

# STATE LEGISLATION AND THE “EVOLVING STANDARDS OF DECENCY”: FLAWS IN THE CONSTITUTIONAL REVIEW OF DEATH PENALTY STATUTES

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## I. INTRODUCTION

On June 25, 2008, the United States Supreme Court held that the death penalty for the crime of child rape was an excessive punishment under the Eighth Amendment.<sup>1</sup> The Court found this punishment per se unconstitutional when the crime did not result, or was not intended to result, in the child's death.<sup>2</sup> Factors such as the victim's age, the brutality of the crime, or the number of children the defendant has sexually assaulted were held to be incapable of changing the punishment's constitutional validity. Consequently, this ruling created another link in the ever-growing chain of categorical bans on death penalty legislation.<sup>3</sup>

The Eighth Amendment of the United States Constitution prohibits the imposition of "cruel and unusual punishments."<sup>4</sup> The limited legislative history available indicates that ratification of the amendment was motivated by a perceived need for a judicial check on legislatively prescribed punishments in order to prevent federally sanctioned torture.<sup>5</sup> However, the United States Supreme Court has since held that the amendment also prohibits all criminal sentences that are grossly disproportionate to the gravity of the offense.<sup>6</sup> Thus, the Eighth Amendment does not only bar punishments that are "cruel and unusual" but also proscribes punishments that are "excessive," even when the form of the punishment may be widely acceptable in other instances.<sup>7</sup>

The Supreme Court has held that the excessiveness of a penalty is to be determined in light of current social values.<sup>8</sup> This means that a punishment may be found excessive today even if it would have been socially acceptable at the time the Amendment was drafted. Thus, the

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<sup>1</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2677 (2008) (holding a Louisiana statute permitting the death penalty for the rape of a child under the age of twelve unconstitutional under the Eighth Amendment).

<sup>2</sup> *Id.* at 2664.

<sup>3</sup> See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding execution of persons under the age of eighteen unconstitutional); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding execution of mentally disabled persons unconstitutional); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (holding execution of persons under sixteen years of age unconstitutional); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (holding execution of insane persons unconstitutional); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding death penalty for felony murder unconstitutional); *Coker v. Georgia*, 433 U.S. 584, 597-600 (1977) (holding the death penalty for the rape of an adult unconstitutional).

<sup>4</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

<sup>5</sup> *Furman v. Georgia*, 408 U.S. 238, 258-61 (1972) (citing statements made by Abraham Holmes during the Massachusetts ratifying convention and statements made by Patrick Henry at the Virginia convention to demonstrate that, at a minimum, the founding fathers were concerned with banning punishments resembling torture).

<sup>6</sup> See *Weems v. United States*, 217 U.S. 349, 370, 382 (1910). The Supreme Court held for the first time that excessive punishments were barred by the Eighth Amendment, thereby overturning a sentence of fifteen years at hard labor imposed on defendant convicted of falsification of a government document. *Id.* See also *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (holding that a punishment is excessive when it is "grossly out of proportion to the severity of the crime").

<sup>7</sup> *Weems*, 217 U.S. at 368-71; *Gregg*, 428 U.S. at 173.

<sup>8</sup> *Gregg*, 428 U.S. at 173.

Eighth Amendment is a living mandate, the interpretation of which changes over time to reflect the moral values held by contemporary society. In the words of the Court, the excessiveness of a punishment is to be evaluated according to the “evolving standards of decency that mark the progress of a maturing society.”<sup>9</sup>

Since its original appearance in the Court’s dicta of *Trop v. Dulles*, the phrase “evolving standards of decency” has been universally accepted by members of the Supreme Court.<sup>10</sup> It has appeared in plurality, concurring, and dissenting opinions drafted by both originalist and progressive Justices. “Evolving standards of decency” refers to the Court’s review of a prescribed punishment based upon “objective indicia” of public opinion.<sup>11</sup> In reviews of death penalty cases, legislative trends, jury behavior, public opinion polls, foreign policy, and views held by professional organizations have all been used as objective indicators of the public’s moral opinion of a particular punishment.<sup>12</sup> Of these, the Court has always viewed state legislation as the most reliable.<sup>13</sup> For this reason, the Court has consistently resorted to a broad examination of American jurisdictions to discover whether there is a consensus among legislatures that death is an appropriate sanction for a particular class of crimes or defendants.<sup>14</sup>

The reason for bringing the public to bear on this constitutional issue is simple: popular opinion establishes current society’s “standards of decency.” At first blush, this approach seems plausible. Nevertheless, this Comment will demonstrate that state legislation, the primary objective indicator relied upon by the Court, is incapable of accurately measuring society’s moral values. The lack of voter turnout during state elections presents strong evidence that the views of the people are not adequately reflected through the actions of elected representatives. Moreover, even if voter turnout was significantly greater, broad moral issues such as capital punishment are unlikely to receive the level of public attention necessary to induce lawmakers to take legislative action. These problems have rendered

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<sup>9</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>10</sup> Brian W. Varland, *Marking the Progress of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, 28 *HAMLIN L. REV.* 311, 313-32 (2005).

<sup>11</sup> *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (referring to objective evidence of society’s standards as “objective indicia”).

<sup>12</sup> Dwight Aarons, *The Abolitionist’s Dilemma: Establishing the Standards for the Evolving Standards of Decency*, 6 *PIERCE L. REV.* 441, 444-45 (2008) (noting legislation, jury behavior, and international law applied in standards of decency analysis); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (applying public opinion polls and the official positions of professional organizations).

<sup>13</sup> Susan M. Raeker-Jordan, *Parsing Personal Predilections: A Fresh Look at the Supreme Court’s Cruel and Unusual Death Penalty Jurisprudence*, 58 *ME. L. REV.* 99, 108 (2006).

<sup>14</sup> See Varland, *supra* note 10, at 313-32 (presenting a chronological timeline of Supreme Court cases that have applied the “evolving standards of decency” principle).

the use of state legislation unreliable and inappropriate as the primary objective indicator of the “evolving standards of decency.”

Part II of this Comment provides a historical background of death penalty jurisprudence and discusses the emergence and acceptance of “evolving standards of decency” as a tool for determining a punishment’s excessiveness. Part III argues that this test is unreliable because state legislation is incapable of conveying accurate information concerning public opinion on death penalty issues. Part IV concludes that the test used to define the “evolving standards of decency” should be revised to place less emphasis on the use of state legislation in death penalty analysis.

## II. BACKGROUND

### *A. Early Eighth Amendment Jurisprudence*

#### 1. “Cruel and Unusual”

The Eighth Amendment prohibits the federal and state governments from imposing “cruel and unusual punishments.”<sup>15</sup> However, the text of the Amendment alone does not reveal what the Framers intended “cruel and unusual” to mean. In addition, little legislative history exists to help alleviate this uncertainty. To further complicate matters, the limited legislative history that is available indicates that the founding fathers were themselves unclear about what the Amendment prohibited. Only two statements were made about the Eighth Amendment during the First Congress’s debates over the incorporation of the Bill of Rights. William Smith of South Carolina objected to the phrase “cruel and unusual punishments,” believing the meaning to be too indefinite.<sup>16</sup> Samuel Livermore of New Hampshire also objected to these words for fear that their ambiguity would lead the courts to ban socially acceptable forms of punishment.<sup>17</sup>

Nevertheless, the Eighth Amendment’s interpretation is not left wholly unguided. To better understand its meaning, it is necessary to go beyond the debates of the First Congress and examine the events that brought the Eighth Amendment before Congress in the first place. An examination of this history suggests that, at the very least, the Eighth Amendment was intended to proscribe punishments that are barbarous and inhumane.

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<sup>15</sup> U.S. CONST. amend. VIII.

<sup>16</sup> *Furman v. Georgia*, 408 U.S. 238, 262 (1972).

<sup>17</sup> *Id.*

## 2. “Cruel and Unusual” at a Minimum Prohibits Barbarous and Inhumane Punishments

After the Constitution was approved by the delegates of the Philadelphia Convention, it was sent to the individual states for ratification. Here, the document met significant opposition. This opposition was incited by the Anti-Federalists, who believed that the Constitution lacked sufficient protection for individual liberties.<sup>18</sup> These opponents demanded that the Constitution incorporate a bill of rights to ensure that certain civil liberties were adequately protected from infringement by the federal government.<sup>19</sup> Among the liberties demanded was a prohibition on “cruel and unusual” punishments. Statements made during Virginia’s ratification debate clearly evince that the proposal of the Eighth Amendment was motivated by a fear of federally sanctioned torture.<sup>20</sup> Patrick Henry stated:

In this business of legislation, your members of Congress will loose the restriction of not . . . inflicting cruel and unusual punishments. These are prohibited by your [Virginia] declaration of rights. What has distinguished our ancestors? — That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of . . . torturing, to extort a confession of the crime.<sup>21</sup>

These beliefs were not confined to the Virginia convention. Abraham Holmes of the Massachusetts convention was also fearful of a Constitution that lacked a judicial check on legislatively prescribed punishments. Holmes stated:

What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restraining from inventing the most cruel and unheard-of punishments, and annexing them

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<sup>18</sup> Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 676 (2004) (citing ROBERT A. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, at 126-58 (1955)); Paul Finkelman, “*A Well Regulated Militia*”: *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 197 (2000). The Anti-Federalists believed that the Constitution would “create tyranny” and that this tyranny would “take away the liberties of the American people.” *Id.*

<sup>19</sup> Finkelman, *supra* note 18, at 197.

<sup>20</sup> See Note, *Original Meaning and Its Limits*, 120 HARV. L. REV. 1279, 1290 (2007) (citing Anthony Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CAL. L. REV. 839, 860-65 (1969) for the proposition that the founding fathers misinterpreted the English Bill of Rights, from which the language of the Eighth Amendment was borrowed, to be concerned only with particularly gruesome methods of punishment).

<sup>21</sup> Rumann, *supra* note 18, at 677.

to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline.<sup>22</sup>

The concerns raised by the Anti-Federalists created substantial discourse in the ratifying conventions of several states.<sup>23</sup> To secure Anti-Federalist support, states such as Massachusetts, New Hampshire, and Virginia ratified the Constitution but included proposed amendments as part of their official proceedings.<sup>24</sup> Collectively, the amendments proposed by the Anti-Federalists of the various states numbered at least two hundred, varying from large structural changes to the Constitution to the preservation of simple civil liberties.<sup>25</sup> Among these, Virginia recommended forty amendments, twenty of which were referred to as the “Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable Rights of the People.”<sup>26</sup> Included within this declaration was a “cruel and unusual punishments” provision. This provision was among those selected by James Madison, from the over two hundred proposals, to be included in the tentative Bill of Rights and proposed to the First Congress.<sup>27</sup> In the end, the measure was approved and was preserved as the Eighth Amendment to the Constitution.

