the third point: what is it then that affects where the Justices want to go in drawing the boundaries of the Cruel and Unusual Punishments Clause? Here the discussion requires some nuance, a recognition that the Justices not only differ in their policy preferences, but also in the malleability of those policy preferences. Some Justices—think Justices Brennan and Marshall on the left, and Justices Rehnquist and Scalia on the right—have particularly strong views about the death penalty, and their voting records reflect that fact. Justice Rehnquist, for example, voted to affirm the death sentence in all but two of the thirty-three capital cases he heard, and in four of those cases, he was the lone dissenter.⁵⁷ By the same token, Justices Brennan and Marshall voted to reverse the death sentence in every case before them after 1972.⁵⁸ On both ends of the ideological spectrum, the Justices' policy preferences are strong and rigid, and neither the law nor anything else is likely to make a dent. Thus, it did not matter to Justices Brennan and Marshall that in 1976 the country was demanding that the Court bring the death penalty back; come what may, they voted to finish in *Gregg* what they had started in *Furman* in 1972.⁵⁹ Similarly, Justice Scalia has remained remarkably unaffected by the past decade's revelation of innocents on death row. "[The system] cannot be perfect," he has said, and "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."⁶⁰ Times

56. See Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 69–78 (2007) (discussing the impact of institutional values like federalism on the Justices' pursuit of personal policy preferences when deciding death).

57. See BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 242–43 n.129 (1987).

58. See HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 138–39 (1987).

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

60. See Justice Antonin Scalia, Speech at *A Call for Reckoning: Religion and the Death Penalty Seminar* (Jan. 25, 2002), available at <http://web.telia.com>

change, but some Justices—again, on both ends of the political spectrum—are not likely to change with it.

That said, the membership of the Supreme Court has, at least thus far, not been dominated by the ideological extremes. Despite the efforts of a good many presidents, the Court has remained more or less ideologically balanced for decades, with the moderate swing Justices determining much of the Court's Cruel and Unusual Punishments Clause jurisprudence. In the 1970s, it was swing Justices Stewart and White who cast the pivotal votes in *Furman*, and then (ironically) *Gregg*.⁶¹ And more recently, it was swing Justices Kennedy and O'Connor who were responsible for the Court's flip-flop rulings on the death penalty for juveniles and mentally retarded offenders.⁶²

What we know about these moderates is that they are not only less committed to any particular policy preference, but (as one might guess and empirical work has proven)⁶³ they are also

/~u15509119/scalia.htm (reproducing about the death penalty). The full quote is as follows:

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—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.

Id.

61. See Lain, *supra* note 8, at 62 (comparing voting patterns of Justices White and Stewart in *Furman* and *Gregg*, and explaining their change of view).

62. See Lain, *supra* note 56, at 34 (discussing the Justices voting patterns on the juvenile death penalty and death penalty for mentally retarded offenders and concluding, "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.").

63. See William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 189–93 (1996) ("[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.").

highly responsive to changes in public opinion on salient issues like the death penalty. As such, it should come as no surprise that Justices Stewart and White voted the way they did in *Furman* because they thought the death penalty was on its way out anyway,⁶⁴ or that they went the other way in *Gregg* when it became apparent that the country had changed its mind.⁶⁵ Similarly, it should come as no surprise that Justices Kennedy and O'Connor supported the death penalty for juvenile and mentally retarded offenders in 1989,⁶⁶ when public support for capital punishment was at an all-time high of seventy-nine percent,⁶⁷—or that they went the other way on one or both of these issues in 2002 and 2005,⁶⁸ when public support for the death penalty (as well as death sentences and executions) had plummeted to a twenty-year low.⁶⁹ None of these pivotal rulings can be explained by the “evolving standards” doctrine or any other point of law, although they do reflect an evolved understanding of what the law should allow.

Herein lies the irony of the “evolving standards” doctrine. The doctrine purports to identify contemporary standards of decency and mark constitutional protection thereby, but it is a sham; both in its inception and in its application, the Justices have used the “evolving standards” doctrine to get where they

64. See THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 617 (Del Dickson ed., 2001) (reporting Justice Stewart’s remark in conference discussions on *Furman* that, “If we hold it constitutional in 1972, it would only delay its abolition.”); *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) (reasoning that the death penalty cannot serve legitimate penological goals like deterrence because it “has for all practical purposes run its course”).

65. See Lain, *supra* note 8, at 62 (discussing how the nation’s renewed support of the death penalty influenced the position of Justices Stewart and White in *Gregg*).

66. See *Penry v. Lynaugh*, 492 U.S. 302 (1989) (upholding death penalty for mentally retarded offenders); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding death penalty for juvenile offenders).

67. See Lain, *supra* note 56, at 35–43 (discussing sociopolitical context of death penalty rulings in 1989).

68. See *Roper v. Simmons*, 543 U.S. 551 (2005) (invalidating death penalty for juvenile offenders); *Atkins for Virginia*, 536 U.S. 304 (2002) (invalidating death penalty for mentally retarded offenders).

69. See *id.* at 43–54 (discussing post-2000 sociopolitical context of death penalty rulings).

want to go. Yet where the Justices have wanted to go—at least for the pivotal swing voters—has been affected by a zeitgeist of larger social and political currents that have nothing to do with the law and can never be completely captured in doctrine. We can get rid of the “evolving standards” doctrine, but decisions driven by evolving societal standards are here to stay.

This brings me to a fourth and final point. We tend to think of constitutional law as a means of constraining majoritarian impulses, protecting minorities from the vagaries of majority will. This is the reason the “evolving standards” doctrine is so controversial—it renders the countermajoritarian function of the Supreme Court an impossible task. Yet the evolution of the “evolving standards” doctrine turns this image on its head. The responsiveness of swing voters to public opinion suggests that the law does not constrain majoritarian impulses. Rather, majoritarian impulses constrain the law—and that is true whether or not we have a doctrine that says so explicitly. Where this leaves me is less interested in talking about the “evolving standards” doctrine (and other jurisprudence under the Cruel and Unusual Punishments Clause) and more interested in talking about the composition of the Court and how to move public opinion on the death penalty from the ground up. This, then, is perhaps the ultimate lesson learned from the evolution of the “evolving standards” doctrine: the evolution that matters most has little to do with the law.