### 3. The Eighth Amendment’s Application During the Nineteenth Century

The Eighth Amendment remained relatively dormant during the first century following its adoption.<sup>28</sup> Almost eighty years passed before the Supreme Court first reviewed a case challenged under this provision.<sup>29</sup> Even in the three decades following this decision, litigation on the subject was sparse and often dealt with the constitutionality of a method of execution.<sup>30</sup> Throughout this time, Eighth Amendment analysis was historically based, meaning that a punishment would be deemed

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<sup>22</sup> *Furman*, 408 U.S. at 258-59 (quoting 2 J. Elliot’s Debates 111 (2d ed. 1876)).

<sup>23</sup> Finkelman, *supra* note 18, at 199.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 200. For example, one amendment proposed a substantive change that would deprive Congress of its ability to enact legislation to regulate elections. R. Carter Pittman, *Our Bill of Rights, How it Came to Be*, [http://rcarterpittman.org/essays/Bill\\_of\\_Rights/Our\\_Bill\\_of\\_Rights.html](http://rcarterpittman.org/essays/Bill_of_Rights/Our_Bill_of_Rights.html) (last visited May 11, 2010). In addition, many ratifying conventions suggested amendments that protected basic civil liberties such as the freedom of speech. *Id.* (citing the New York Convention’s version of what ultimately became the First Amendment: “That the freedom of the press, ought not to be violated or restrained”).

<sup>26</sup> Finkelman, *supra* note 18, at 201. For a complete list of Virginia’s proposed amendments, see Pittman, *supra* note 25.

<sup>27</sup> Finkelman, *supra* note 18, at 201 (noting that the majority of the civil liberties demanded in Virginia’s “Bill or Declaration of Rights” were ultimately preserved in the final Bill of Rights); Rumann, *supra* note 18, at 678 (noting that George Mason had included the prohibition against cruel and unusual punishments into Virginia’s proposed amendments).

<sup>28</sup> *Furman v. Georgia*, 408 U.S. 238, 264 (1972) (Brennan, J., concurring).

<sup>29</sup> *Id.* (referring to *Pervear v. Commonwealth*, 72 U.S. 475 (1866)).

<sup>30</sup> See *Wilkerson v. Utah*, 99 U.S. 130, 136-37 (1878) (upholding the constitutionality of execution by a firing squad); *In Re Kemmler*, 136 U.S. 436, 441-49 (1890) (upholding the constitutionality of execution by electrocution).

unconstitutional only if it would have been considered “cruel and unusual” at the time the Amendment was enacted.<sup>31</sup>

Constitutional review in this era focused on comparing a challenged punishment to punishments that would have been perceived as barbarous and inhumane by Americans of the late eighteenth century.<sup>32</sup> Thus, early Eighth Amendment decisions would invalidate a punishment only if it was “manifestly cruel and unusual,”<sup>33</sup> which was the case solely “when [it] involve[d] torture or a lingering death.”<sup>34</sup> These opinions used classic forms of torture such as burning at the stake, crucifixion, and breaking on the wheel as benchmarks against which to evaluate the constitutionality of a challenged punishment.<sup>35</sup> Because legislatures did not prescribe punishments that fit within this ambit of prohibition, some scholars believed that the Eighth Amendment had become obsolete.<sup>36</sup>

### *B. The Emergence of the “Evolving Standards of Decency”*

The historical approach that invalidated a punishment only if it was “manifestly cruel and unusual” was short-lived. Ideas that the Amendment extended beyond barbarous and inhumane punishments began to surface in the Supreme Court during the last decade of the nineteenth century. In a dissent from an 1892 opinion, Justice Field argued that the constraint on “cruel and unusual” punishments should be directed toward “all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.”<sup>37</sup> Thus, the notion was spawned that the “cruel and unusual” punishment clause extended not only to prohibit penalties that are torturous in nature but also to those that are “excessive” when compared to the gravity of the offense. A punishment could be deemed “cruel and unusual” even if its type was one that would be acceptable in other instances.<sup>38</sup>

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<sup>31</sup> *Wilkerson*, 99 U.S. at 136; *Kemmler*, 136 U.S. at 441; see also Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 423 (1995).

<sup>32</sup> Bukowski, *supra* note 31, at 421; *Kemmler*, 136 U.S. at 447; *Furman*, 408 U.S. at 264.

<sup>33</sup> *Kemmler*, 136 U.S. at 446.

<sup>34</sup> *Id.* at 447.

<sup>35</sup> *Id.* at 446.

<sup>36</sup> Bukowski, *supra* note 31, at 422; *Weems v. United States*, 217 U.S. 349, 371 (1910) (quoting Justice Story’s *Commentaries on the Constitution of the United States*, vol. 2, 5th ed. § 1903 that the Eighth Amendment “would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct”).

<sup>37</sup> *O’Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)

<sup>38</sup> For example, a jail sentence could still be contrary to the Eighth Amendment if its length is greatly disproportionate to seriousness of the crime. See *Robinson v. California*, 370 U.S. 660, 667 (1962) (“Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”).

Justice Field's interpretation of the "cruel and unusual" punishment clause received majority recognition by the Supreme Court in 1910.<sup>39</sup> In *Weems v. United States*, the Court invalidated the sentence of an officer of the Coast Guard who was convicted for "the falsification of a public and official document."<sup>40</sup> The defendant had made an entry into the government's cash book that falsely indicated that wages had been paid to lighthouse employees.<sup>41</sup> The lower court sentenced Weems to fifteen years of hard and painful labor.<sup>42</sup> Although Weems's conduct fell within the language of the statute, the Court noted that the provision did not consider whether anyone was injured or intended to be injured, whether there was a desire or intent to defraud, or whether the defendant was motivated by personal financial gain.<sup>43</sup> A person only needed to act with the intent to "pervert the truth" of an official record to receive a sentence ranging from twelve to twenty years, regardless of the harmlessness of the defendant's conduct.<sup>44</sup>

The Court was dismayed by this outcome. The plurality stated that "the sentence in this case, excite[s] wonder in the minds accustomed to a more considerate adaptation of punishment to the degree of crime."<sup>45</sup> The Court continued that:

Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense.<sup>46</sup>

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<sup>39</sup> *Weems*, 217 U.S. at 368.

<sup>40</sup> *Id.* at 357, 362-63.

<sup>41</sup> *Id.* at 357-58.

<sup>42</sup> *Id.* at 358. Weems was sentenced to "cadena temporal." This punishment required that the convict "labor for the benefit of the state" and that "[the convict] shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution." *Id.* at 364. Weems was also subjected to "accessory" penalties that deprived him of certain civil rights. *Id.* During the term of his imprisonment, Weems lost the rights of parental and marital authority and after his imprisonment was subjected to the surveillance of the state. *Id.* This meant that Weems was unable to change domiciles without the knowledge and permission of state authorities. *Id.*

<sup>43</sup> *Id.* at 363. The trial court stated that "[i]t is not necessary that there be any fraud nor even the desire to defraud, nor intention of personal gain . . . that a falsification of a public document be punishable; it is sufficient that the one who committed it had the intention to pervert the truth and to falsify the document, and that by it damage might result to a third party." *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 365.

<sup>46</sup> *Id.* at 366-67.



Thus, the Court found that the statute permitting Weems’s sentence had gone astray of the traditional American practice of assigning penalties according to the gravity of the defendant’s conduct.<sup>47</sup>

Determining that the sentence in *Weems* was disproportionate to the crime, the Court found it excessive and therefore unconstitutional under the Eighth Amendment.<sup>48</sup> This decision was unprecedented. Earlier rulings restricted Eighth Amendment proscriptions to only those punishments that were barbarous and inhumane; excessiveness was never a factor. The Court justified the holding on two grounds. First, previous decisions never defined the Amendment’s precise boundaries.<sup>49</sup> Instead, these decisions only affirmed that barbarous and inhumane punishments *at the very least* were prohibited by the Amendment.<sup>50</sup> Second, the Amendment’s legislative history, although limited, supported the position that the Amendment was intended to provide a judicial check on all legislatively prescribed punishments, torturous or not, to prevent oppression by a strong federal government.<sup>51</sup>

To reach its conclusion the Court in *Weems* began its analysis with the Supreme Court’s 1878 decision of *Wilkerson v. Utah*.<sup>52</sup> In *Wilkerson*, the Court made the following assertion:

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, such as [disembowelment, quartering, and burning alive] are forbidden by that amendment to the Constitution.<sup>53</sup>

Therefore, the *Wilkerson* decision did not attempt to provide a thorough definition of “cruel and unusual” punishments;<sup>54</sup> the Court only expressed the hardship associated with any attempt to do so. Instead, the *Wilkerson* Court limited its conclusion to what it knew for certain: that the Clause prohibited barbarous and inhumane punishments. Subsequent cases cited *Wilkerson* for the proposition that the Eighth Amendment prohibited those punishments that were barbarous and inhumane, but never addressed

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<sup>47</sup> *Id.* at 381. In this case, falsifying a single item within the government’s cash book could produce the same punishment as falsifying a record that causes the loss of several thousand dollars. *Id.* Also important to the Court was that the federal statute most similar to the one that convicted Weems (embezzlement) authorized, at most, a punishment of two years. *Id.* at 380.

<sup>48</sup> *Id.* at 381-82.

<sup>49</sup> *Id.* at 369-70.

<sup>50</sup> *Id.* at 370 (discussing *In re Kemmler*, 136 U.S. 436, 447 (1890)).

<sup>51</sup> *Id.* at 372-73 (stating that the “predominant political impulse” that motivated the Bill of Rights was a distrust of federal power).

<sup>52</sup> *Id.* at 369.

<sup>53</sup> *Id.* at 370 (quoting *Kemmler*, 136 U.S. at 447) (emphasis added).

<sup>54</sup> *Id.* at 370-71 (the language of previous cases illustrates that no comprehensive definition of cruel and unusual has been given).

the issue of whether the Amendment was capable of wider application.<sup>55</sup> Therefore, the contours of the Eighth Amendment were unconfined to the Court's prior decisions.

*Weems* also relied upon the limited legislative history of the Eighth Amendment to validate the proscription on excessiveness. Historical sources do not foreclose the possibility that the provision bars excessive punishments. The Court acknowledged that the history was primarily concerned with the prevention of state-administered torture, but also recognized that none of the history immured the boundaries of the Eighth Amendment to this sole concern.<sup>56</sup> Contrarily, Samuel Livermore of the First Congress feared that the Amendment was unconstrained and that it might therefore one day be used to preclude socially acceptable punishments.<sup>57</sup> The Court also noted that Patrick Henry, although he spoke directly of torture, was generally concerned with the constitutional protection of civil liberties from the abuse of power by a strong federal government.<sup>58</sup> This more general rationale behind the Eighth Amendment did not require that the Eighth Amendment be limited only to the proscription of punishments resembling torture. Rather, the Court opined that the Amendment could extend to *all* legislatively imposed punishments that reached the threshold of government oppression, including excessive sentences.<sup>59</sup>

It was almost fifty years after *Weems* before the Supreme Court again addressed the scope of the Eighth Amendment. In *Trop v. Dulles*, the Court decided the constitutionality of a sentence imposed upon an Army private who was convicted of desertion by military tribunal.<sup>60</sup> The conviction was based on the petitioner's escape from a stockade where he was being held for a previous breach of discipline.<sup>61</sup> The petitioner's sentence caused him to lose his U.S. citizenship.<sup>62</sup> In determining whether the punishment was "cruel and unusual," the Court noted in dicta that "the [Eighth] Amendment stands to assure that [the power to punish] be

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<sup>55</sup> *E.g.*, *Kemmler*, 136 U.S. at 447.

<sup>56</sup> *See Weems*, 217 U.S. at 372-73 ("But surely [the founding fathers] intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts . . . . [I]t must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation . . . . We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked.").

<sup>57</sup> *Furman v. Georgia*, 408 U.S. 238, 244 (1972) (quoting Livermore's statement that "it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel?").

<sup>58</sup> *Weems*, 217 U.S. at 372-73. Discussing Patrick Henry, the Court stated that the "predominant political impulse" of the founding fathers in developing the Eighth Amendment "was distrust of power" and that "power might be tempted to cruelty." *Id.* Therefore the founding fathers "insisted on constitutional limitations against its abuse." *Id.*

<sup>59</sup> *Furman*, 408 U.S. at 268 (interpreting *Weems*).

<sup>60</sup> *Trop v. Dulles*, 356 U.S. 86, 87-88 (1958).

<sup>61</sup> *Id.* at 87.

<sup>62</sup> *Id.* at 87-88.

exercised within the limits of civilized standards.”<sup>63</sup> The Court continued 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*.”<sup>64</sup>

*Trop* therefore emphasized certain aspects of the *Weems* decision. Although the decision in *Weems* focused on the proportionality of a sentence compared to the gravity of the crime, the *Weems* Court was able to interpret the Eighth Amendment to cover disproportionate sentences only by holding that the Amendment was “capable of wider application than the mischief which gave it birth.”<sup>65</sup> In particular, the *Weems* Court stated that “[t]ime works changes, brings into existence new conditions and purposes” and was of the view that the Amendment’s meaning must be capable of flexible interpretation in order to meet these new conditions and purposes.<sup>66</sup> The Court in *Trop* understood this to mean that the Eighth Amendment was in a constant state of evolution. Consequently, the meaning of the Amendment at any given time is dependent upon the “evolving standards of decency”: civilized standards defined by contemporary society.<sup>67</sup>

### C. Application of the “Evolving Standards of Decency” Since *Trop*

Since *Trop*, the concept of “evolving standards of decency” has been transformed from passive dicta into constitutional bedrock by being applied to every death penalty decision handed down by the Supreme Court.<sup>68</sup> It is clear from these opinions that Justices interpret the phrase to mandate an inquiry into whether there is an objective acceptance by contemporary society of the punishment under review.<sup>69</sup> The “evolving standards of decency” requires courts to analyze prevailing community standards to decide if a punishment is in accordance with established or developing social norms.<sup>70</sup> This section seeks to explain the “evolving standards of decency” and its application in more detail by examining: (1) how the concept has become a benchmark for determining excessiveness; (2) the relevant factors used to determine the existence of societal

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<sup>63</sup> *Id.* at 100.

<sup>64</sup> *Id.* at 100-01 (emphasis added).

<sup>65</sup> *Weems v. United States*, 217 U.S. 349, 373 (1910).

<sup>66</sup> *Id.*

<sup>67</sup> *Trop*, 356 U.S. at 100-01.

<sup>68</sup> Cases that have not made explicit reference to the “evolving standards of decency” have applied the concept by implication. *E.g.*, *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (holding, without mentioning the evolving standards of decency, that the Court’s judgment “should be informed by objective factors to the maximum possible extent”); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (applying “objective factors to the maximum possible extent”).

<sup>69</sup> *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (stating that whether a “punishment is excessive is judged not by the standards that prevailed in 1685 . . . or when the Bill of Rights was adopted, but rather by those that currently prevail”).

<sup>70</sup> Samuel B. Lutz, *The Eighth Amendment Reconsidered: A Framework for Analyzing the Excessiveness Prohibition*, 80 N.Y.U. L. REV. 1862, 1869 (2005).

consensus; and (3) the manner in which these factors have been applied by the Court.

### 1. Evolving Standards of Decency as a Benchmark for Excessiveness

*Weems* held that the Eighth Amendment proscribes all punishments that are excessive in addition to those that are barbaric. However, the Court left “excessive” undefined until 1976. In *Gregg v. Georgia*, the Court announced two circumstances under which a punishment can be excessive: (1) where the penalty makes no measurable contribution to the acceptable goals of punishment and thus is merely a purposeless and needless imposition of pain and suffering;<sup>71</sup> or (2) the punishment is grossly disproportionate to the offense.<sup>72</sup>

The problem with rendering a punishment “excessive” when it is grossly disproportionate to the offense is that the degree of disproportion is subjective.<sup>73</sup> Even if reasonable minds can agree that a given punishment is disproportionate to its corresponding crime, they may disagree over *how disproportionate* that punishment is. As one scholar noted, “any excessiveness inquiry under the Eighth Amendment necessarily requires a [benchmark] that will serve as a point of reference . . . .”<sup>74</sup> Absent any objective indicator against which to measure the excessiveness of a punishment, the inquiry “ultimately calls upon judges to make subjective determinations . . . .”<sup>75</sup> Therefore, in order for the degree of disproportion to be measured, there must be some stable benchmark that serves as a basis for comparison.

The “evolving standards of decency” principle developed in *Trop* provides an answer to this problem. When faced with the question of whether a punishment is grossly disproportionate to an offense, the Court uses the societal acceptance of the punishment as the requisite benchmark against which to measure excessiveness.<sup>76</sup> To ensure that current social acceptance is truly an objective anchor, the Court has held that “[p]roportionality review under those evolving standards [of decency] should be informed by ‘objective factors to the maximum possible extent . . . .’”<sup>77</sup> Therefore, the Court looks to quantifiable evidence of society’s

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<sup>71</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). The “acceptable” goals of punishment for the death penalty are (1) deterrence, and (2) retribution. *Id.* at 183. Whether the death penalty contributes to these goals is a subject of great debate and any attempt to measure its success has been inconclusive. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2661-62. This comment does not argue this point and will assume that the death penalty advances these purposes.

<sup>72</sup> *Gregg*, 428 U.S. at 173.

<sup>73</sup> Lutz, *supra* note 70, at 1865.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1869.

<sup>76</sup> *Id.* at 1867-69.

<sup>77</sup> *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)).

attitude toward prescribing the death penalty to a particular class of crimes or defendants. If these objective indicia signify that there is a national consensus against the punishment under review, then the threshold for excessiveness has been crossed, and the penalty is unconstitutional.<sup>78</sup>

## 2. Factors used to Determine Standards of Decency

The existence of a societal consensus against a punishment is to be determined “to the maximum possible extent” by objective indicators.<sup>79</sup> To evaluate public sentiment of the death penalty with respect to a given crime, the Court has examined such objective factors as the number of states that permit the penalty, the frequency of jury verdicts imposing the penalty, international laws, whether the penalty furthers accepted penological goals such as deterrence and retribution, polling data, and the official positions held by professional organizations.<sup>80</sup>

Of these, the Court has long held the view that state legislation is the most important and influential factor. For example, the plurality in *Penry v. Lynaugh* stated that “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”<sup>81</sup> Also, in *Woodson v. North Carolina* the Court accepted state legislation as being one of the two primary indicia of public opinion.<sup>82</sup> Moreover, originalist Justices, such as Justice Scalia, believe that state legislation and jury verdicts are the *only* objective criteria upon which to assess societal attitudes.<sup>83</sup> For these reasons, every death penalty case decided by the Supreme Court that has applied the “evolving standards of decency” since *Gregg* has begun its analysis with a survey of state legislation. Furthermore, it appears that the Court is wholly content with confining its objective indicia analysis to only state legislation and jury

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<sup>78</sup> The objective evidence gathered from the “evolving standards of decency” indicators is of “great importance” but does not end the Court’s inquiry. *Id.* Instead, the Court conducts a two-part inquiry. After the objective indicators of popular opinion are assessed, the Court resorts to its own judgment to determine whether there is reason to disagree with social norms. *Id.* However, a punishment that has not passed the initial inquiry of the “evolving standards” has never been held constitutional through the Court’s own judgment.

<sup>79</sup> *Id.*

<sup>80</sup> Aarons, *supra* note 12, at 445 (examining such factors as statutes, jury verdicts, international and comparative law, and penological goals); *Atkins*, 536 U.S. at 326 (examining public opinion polls, views of interest groups, and official positions of professional organizations).

<sup>81</sup> *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (finding that the execution of a mentally disabled defendant convicted of a capital offense is not categorically prohibited by Eighth Amendment); *see also* Bryan Lester Dupler, *Another Look at Evolving Standards: Will Decency Prevail Against Executing the Mentally Retarded?*, 52 OKLA. L. REV. 593, 602 (1999).

<sup>82</sup> *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976).

<sup>83</sup> *See* *Stanford v. Kentucky*, 492 U.S. 361, 364-80 (1989) (comprising of Scalia, White, Kennedy, and Rehnquist, the majority applied only the attitudes of state legislatures and jury behavior in the Court’s “evolving standards” analysis); 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, 485-86 (1996) (discussing Justice Scalia’s approach to an “evolving standards of decency” analysis in detail).

behavior if those two factors are decisive in the case before it. Cases where the Court has applied the less relevant factors, such as international opinion and public opinion polls, have been almost exclusively limited to instances where state legislation strongly disfavored a punishment but did not universally condemn it.<sup>84</sup> In these cases, these other factors appear to serve as a gap-filler when the two primary indicia (state legislation and jury behavior) do not fully decide the issue.

### 3. How State Legislation is used to Determine the “Evolving Standards of Decency”

When the Court resorts to the “evolving standards of decency,” it invalidates a punishment only when there is a national consensus *against* it.<sup>85</sup> Therefore, prevailing community standards are assessed to decide whether current social norms uniformly oppose a particular punishment, not whether these norms favor it. When using state legislation as a measure of public opinion, the Court literally counts the number of states that permit or reject the penalty under review to see if it is universally rejected among jurisdictions. This process is not as simple as it sounds. Justices have not been able to agree on a basic set of rules to govern how states are to be counted.<sup>86</sup> For example, should the Court examine the legislation of all states, or just death penalty states?<sup>87</sup> Should states that have not spoken on the issue but that generally permit the death penalty be assumed to approve of the challenged punishment? Or, should they be excluded from the analysis?

The constitutionality of a penalty can be dependent upon the answers to these questions.<sup>88</sup> Unfortunately, the failure of the Justices to agree upon a method of counting state legislation has resulted in a dichotomy in the Court with originalist Justices favoring a different method of counting than Justices who hold a more progressive judicial philosophy. Consequently, whether a particular punishment will be found constitutional is partially dependent upon which side of the dichotomy the composition of the Court sways.<sup>89</sup>

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<sup>84</sup> *E.g.*, *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2661-64 (2008) (deciding whether the death penalty for child rape furthers the penological goals of deterrence and retribution after a lack of legislative consensus); *Atkins*, 536 U.S. at 312 (using public opinion polls and the official positions of professional organizations when there is no consensus among state legislation).

<sup>85</sup> Lutz, *supra* note 70, at 1868. The goal of the “evolving standards of decency” doctrine is to “determine whether a ‘national consensus’ has developed in moral opposition to the criminal sanction at issue, such that it is clear that ‘society has set its face against it.’” *Id.*

<sup>86</sup> *See generally* Raeker-Jordan, *supra* note 83 (discussing in detail the different methods Justices have adopted to count state legislation).

<sup>87</sup> If non-death penalty states are to be included within the analysis, the result is automatically skewed towards condemnation, regardless of the nature of the specific crime at issue.

<sup>88</sup> *See* Raeker-Jordan, *supra* note 13, at 109-10 (discussing how an individual Justice’s preferences for “evolving standards” analysis affects the outcome of cases).

<sup>89</sup> *Id.* at 102.

Originalists<sup>90</sup> are of the view that only death penalty states should be considered in a “standards of decency” analysis.<sup>91</sup> Because non-death penalty states disapprove of the punishment in all circumstances, their opinion of it with respect to a specific issue is irrelevant. Therefore, these justices only examine legislation from states for which the issue exists.<sup>92</sup>

Originalists also presume that those jurisdictions that have not addressed the particular issue, but approve of the death penalty in general, would permit the punishment.<sup>93</sup> These Justices “essentially read into a general allowance a more specific provision, that the states considered and chose to allow the execution . . . .”<sup>94</sup> This position is supported by the principle that the “evolving standards of decency” seek to uncover a consensus against, not in favor of, a punishment.<sup>95</sup> Still, scholars have criticized this view for being a logical fallacy. They argue that a general authorization for the death penalty does not foreclose a state from later proscribing the punishment for a specific crime or class of defendants.<sup>96</sup>

Progressive Justices<sup>97</sup> hold a directly opposing view. In their opinion, legislation of both death penalty and non-death penalty states should be included in the analysis.<sup>98</sup> The purpose of resorting to the “evolving standards of decency” is to gauge the public sentiment of all citizens to determine whether there is a national consensus against a particular punishment. Moreover, it can be certain that a state that bars the death penalty under all circumstances would necessarily not permit the death penalty for any specific case under review. Progressive Justices also refuse to include within their analysis death penalty states that have not directly addressed the challenged punishment.<sup>99</sup> Justice Brennan, perhaps the most outspoken on the topic, justifies this view by arguing that constitutional liberty should not be dependent upon negative legislation.<sup>100</sup> State legislatures that have not spoken on the issue have done so either

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<sup>90</sup> “Originalist” refers to Justices who prefer to interpret the Constitution according to its original meaning. Scalia, Rehnquist, Alito, and White favor this version of the “standards of decency” analysis for state legislation.

<sup>91</sup> See *Stanford v. Kentucky*, 492 U.S. 361, 364 (1989) (Justice Scalia announced the judgment of the Court, joined by Justice White and Chief Justice Rehnquist).

<sup>92</sup> *Id.* at 370.

<sup>93</sup> *Raeker-Jordan*, *supra* note 83, at 548 (discussing *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding death penalty unconstitutional for defendants under sixteen years of age)).

<sup>94</sup> *Id.*

<sup>95</sup> Those that have not expressed an opinion one way or the other cannot affirmatively be said to oppose the penalty under review.

<sup>96</sup> Therefore, it cannot be said that these states have made a conscious choice to allow the punishment when the very structure of the legislative scheme has left open the possibility to later proscribe it. *Raeker-Jordan*, *supra* note 83, at 548.

<sup>97</sup> “Progressive” refers to Justices who interpret the Constitution in light of current conditions, unforeseeable to the original drafters.

<sup>98</sup> *Stanford v. Kentucky*, 492 U.S. 361, 382-85 (1989) (Brennan, J., dissenting).

<sup>99</sup> *Raeker-Jordan*, *supra* note 83, at 490.

<sup>100</sup> *Id.* at 490-91 (discussing Justice Brennan’s views on the “evolving standards of decency” in detail).

because they chose to allow the punishment or because they did not consider the issue.<sup>101</sup> These states are discarded from the evaluation because it cannot be said for certain whether their legislatures have consciously chosen to permit the punishment.

The method for counting state legislation is not the only uncertain factor in a “standards of decency” analysis. The number of states it takes before the Court will find a consensus for or against a punishment has also never been firmly established.<sup>102</sup> Instead, the notion of consensus has changed over the years with a trend of becoming more liberal. This is made apparent by the most recent decisions that have found a consensus in instances where the death penalty for a particular crime was far from universally condemned.

Until 2002, the term consensus was used by the Court according to its plain meaning. All states considered in the analysis had to reject the challenged punishment. In *Tison v. Arizona*, the Court did not find a sufficient consensus against the death penalty for felony murder when twenty-one states authorized death in cases where the defendant was a major participant in the crime and only eleven prohibited the penalty in cases where there was no intent to kill.<sup>103</sup> On the other hand, in *Thompson v. Oklahoma*, the Court *did* find a national consensus against the death penalty when it pertained to the execution of defendants under the age of sixteen.<sup>104</sup> In this case, it was found that all states that had considered a minimum age limit for execution had exempted those who were fifteen and younger.<sup>105</sup> In cases where state legislation was strongly but not universally opposed to a particular punishment, the Court turned to other less relevant objective factors<sup>106</sup> to make up for the lack of legislative consensus.<sup>107</sup>

In 2002, the Court changed the manner in which it determines legislative consensus. In *Atkins v. Virginia*, the Court held that an emerging *trend* toward eliminating the death penalty for a particular issue could constitute a consensus even if there was not an *actual* consensus against the penalty.<sup>108</sup> *Atkins* stated that “[i]t is not so much the number of these States

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<sup>101</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 850-51 (1988) (O’Connor, J., concurring).

<sup>102</sup> *See Atkins v. Virginia*, 536 U.S. 304, 343-44 (2002) (Scalia, J., dissenting) (noting that the Court has found consensus when all but one state did not permit a punishment, when all states banned a particular punishment, and when 78% of states banned a punishment).

<sup>103</sup> *Tison v. Arizona*, 481 U.S. 137, 138, 152-54, 158 (1987) (upholding the death penalty for felony murder when the defendant was not the trigger man but nevertheless acted recklessly in the execution of the crime).

<sup>104</sup> *Thompson*, 487 U.S. at 821-23.

<sup>105</sup> *Id.* at 817.

<sup>106</sup> *See* sources cited and factors listed, *supra* note 12 (e.g., international opinion).

<sup>107</sup> *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 575-76 (2005) (applying international opinion to hold that execution of defendants under the age of eighteen is unconstitutional); *Atkins*, 536 U.S. at 316 (using public opinion polls and the official positions of professional organizations when there is no consensus among state legislation).

<sup>108</sup> *Atkins*, 536 U.S. at 315-17.



that is significant, but the consistency of the direction of change.”<sup>109</sup> Therefore, if a simple tally of states does not strongly support constitutional proscription of the punishment, the Court may still strike the punishment down if it can be inferred from recent legislative action that approval for the death penalty is beginning to dwindle.

Based on this premise, the majority found a national consensus against the execution of the mentally disabled, even though less than half of the death penalty states barred such executions.<sup>110</sup> The Court noted that between 2000 and 2001, six states joined the existing twelve death penalty states that prohibited the execution of a mentally disabled defendant.<sup>111</sup> The plurality regarded this emerging trend as evidence of the recent public enlightenment that the execution of mentally disabled defendants offends standards of human decency.<sup>112</sup> The originalist dissenters were not convinced. Justice Rehnquist argued that the Court’s actions were taken merely to advance the plurality’s subjectively preferred result.<sup>113</sup> Scalia stated that the Court had paid “lip service to . . . precedents” and that the emerging trend was only used in order to bolster otherwise “feeble evidence” of a national consensus.<sup>114</sup> Regardless of the dissent’s view, it appears that the use of legislative trends to compensate for the absence of consensus will not soon disappear. The Court has since applied a trend analysis to both of the major death penalty cases visited since *Atkins*.<sup>115</sup>

### III. ARGUMENT

Although there is much disagreement regarding how the “standards of decency” analysis should be conducted, it cannot be denied that state legislation plays an important role. This Comment now argues that the Court’s view that state legislation is the “clearest and most reliable objective evidence of contemporary values” is flawed. The Court operates under the assumption that laws passed by state legislatures are truly reflective of the moral values held by each individual state’s citizens. This assumption is subject to scrutiny for at least two reasons. First, voter turnout statistics show that approximately half of the registered voters for any given state do not show up at the polls during state elections to elect a representative of their choice. Thus, a representative’s moral policy choices cannot be

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<sup>109</sup> *Id.* at 315.

<sup>110</sup> *Id.* at 314-16.

<sup>111</sup> *Id.* at 315.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 322.

<sup>114</sup> *Id.* at 342.

<sup>115</sup> *Roper v. Simmons*, 543 U.S. 551, 565-66 (2005); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2657 (2008) (addressing the “trend or change in the direction” of state legislation in favor of the death penalty for the crime of child rape but ultimately finding the trend insufficient). It is significant that, since the last time the Court addressed the issue of the death penalty for offenders under eighteen, five states that previously permitted the penalty now made it illegal even though there was no consensus against the punishment. Thus, the legislative trend substituted for the lack of consensus. *Roper*, 543 U.S. at 565-66.

broadly attributed to all of his or her constituents. Second, even if voter turnout was significantly greater, legislation on broad social issues such as capital punishment may not be enacted, even when a vast majority of voters would morally support the measure.

*A. Voter Turnout*<sup>116</sup>

An elected official is assumed to represent the views of the majority of his or her constituency. Thus, when policies are enacted through legislation, they theoretically reflect the preferences of *most* citizens.<sup>117</sup> It is a dangerous assumption, however, to equate the “majority of votes” with the “majority of people,” by treating the two notions as interchangeable. Although we tolerate a governmental scheme where the majority-view rules, it may not be safe to assume that the method of calculating the majority opinion (voting) is indeed an accurate means of doing so. The weakness of this assumption increases as voter turnout decreases. As the number of persons showing up at the polls diminishes, there is a correspondingly higher likelihood that the policy choices of the representative elected will not comport with the preference of the majority.

An analysis of the voting statistics from several states reveals that the possibility of underrepresentation in state legislatures is a real problem. Data from the 2006 general elections of thirteen states indicate that approximately one half of registered voters do not show up during state elections to choose a representative that would act to reflect their views. The average voter turnout among these states was only 53.09%.<sup>118</sup> Of the states analyzed, Texas recorded the lowest voter turnout with an average voter turnout of only 33.64%,<sup>119</sup> and Washington recorded the highest voter turnout with an average of 64.55%.<sup>120</sup> Vermont held the median with an average voter turnout of 53.8%.<sup>121</sup>

In aggregate, the statistics show that less than half of registered voters participate in state elections. In total, the combined registered voters

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<sup>116</sup> For the purposes of this section, voting statistics from thirteen states were analyzed to determine the extent that registered voters were absent from the polls during state elections. These states were selected randomly from all parts of the country and consist of Ohio, Indiana, Iowa, Texas, Colorado, Connecticut, Washington, Arizona, Vermont, Alabama, Georgia, Montana, and New Jersey. All states used in this analysis follow a bicameral form of government with both a house of representatives and a senate. The representatives of these states are elected according to a majority of votes gathered from their respective voting districts. In addition, all states for which data is used hold general elections for state representatives every two years. This analysis will focus on the most recent data available for a non-Presidential election year (2006). The reason for using a non-Presidential year is to separate the statistics of citizens who showed up at the polls merely to choose a Presidential candidate. The statistics used in this analysis are attached in Appendix A.

<sup>117</sup> Measures passed that favor the choices of most citizens are accepted even if they are passed contrary to the preferences of the minority.

<sup>118</sup> *See infra* app. A.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

of all thirteen states numbered 50,236,175.<sup>122</sup> The total number of these registered voters that actually voted in the 2006 state elections was 23,993,355.<sup>123</sup> Thus, actual voter turnout from a national standpoint was only 47.76%.<sup>124</sup>

It might be argued that the approximately 50% of voters that do participate are merely a random sample of the greater population. Therefore, it is possible that the voting habits of the electoral participants are representative of the entire voting age population. If this were true, the outcome of a state election would be the same regardless of whether all, or only half, of the registered voters cast their ballot. However, at least one esteemed scholar disagrees with this generalization.

In his book, *The Semisovereign People*, E.E. Schattschneider addressed the deficiency in voter turnout at the federal level.<sup>125</sup> He argued that the lack of attendance at the polls is evidence that the struggle for true democracy is ongoing.<sup>126</sup> Thus, although the battle for the *right* to vote among suspect classes has been won, the battle for the ability to influence the political system in a meaningful way is still being waged.<sup>127</sup> Those that do not vote fail to do so because they do not hold a significant interest in the issues that they perceive will be decisive in the election.<sup>128</sup> Consequently, the absence of activity in the electoral process by nonvoters can be attributed to apathy.<sup>129</sup> As an example, a registered voter who does not identify himself as either a Democrat or a Republican is more likely to abstain from voting when the deciding issue of the election is strictly a party-based disagreement over a particular policy. Moreover,

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 97-113 (1960). Schattschneider was a famous American Political Scientist. His books include *POLITICS, PRESSURES AND THE TARIFF* (1935), *PARTY GOVERNMENT* (1942), *THE STRUGGLE FOR PARTY GOVERNMENT* (1948), *EQUILIBRIUM AND CHANGE IN AMERICAN POLITICS* (1958), and *TWO HUNDRED MILLION AMERICANS IN SEARCH OF A GOVERNMENT* (1969). In addition, each year an award in Schattschneider's name is granted to a graduate student for the best doctoral dissertation in the field of American government. E.E. Schattschneider Award, The American Political Science Association Homepage, [http://www.apsanet.org/content\\_4125.cfm](http://www.apsanet.org/content_4125.cfm) (last visited May 11, 2010).

<sup>126</sup> SCHATTSCHNEIDER, *supra* note 125, at 95-100. "Voting is not a strenuous form of activity, but it is apparently beyond the level of performance of four out of every ten adults." *Id.* at 97.

<sup>127</sup> *Id.* at 102. The political community is much smaller than the voting age population; majority rule is assumed and has never been legitimized. Even though all persons have the right to vote, the struggle is now over the organization of politics. *Id.*

<sup>128</sup> *Id.* at 104; see also *id.* at 109 ("Since the Democratic-Republican version of the cleavage between government and business has dominated American politics, the submerged millions have found it difficult to get interested in the game."); *Id.* at 129 (stating that "the nature of the conflict determines the nature of the public involvement").

<sup>129</sup> Schattschneider also notes that voter turnout can be deterred by a lack of choice in representatives. *Id.* at 105. This is also a problem in state elections. A look at former election ballots collected from the states referred to in this analysis shows that voters in some districts were given only a single choice of representative. *E.g.*, OHIO SEC'Y OF STATE, ELECTIONS & BALLOT ISSUES, OHIO SENATE: NOV. 2, 2006, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2006ElectionsResults/06-107OHSenate.aspx> (documenting that John A. Boccieri and Teresa Fedor ran unopposed).

Schattschneider argues that poor voter turnout persists because the same central issues have been frozen into the electoral process.<sup>130</sup> Until the general focus of politics is capable of shifting to include issues that capture the interest of the entire public, the lack of voter turnout will be perpetual.<sup>131</sup>

Individuals who do show up to cast a vote in state elections are most likely to be those who feel strongly about an issue that is at center-stage. Any argument that additional voters would merely mimic those who had already attended the polls is incorrect. Those who do not show up to vote do so because the policies that they care most deeply about are not at the heart of the political debate. Moreover, merely because these individuals care most deeply about issues that are not receiving political attention does not foreclose the possibility that they are opposed to the election of the victorious candidate. It can be concluded only that they probably do not have a *strong* opposition. In sum, it is quite possible that a representative can win an election by supporting policies that the majority of voters agreed with but the majority of people did not. E.E. Schattschneider has reflected:

A great multitude of causes languish because the forty [percent] or so nonvoters do not support them at the polls. It staggers the imagination to consider what might happen if the forty [percent] suddenly intervened, for we cannot take it for granted that they would be divided in the same proportions as the sixty [percent]. All political equations would be revised.<sup>132</sup>

With such an incredible void in the political process, the United States Supreme Court's reliance on state legislation as the best indicator of public opinion is subject to serious question. State legislation is promulgated, voted on, and passed by state representatives elected from a state's several districts. If only half of the registered voters of these districts are appearing at the polls to place these officials into office, then there exists a great possibility that the outcome of these elections, and therefore any subsequent legislation passed by the officials elected, would be different in the event of complete voter attendance. This analysis can be applied to any piece of legislation, including death penalty statutes. It does not follow that state representatives' positions on the death penalty are worthless in determining how the citizens of our nation feel about capital punishment. Nevertheless, such a factor is so far attenuated from what it is intended to

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<sup>130</sup> SCHATTSCHEIDER, *supra* note 125, at 109-10. The focus of politics "has tended to freeze the stakes of politics at a point that has never involved the whole community." *Id.*

<sup>131</sup> *Id.* at 104.

<sup>132</sup> *Id.* at 110-11. The quote originally discussed the "forty million" non-voters. However, at the time this book was written, America had approximately 100 million registered voters. Due to the changes in population, the number of non-voters was converted into a percentage. *Id.*

reflect—a consensus on current standards—that it fails to be a reliable objective indicator, let alone the “best” indicator.

### *B. Legislation on Broad Social Issues*

Even if the vast majority of registered voters actually did participate in state elections, the existence of legislation would still be an inaccurate means of measuring society’s moral stance on a particular death penalty issue. The nature of our political system can lead to a failure of such legislation being enacted, even in jurisdictions where the majority of citizens would morally support the measure, as is evinced by the relationship between the public, the representative, and the creation of legislation.

#### 1. Madisonian Democracy

In our system of government, individuals are elected to act on behalf of those whom they represent. Elected officials are assumed to be a medium through which the legislative will of the people is transmitted. Still, the nature of how this notion actually plays out is not entirely understood. Since the days of the founding fathers, many great thinkers have sought to develop a model that best explains the role that the public plays in the enactment of legislation. The starting point for most of these models has been the work of James Madison.

Early in our nation’s history, Madison noted that the legislative choices of elected representatives are influenced by organized private power.<sup>133</sup> Madison argued that political behavior was the result of pressure exerted by groups of citizens who were bound together by a common interest.<sup>134</sup> Madison referred to these groups as factions.<sup>135</sup> The existence of factions was, and still is, accepted as something that a democracy cannot control. The inclination to organize into pressure groups in order to promote a shared interest was said by Madison to be “sown in the nature of man.”<sup>136</sup> Moreover, it was believed that factions were not necessarily bad for democracy and, contrarily, that they were essential to the existence of liberty,<sup>137</sup> because an election is only a “very blunt instrument for the

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<sup>133</sup> See KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 2 (1986).

<sup>134</sup> THE FEDERALIST No. 10, at 16 (James Madison) (Roy P. Fairfield ed., 1966).

<sup>135</sup> *Id.* at 17 (defining factions as “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community”).

<sup>136</sup> *Id.* at 18; see also MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 7 (Harvard Univ. Press 1965). An individual’s unorganized effort to influence legislation would be futile and so it is irrational to participate in the political process absent group association. Specifically, Olson states “when a number of individuals have a common or collective interest—when they share a single purpose or objective—individual, unorganized action . . . will either not be able to advance that common interest at all, or will not be able to advance that interest adequately.” *Id.*

<sup>137</sup> SCHLOZMAN, *supra* note 133, at 2.

conveyance of [political] information.”<sup>138</sup> Once elected, an official will be unaware of the policy preferences of his or her constituents on issues other than those that were a part of that official’s political campaign.<sup>139</sup> Factions are needed to convey information to elected representatives to keep them in tune with the legislative desires of the public.<sup>140</sup>

## 2. Pluralism

Madison’s theory of the democratic political process assumes that a minority faction would be unsuccessful in pressuring a representative into making a policy choice that the majority disfavors.<sup>141</sup> The development of our understanding of politics since Madison’s day has proven this assumption to be false. It is now apparent that minority factions routinely exert control over legislative measures, even when minority preferences are contrary to the will of the majority.<sup>142</sup> Today, we call these minority factions special interest groups.

The *pluralist* theory of organized politics explains this phenomenon by noting that the number of supporters in a faction is only one factor that determines its influential capacity.<sup>143</sup> Furthermore, this factor carries less relative weight when compared to other factors.<sup>144</sup> In addition to numbers, the intensity of the group with respect to its position on a particular issue can exponentially increase its political power.<sup>145</sup> An organized group that is otherwise small in numbers can make up for its numerical disadvantage by increasing the ferocity with which it advocates for its political preferences. This makes it possible for a special interest group to be politically successful even when the majority of constituents oppose the group’s view.<sup>146</sup>

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<sup>138</sup> *Id.* at 3.

<sup>139</sup> See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 131-33 (Univ. of Chicago Press 1956).

<sup>140</sup> SCHLOZMAN, *supra* note 133, at 4 (stating that interest groups link citizens to leaders “once the political community grows beyond the manageable [bounds] of the town meeting”).

<sup>141</sup> Preferences of interest groups oftentimes oppose one another. Consequently, it has been said that “[i]f unrestrained by external checks, any individual or group of individuals [would] tyrannize over others.” DAHL, *supra* note 139, at 17. Nevertheless, Madison discounted the threat of a single faction oppressing the whole. In his opinion, a minority faction would always be unsuccessful in exerting control over the government because a republican system would cause the majority to prevail. *Id.* at 16. Moreover, the majority view would be widely distributed among many different factions, each of whom opposes the others to some degree, thus preventing a single majority faction from dominating the choices of the government. *Id.* at 16-17.

<sup>142</sup> OLSON, *supra* note 136, at 63 (stating that small groups will work together to obtain targeted benefits at the expense of the unorganized public).

<sup>143</sup> SCHLOZMAN, *supra* note 133, at 4 (noting that the strength of a faction is determined by the faction’s intensity, as well as its numbers).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 3.

<sup>146</sup> Granted, the majority cares less about the issue than the special interest group.

This notion stems from the fact that individuals are not equally sensitive to all political issues that affect them.<sup>147</sup> Instead, constituents will be more concerned with policies that significantly impact their lives than those policies whose impact will be negligible.<sup>148</sup> Consequently, even though many Americans have a strong position on moral issues such as capital punishment and gun control, they are less likely to advocate as intensely on these issues as opposed to those issues that more directly interfere with their personal lives.<sup>149</sup> This attitude allows special interest groups, who vigorously pursue their legislative goals, to assert their will over the “lukewarm” majority.<sup>150</sup>

### 3. Public Choice Theory

More recently, scholars have been turning to public choice theory to understand the political behavior of elected officials.<sup>151</sup> Public choice theory seeks to explain the influence that the public has on the legislative choices of its elected officials through the use of economic models.<sup>152</sup> Under this theory, the legislative environment is viewed as a political marketplace where the public and/or interest groups are demanders of legislation and elected representatives are the suppliers.<sup>153</sup> This theory suggests that legislation is more likely to surface as demand for that legislation increases, manifested by the communication of preferences from interest groups to elected officials.

Not all interest groups are equally effective at exerting pressure upon elected officials. The strength of demand for legislation is highly dependent on the degree of organization of those who desire it.<sup>154</sup>

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<sup>147</sup> SCHLOZMAN, *supra* note 133, at 35. An individual will be more invested in issues that affect them “appreciably” than about those whose effects are “negligible.” *Id.*

<sup>148</sup> *Id.* For example, a citizen will be considerably more invested in a policy that impacts his or her taxes than on a broad social issue such as abortion. *Id.*

<sup>149</sup> *Id.* (“[C]itizens are ordinarily likely to care less deeply about what they have at stake as members of the public than about what they have at stake in other capacities.”)

<sup>150</sup> *Id.* “Lukewarm” is a term used to describe a majority group who has an opinion on a policy, but that opinion is not strong enough to induce the members of the group into organized activity. *Id.* To illustrate, the book, *Organized Interests and American Democracy*, noted that public opinion polls show that an “overwhelming majority” of citizens would prefer stricter firearm laws. *Id.* at 36. Nevertheless, as a result of the zealous political activity of special interest groups such as the NRA, stricter firearm legislation has failed to surface. *Id.* On the other hand, if the majority would have responded with an equivalent intensity, the greater numbers of that faction would most likely have been the deciding factor, driving gun control policy to the opposite result.

<sup>151</sup> This theory is also known academically as the “transactional theory” of legislation. WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 54 (3d ed., 2001).

<sup>152</sup> See generally Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, Q.J. ECON., August 1983 (providing a detailed mathematical explanation of public choice theory through economic concepts).

<sup>153</sup> *Id.*

<sup>154</sup> Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 40 (2008) (explaining how legislation that greatly benefits a few interested persons will trigger more powerful lobbying efforts because those few persons will be more inclined to formally organize themselves for political action).

Individuals who are more successful in formally organizing themselves into a group for political action will theoretically be more successful at getting their demands recognized and thus initiating legislative measures.<sup>155</sup> Still, not all interest groups actually organize themselves in a manner that permits them to effectively communicate their preferences.<sup>156</sup> Preferences of large groups may potentially go unrecognized in the political arena if conditions render them incapable of organizing or if they lack sufficient incentive to exert pressure upon their elected officials.

Public choice theory is rooted in economics and therefore assumes that individuals act rationally.<sup>157</sup> Based on this assumption, the theory holds that a person will only take a particular action when the benefit of doing so outweighs its cost.<sup>158</sup> Because formal organization entails the investment of time, money, and other resources, public choice theory concludes that individuals will only coalesce into interest groups when each member has a large enough stake in the desired legislation that he or she is justified in expending the cost of participating in an organized effort.<sup>159</sup>

In his book, *The Logic of Collective Action*, Mancur Olson addressed this issue as the “free rider problem.”<sup>160</sup> This principle recognizes that as the number of beneficiaries of a piece of legislation increase, each individual’s share of that benefit becomes reciprocally smaller.<sup>161</sup> As individual shares of the benefit diminish, each group member has less of a personal incentive to participate in activity that would pressure an elected official to support the desired legislation.<sup>162</sup> Phrased differently, as an individual’s share of the benefit decreases, his interest in it becomes less intense, making him more likely to shirk. Such an individual would prefer, instead, to rely upon other group members who may take political action on his behalf.<sup>163</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> SCHATTSCHEIDER, *supra* note 125, at 129-30. Schattschneider argues that Americans assume all views to be sufficiently represented through our political system. Contrarily, our governmental system cannot be classified as a “democracy” within the traditional definition of the word because many views are not represented. *Id.*

<sup>157</sup> William F. Shughart, Library of Economics and Liberty, The Concise Encyclopedia of Economics: Public Choice, <http://www.econlib.org/library/Enc/PublicChoice.html> (last visited May 10, 2010) (noting that the science of economics is founded upon the assumption that individuals will behave rationally).

<sup>158</sup> *Id.*

<sup>159</sup> See generally OLSON, *supra* note 136. The Logic of Collective Action seeks to explain political behavior of individuals by drawing on principles of economics. Of importance to this article is the belief that it is only rational for an individual to participate in the political process when doing so will produce a net benefit. *Id.*

<sup>160</sup> William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 286 (1988) (explaining the free rider problem in detail).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*



Thus, under the free rider theory, legislation is most likely to form when it bestows *concentrated benefits* or helps avoid *concentrated costs*.<sup>164</sup> When legislation would act to confer a substantial benefit upon a few citizens at a cost that would be widely distributed across the entire population, those who would receive that benefit would likely endure the costs of organization in order to push for the legislative measure.<sup>165</sup> In addition, this group would probably not face much resistance. Because the cost is distributed across the entire population, an individual citizen would not suffer a great enough loss from the legislation to justify the expense associated with organizing to oppose it. In contrast, legislation that confers a *widely distributed benefit* at the expense of a select few stands much less of a chance of enactment. Even though the policy may benefit the majority of the citizens, the share of the benefit that the average voter would receive would be insufficient to induce him to expend the costs of organization.<sup>166</sup> Instead, each member of the general public would prefer to “free ride” on the efforts of others.<sup>167</sup>

Finally, those who would gain from widely distributed benefits suffer from another drawback: they lack the advantage of smaller numbers. Communication breaks down as group size increases, preventing coordination of group effort and, consequently, less effective political pressure.<sup>168</sup> In the words of Mancur Olson:

[Small] groups are . . . twice blessed in that they have not only economic incentives, but also perhaps social incentives, that lead their members to work toward the achievement of the collective goods. The large, ‘latent’ group, on the other hand, always contains more people than could possibly know each other, and is not likely . . . to develop social pressures that would help it satisfy its interest in a collective good.<sup>169</sup>

### C. Implications of Public Choice on Death Penalty Legislation

Under the logic of public choice theory, it is conceivable that a policy benefitting all members of society may fail to form despite a societal majority that favors the measure. This may well be the case with death penalty legislation. If so, then there is a lack of death penalty (or anti-death penalty) legislation even in areas of the country where such policies would

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<sup>164</sup> Biber, *supra* note 154, at 43-44.

<sup>165</sup> *Id.* at 40-41.

<sup>166</sup> *Id.* (explaining how more widely distributed benefits are less likely to trigger an individual to take political action, whereas legislation that creates concentrated benefits will be more likely to induce an individual voter to invest the initial costs to organize and monitor the political process).

<sup>167</sup> Eskridge, *supra* note 160, at 286.

<sup>168</sup> *See id.*

<sup>169</sup> OLSON, *supra* note 136, at 63.

be widely supported. If this is true, then the use of state legislation as the best indicator of society's attitudes toward the death penalty is unreliable, crippling the accuracy of the Court's "evolving standards of decency" analysis.

### 1. Widely Distributed Benefits and the "Lukewarm" Majority

When potential legislation bestows significant benefits that are concentrated on a few individuals, each of those individuals is more likely to be roused into group action to support it. The costs of participation are sufficiently offset by the perceived benefits.<sup>170</sup> However, the benefits of death penalty legislation are almost negligible to the average citizen; thus, it will not command much attention from beneficiaries, which consist of the entire population.

The benefits of capital punishment statutes are (1) *deterrence* and (2) *retribution*.<sup>171</sup> Deterrence seeks to prevent crime by making the punishment severe enough that a would-be perpetrator is persuaded not to commit the crime to avoid the risks of punishment.<sup>172</sup> Through deterrence, society as a whole is benefitted by receiving a reduction in the frequency of a crime, and would-be victims are directly benefitted by not having to experience it. In contrast, retribution seeks to fulfill the victim's sense of fairness.<sup>173</sup> In theory, the victim is psychologically fulfilled by seeing that the perpetrator receives his "just desserts."<sup>174</sup> Retribution is also intended to prevent individual citizens from taking the law into their own hands when they feel that the government has not produced a sufficient punishment.<sup>175</sup>

#### a. Deterrence

The benefit of deterrence upon a society that has passed death penalty legislation for a particular crime is the diminished frequency of that crime. This benefit is distributed among society which would, in theory, record fewer instances per year of the now-capital crime. Thus, the benefit is *widely distributed* because the public good, a reduced crime rate, is shared among all members of the constituency. At first this may seem significant enough to induce the formation of interest group activity targeted at obtaining the benefit; however, the *collective* benefit is not what is

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<sup>170</sup> See Eskridge, *supra* note 160, at 286.

<sup>171</sup> *Furman v. Georgia*, 408 U.S. 238, 342-47; *Death Penalty: Hearing on S. 32 Before the S. Comm. on the Judiciary*, 101th Cong. 1-2 (1991) (statement of Sen. DeConcini).

<sup>172</sup> Robert Keel, Rational Choice and Deterrence Theory, <http://www.umsl.edu/~keelr/200/ratchoc.html> (last visited May 11, 2010) (discussing general deterrence).

<sup>173</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2662 (2008) (stating that retribution "reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused").

<sup>174</sup> *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

<sup>175</sup> *Furman*, 408 U.S. at 308 ("When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy-of self-help, vigilante justice, and lynch law.").

important. When it comes to interest group formation, *each person* within the faction would have to have an *individual interest* in a benefit that is substantial enough to motivate him or her to endure the costs of group participation.<sup>176</sup> Because only a small fraction of citizens would be benefitted substantially by the deterrence (those who would otherwise have been victims of the crime now punishable by death), the average person receives only a marginal share of the overall benefit.

For example, consider the statute permitting the death penalty for child rape that the Supreme Court held unconstitutional in August 2008. As serious as this crime may be, the vast majority of persons in any given jurisdiction do not have to personally deal with it in their lifetimes. In its amicus brief filed in the case of *Kennedy v. Louisiana*, the National Association of Social Workers cited that between 87,000 and 217,000 children in the United States report sexual abuse each year.<sup>177</sup> Although this is a significant number, the 2000 Census recorded that the number of children living in the United States who were fourteen years of age or younger was 60,253,375.<sup>178</sup> Therefore, a conservative estimate would suggest that only .14% of the child population suffers from some form of sexual abuse.<sup>179</sup> However, even the more egregious estimate of 217,000 incidents per year would raise the percentage of child victims to only .36%. Given the negligible frequency of child rape, each citizen has an equally negligible interest in legislation targeted at curbing its occurrence. The threat of the crime affecting someone that he or she loves is almost non-existent. Moreover, the benefit of a capital punishment statute for child rape would not entirely eradicate this threat. Deterrence, if anything, would only slightly diminish the occurrence of the already rare crime.<sup>180</sup> Thus, the benefit that any one citizen would receive from capitalizing the penalty for child rape would be a marginal decrease in the threat of a crime that is already almost certain not to occur.

This lack of individual connection with the crime deprives the majority of citizens of the personal stake necessary to bring about death

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<sup>176</sup> See OLSON, *supra* note 136, at 60. An individual needs an incentive, economic or otherwise, to induce him or her to take political action. *Id.*

<sup>177</sup> Brief for Nat'l Ass'n of Social Workers, et al. as Amici Curiae in Support of Petitioner at 7, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (No. 07-343). Note that the term “sexual abuse” encompasses conduct short of rape.

<sup>178</sup> CensusScope: Age Distribution by Sex (2000), [http://www.censuscope.org/us/chart\\_age.html](http://www.censuscope.org/us/chart_age.html) (last visited May 11, 2010). Thus, one can expect that this number is actually greater considering the amount of time that has lapsed since the last census was taken. *Id.*

<sup>179</sup> Rape is a subset of the sexual abuse category, which would suggest that the percentage of children who are subjected to child rape is even lower.

<sup>180</sup> The effectiveness of deterrence as a rationale for the death penalty is a controversial issue. Any study that has been conducted on the issue has been inconclusive, with some studies indicating that capital punishment has no deterrent effect whatsoever. *Furman*, 408 U.S. at 307-08 n.7. Studies of capital punishment's deterrent and retributive effect have resulted in only “inconclusive empirical evidence.” *Id.*

penalty legislation for child rape. Nevertheless, this fact alone does *not* mean that such legislation would not be morally supported by a majority. The majority of citizens may despise child rape to the point where they feel that death is an appropriate punishment. Nevertheless, these feelings may not be strong enough to induce these persons to invest the time and effort necessary to take group action, organize and attend meetings in support of the cause, or even to write to their congressman. In short, the widely distributed benefit of seeing reduced crime statistics or decreasing the already slight risk of having a child suffer a sexual assault in the future would not justify the costs of organizing to support the potential legislation.

The strength of the benefits is not the end of the analysis. Public choice theory also holds that interest groups with fewer members are the privileged groups.<sup>181</sup> With smaller numbers comes greater ease of organization. However, broad social issues such as the death penalty are intended to benefit the entire society. This large group “contains more people than can possibly know each other,” which makes the communication necessary to organize the faction strenuous or impossible.<sup>182</sup> Taken together, the lack of a personal stake in death penalty legislation, coupled with the barriers to interest group formation brought about by the large size of the faction, makes such legislation unlikely to form.

#### b. Retribution

The analysis regarding retribution is similar to that of deterrence. Again, relatively few persons are ever victims of child rape. As a corollary, relatively few individuals are able to feel fulfilled by seeing the execution of a person convicted of this crime. This is not to say that such a person does not feel better knowing that our government is willing to impose such a punishment. Rather, the majority of citizens do not experience such a satisfaction to their sense of justice that they are willing to incur the costs associated with the formal organization required to bring about the necessary legislation.

In sum, it is entirely possible for the majority of citizens of a jurisdiction to morally support a death penalty statute but still lack the intensity necessary to lead them into collective action.<sup>183</sup> Therefore, death

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<sup>181</sup> OLSON, *supra* note 136, at 63 (noting that interest groups with fewer members enjoy fewer barriers to formal organization).

<sup>182</sup> *Id.*

<sup>183</sup> The analysis is identical for anti-death penalty legislation. The majority of citizens in a jurisdiction that permits the death penalty for a certain crime may be opposed to that penalty but lack the incentive to organize into a group to lobby for repealing it. This comment presents the argument from the standpoint of a jurisdiction that has a majority of citizens that would support a death penalty law that it does not already have. This is not intended to express an opinion in favor of additional death penalty laws.

penalty legislation can fail to materialize even in a jurisdiction where the measure would be overwhelmingly supported.

## 2. Death Penalty Statutes and Special Interest Group Activity: *Kennedy v. Louisiana* as an Example

The pluralist theory concludes that small minority factions can succeed at achieving their legislative goals, even when their interests are adverse to those of the majority. Differences in intensity allows for the interest group to exercise its will over the lukewarm majority who cares much less about its position on the issue. Those whom death penalty statutes are intended to benefit (society as a whole) hold a relatively weak personal interest in the legislation because it conveys to them only a small share of a widely distributed benefit. The result is the creation of exactly the type of lukewarm majority that special interest groups are able to take advantage of.

In August 2008, the United States Supreme Court held that a Louisiana statute permitting the death penalty for the rape of a child under the age of twelve was unconstitutional.<sup>184</sup> Prior to issuing this decision, the Court permitted the National Association of Social Workers (NASW) to intervene by filing an amicus brief on behalf of the defendant who was sentenced to death pursuant to the challenged statute.<sup>185</sup>

NASW is an association of social workers comprising of approximately 145,000 members dispersed among fifty-six chapters throughout the United States.<sup>186</sup> In its amicus brief, NASW made three arguments against the death penalty for child rape.<sup>187</sup> All three of these arguments found their way into the Supreme Court’s final opinion. First, NASW argued that permitting a child rapist to be executed would worsen the problem of underreporting associated with the sexual abuse of a child.<sup>188</sup> NASW cited several professional sources indicating that the assailant of a sexually abused child is typically related to the child. Because of this, the organization argued that awareness of the potential death sentence would prompt the child to protect the abuser by not reporting the incident. Second, NASW argued that, because the assailant would face no greater penalty for murder, the statute effectively stripped any incentive away from not killing the child.<sup>189</sup> Thus, NASW suggested that the law would increase the murder

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<sup>184</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2664-65 (2008).

<sup>185</sup> Brief for the Petitioner, *supra* note 177, at 1.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 6-7.

<sup>188</sup> *Id.* at 7; *Kennedy*, 128 S. Ct. at 2663 (finding sufficient evidence that a statute capitalizing the crime of child rape may increase the problem of underreporting).

<sup>189</sup> Brief for the Petitioner, *supra* note 177, at 15; *Kennedy*, 128 S. Ct. at 2664 (finding that the statute capitalizing the crime of child rape “in some respects gives less protection” by removing “a strong incentive for the rapist not to kill the victim”).

rate of children.<sup>190</sup> Finally, NASW claimed that the sentence would result in the need for the child to have greater participation in the trial process.<sup>191</sup> The organization maintained that such participation would subject the child to increased trauma by forcing the child to repeatedly relive the abuse.

Although NASW's brief was submitted in support of an argument before the Supreme Court, and not to a state legislature, it demonstrates the significant efforts of an interest group that is willing to incur the costs of opposing death penalty policies that it disfavors. In addition, the NASW's link to other lobbying activity shows that the group is politically active in influencing legislation long before it ever reaches the Supreme Court.

NASW holds a fund that "[p]rovides financial legal assistance and support for legal cases and issues of concern to NASW members and the social work profession."<sup>192</sup> In addition, the Massachusetts chapter provides information regarding its lobbying efforts on a website.<sup>193</sup> This information indicates that the chapter is active in testifying at legislative hearings over bills for which the organization has an interest. For example, the website states that "NASW testifies at the state house in favor of our prioritized legislation and encourages members to come to hearings when appropriate. One such hearing was on July 14, 2005 opposing restoration of the death penalty in Massachusetts."<sup>194</sup> Moreover, the organization regularly organizes local district meetings between lawmakers and its member social workers. Such organization demonstrates that NASW has an active role in legislative developments and is a quintessential illustration of the advantage in political pressure that special interest groups hold over the unorganized majority.

#### IV. CONCLUSION

Excessive punishments are unconstitutional under the Eighth Amendment. Whether a punishment is excessive depends strongly on whether it comports with the "evolving standards of decency that mark the progress of a maturing society." The United States Supreme Court claims that state legislation is the best indicator of what society's current standards of decency are. Consequently, whether a punishment is unconstitutional under the Eighth Amendment relies heavily on the existence of state legislation. Nevertheless, state legislation has been proven to be a poor

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<sup>190</sup> Brief for the Petitioner, *supra* note 177, at 13.

<sup>191</sup> *Id.* at 17; *Kennedy*, 128 S. Ct. at 2645, 2662 (finding that statutes capitalizing the crime of child rape would "require a long-term commitment" by the victim who will have to repeatedly testify and, therefore, relive "the brutality of her experience").

<sup>192</sup> National Association of Social Workers, Legal Defense Fund, <http://www.socialworkers.org/ldf/default.asp> (last visited May 11, 2010).

<sup>193</sup> NASW Massachusetts, Social Policy/Legislation, <http://old.naswma.org/social/default.asp> (last visited May 11, 2010).

<sup>194</sup> *Id.*

gauge of contemporary views on the death penalty. Voter turnout statistics indicate that only half of any given state’s registered voters appear at the polls to elect the representatives responsible for enacting new laws. In addition, the fact that potential death penalty legislation confers only widely distributed benefits among the public results in a lack of incentive for individual citizens to absorb the costs associated with the formal organization usually required to communicate political preferences to elected officials.

These inefficiencies result in the possibility that a multitude of jurisdictions lack legislation addressing the death penalty that accurately reflects the standards of a majority of their citizens. This defect can have a strong impact on an “evolving standards of decency” analysis and renders the Supreme Court’s best objective indicator a poor one. This calls for a reconsideration of the manner in which the Court evaluates punishments under the Eighth Amendment. State legislation should be stripped of the special significance attributed to it under the current analysis and should receive no more consideration than the remaining objective indicators.<sup>195</sup>

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<sup>195</sup> The remaining objective indicators are jury behavior, public opinion polls, international treatment, and official positions held by private organizations. *Aarons*, *supra* note 12, at 445; *Atkins v. Virginia*, 536 U.S. 304, 325 (2002).

## APPENDIX A

State	2006	2004
Ohio <sup>196</sup>	56.04	71.77
Indiana <sup>197</sup>	40	58
Iowa <sup>198</sup>	52.71	72
Texas <sup>199</sup>	33.64	56.57
Arizona <sup>200</sup>	60.47	77.1
Washington <sup>201</sup>	64.55	82.19
Montana <sup>202</sup>	63.3	71.4
Colorado <sup>203</sup>	62.59	89.33
Connecticut* (2002) <sup>204</sup>	56.5	78.65
Vermont <sup>205</sup>	53.8	64.6
New Jersey <sup>206</sup>	48	73
Alabama <sup>207</sup>	50.6	73
Georgia <sup>208</sup>	48	77
<b>average turnout</b>	<b>53.09%</b>	<b>72.66%</b>

<sup>196</sup> OHIO SEC'Y OF STATE, ELECTIONS & BALLOT ISSUES, VOTER TURNOUT: NOV. 7, 2006, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2006ElectionsResults/06-1107turnout.aspx>; OHIO SEC'Y OF STATE, ELECTIONS & BALLOT ISSUES, VOTER TURNOUT NOVEMBER 2, 2004, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2004ElectionsResults/04-1102VoterTurnout.aspx>.

<sup>197</sup> IND. ELECTION DIV., GENERAL ELECTION TURNOUT AND REGISTRATION (2006), at 2, [http://www.in.gov/sos/elections/voters/2006\\_General\\_Turnout\\_and\\_Registration.pdf](http://www.in.gov/sos/elections/voters/2006_General_Turnout_and_Registration.pdf); IND. ELECTION DIV., GENERAL ELECTION TURNOUT AND REGISTRATION (2004), at 2, <http://www.ai.org/sos/elections/2004%20Municipal%20Registration%20and%20Turnout.pdf>.

<sup>198</sup> IOWA SEC'Y OF STATE, REPORT OF VOTERS REGISTERED AND VOTING: 2006 GENERAL ELECTION, at 2, <http://www.sos.state.ia.us/pdfs/2006Statewidestats.pdf>; IOWA SEC'Y OF STATE, GENERAL ELECTION TURNOUT RESULTS: NOV. 2, 2004, <http://www.sos.state.ia.us/pdfs/elections/2004/general/TurnoutStatistics.pdf>.

<sup>199</sup> TEX. SEC'Y OF STATE, TURNOUT AND VOTER REGISTRATION FIGURES (1970-CURRENT), <http://www.sos.state.tx.us/elections/historical/70-92.shtml>.

<sup>200</sup> ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS: 2006 GENERAL ELECTION - NOVEMBER 7, 2006, at 1, <http://www.azsos.gov/election/2006/General/Canvass2006GE.pdf>; ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS: 2004 GENERAL ELECTION - NOVEMBER 2, 2004, at 1, <http://www.azsos.gov/election/2004/General/Canvass2004General.pdf>.

<sup>201</sup> WASH. SEC'Y OF STATE, 2006 GENERAL ELECTION RESULTS, <http://www.vote.wa.gov/Elections/General/Turnout.aspx>; WASH. SEC'Y OF STATE, ELECTIONS (2004), <http://www.vote.wa.gov/Elections/Results/Turnout.aspx?e=a3501711-c318-45f4-8a03-1d926ac839b7>.

<sup>202</sup> MONT. SEC'Y OF STATE, MONTANA VOTER TURNOUT, [http://sos.mt.gov/Elections/Voter\\_Turnout/index.asp](http://sos.mt.gov/Elections/Voter_Turnout/index.asp) (last visited May 23, 2010).

<sup>203</sup> COLO. SEC'Y OF STATE, ELECTIONS CENTER, PRIOR YEARS ELECTION INFORMATION, <http://www.elections.colorado.gov/DDefault.aspx?tid=398&vmid=67> (last visited May 23, 2010).

<sup>204</sup> OFFICE OF THE SEC'Y OF STATE, STATEWIDE TURNOUT AT CONNECTICUT STATE AND MUNICIPAL ELECTIONS 1988-PRESENT, [http://www.sots.ct.gov/sots/lib/sots/ElectionServices/ElectionResults/1998\\_ElectionResults/TurnoutGenElec1988on.htm](http://www.sots.ct.gov/sots/lib/sots/ElectionServices/ElectionResults/1998_ElectionResults/TurnoutGenElec1988on.htm) (2002 was the last year data was available for a non-presidential election).

<sup>205</sup> VT. SEC'Y OF STATE, VERMONT VOTER REGISTRATION, TURNOUT AND ABSENTEE VOTER STATISTICS: 1974 TO 2008, <http://vermont-elections.org/elections/1974to2008RegPop.html>.

<sup>206</sup> Total Number of Registered Voters, Ballots Cast, Ballots Rejected, Percentage of Ballots Cast and the Total Number of Election Districts in New Jersey; General Election, November 7, 2006, <http://www.state.nj.us/state/elections/2006results/06generalelection/2006-general-election-chart.pdf>.

<sup>207</sup> ALA. SEC'Y OF STATE, PRIMARY/PRIMARY RUN-OFF/GENERAL ELECTION STATISTICS - STATE OF ALABAMA (2009), at 5, <http://www.sos.state.al.us/downloads/election/general/turnout.pdf>.

<sup>208</sup> GA. SEC'Y OF STATE, VOTER REGISTRATION SYSTEM, ACTIVE VOTERS BY RACE/GENDER, GENERAL ELECTION VOTING HISTORY (2007), at 12, [http://sos.georgia.gov/elections/voter\\_registration/02-11-07\\_Race-gender.pdf](http://sos.georgia.gov/elections/voter_registration/02-11-07_Race-gender.pdf); GA. SEC'Y OF STATE, VOTER REGISTRATION SYSTEM, ACTIVE VOTERS BY RACE/GENDER, GENERAL ELECTION VOTING HISTORY, at 12 (2005), [http://sos.georgia.gov/elections/voter\\_registration/CFV2004-11-02.pdf](http://sos.georgia.gov/elections/voter_registration/CFV2004-11-02.pdf).



<b>State</b>	<b>Registered Voters (2006)</b>	<b>Number Turnout (2006)</b>
Ohio	7,860,052	4,185,597
Indiana	4,295,687	1,719,351
Iowa	1,981,464	1,044,459
Texas	13,074,279	4,399,068
Arizona	2,568,401	1,533,032
Washington	3,264,511	2,107,370
Montana	649,436	411,061
Colorado	2,533,919	1,586,105
Connecticut* (2002)	1,847,247	1,043,792
Vermont	433,576	262,568
New Jersey	4,848,956	2,315,643
Alabama	2,469,807	1,250,401
Georgia	4,408,840	2,134,908
<b>Total</b>	<b>50,236,175</b>	<b>23,993,355</b>

**Actual Turnout****47.76%**

