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NOTES

LEGISLATIVE DEFERENCE IN EIGHTH AMENDMENT CAPITAL SENTENCING CHALLENGES: THE CONSTITUTIONAL INADEQUACY OF THE CURRENT JUDICIAL APPROACH

“It is emphatically the province and duty of the judicial department to say what the law is.”¹ When the *Marbury* Court first enunciated this fundamental principle, no one could know the full significance of such a statement. From that moment on, the Supreme Court took upon itself the awesome responsibility of deciding for the entire nation what the Constitution requires.² This, of course, does not mean that Constitutional doctrine is fixed forever each time the Court decides an issue. This means, rather, that the Court alone is entrusted with the duty to construe Constitutional provisions when faced with challenges to the laws and decisions of the legislative and executive branches of the state or federal governments.³

For the most part, the Court embraces this responsibility and rules on issues in a manner consistent with its role as the final and sole arbiter of constitutional controversy. However, there is one area where the Court fails in its assigned task—Eighth Amendment capital sentencing and cruel and unusual punishment jurisprudence. Here, the Court relies on a neatly constructed, easily applied test of extreme judicial deference, such that the duty of constitutional interpretation fundamentally sits in the hands of the state legislatures.⁴ This test,

¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (deciding that the Constitution itself vested the authority to interpret constitutional questions in the Court).

² See generally David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646 (1982) (discussing the constitutional origins and importance of judicial review).

³ See generally Bruce A. Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (arguing that the federal judiciary, and specifically the Supreme Court, is the proper arbiter of constitutional doctrine because it is insulated from governmental politics and is less likely to be corrupted by the political process).

⁴ See *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (constructing a test to deal with Eighth Amendment challenges to capital punishment that requires courts to decide the constitutional merits of each case based upon a “national consensus” gleaned from a survey of state

which amounts to little more than a crude poll of state legislatures in favor of or against a particular measure, currently rules the Court's jurisprudence on issues surrounding capital punishment and general proportionality under the Eighth Amendment. The thrust of this Eighth Amendment inquiry rests on the idea that the decisions of state legislatures effectively reflect the tenor of national consensus surrounding various public issues.⁵ This Note contends that this test, while containing some merit, is an unconstitutional delegation of the Court's authority to decide constitutional issues. While the test, at least in its application, closely approximates the "rational basis" analysis used by the Court in due process, or equal protection cases, it is inappropriately applied to Eighth Amendment challenges to capital punishment. At issue in every challenge to sentences of capital punishment is the defendant's right to life. The standard for determining which rights rise to a level warranting protection beyond "rational basis" is whether "[the] right is among those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions."⁶ A defendant's right to a constitutionally sound adjudication and sentencing certainly meets this standard.⁷ The current test is inadequate because it places the power to decide what is constitutionally "cruel and unusual" in the hands of those that the Court is supposed to oversee.⁸ In doing so, it exposes the nation to a host of possible catastrophic outcomes, ranging from the application of the death penalty for mere robbery to the imposition of life sentences for first-time narcotics offenses.⁹

This Note will endeavor to expose the constitutional and philosophical inadequacy of this approach and posit in its place a simpler approach consistent with the framework of the Constitution. While Eighth Amendment analysis is not limited to capital punishment cases, challenges to the imposition of the death penalty dominate the judicial landscape in the Eighth Amendment context and provide the

legislative behavior); *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (originating the test facially applied in *Stanford*).

⁵ See *Gregg*, 428 U.S. at 179-81 (stating that the best evidence of a "national consensus" is state legislative and jury sentencing behavior).

⁶ 391 U.S. 145, 149 (1968).

⁷ See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355, 369-72 (discussing the importance of heightened protective measures in capital sentencing cases, as recognized by the Court in its decisions in *Furman v. Georgia* and *Woodson v. North Carolina*).

⁸ See *infra* Part I.

⁹ See generally *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding the imposition of a life sentence without parole for possession of cocaine, over objection that no mitigating factors, such as the lack of a prior felony record, were heard in the case).

best framework to organize this Note's critique of the Court's Eighth Amendment analysis.

I. BACKGROUND

As previously mentioned, this Note will focus on the history and evolution of Eighth Amendment judicial review, paying particular attention to the decisions of the Supreme Court in the context of challenges to the death penalty and various state capital punishment schemes.

The Eighth Amendment prohibits the imposition of "cruel and unusual punishment."¹⁰ The idea behind the prohibition originated in the British Bill of Rights of 1689 and was incorporated into the American Bill of Rights¹¹ in 1791.¹² However, the American interpretation of the clause differed slightly from the original English conception of the prohibition. The English interpreted the clause only to prohibit those punishments that inflicted a substantively greater harm than that caused by the criminal action.¹³ The American conception changes the British approach and prohibits not only those punishments considered excessive in relation to the crime committed, but "torturous or barbaric punishments" as well.¹⁴ It is within the framework of this general interpretation that the Supreme Court constructed the "proportionality" review that is the subject of this Note.¹⁵

The first step in the construction of the modern standard of review for Eighth Amendment challenges occurred, oddly enough, when the Court struck down capital punishment, as it existed in 1972, as unconstitutional. The majority opinion in *Furman v. Georgia*,¹⁶ a

¹⁰ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

¹¹ See U.S. CONST. amend. I-X.

¹² See generally Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 CAL. L. REV. 839 (1969) (discussing the history and intent of the Eighth Amendment).

¹³ See *id.* at 843 (describing the intention of the cruel and unusual punishment prohibition contained in the British Bill of Rights).

¹⁴ See Kristina E. Beard, *Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause*, 51 U. MIAMI L. REV. 445, 449-59 (1997) (discussing the origins and development of Eighth Amendment jurisprudence); Granucci, *supra* note 12, at 844-45 (same); see also *Weems v. United States*, 217 U.S. 349 (1910) (holding that the Eighth Amendment prohibited excessive and torturous punishments).

¹⁵ See *Gregg v. Georgia*, 428 U.S. 153, 169-74 (1976) (5-4 decision) (discussing the status of capital punishment throughout American legal and constitutional history).

¹⁶ 408 U.S. 238 (1972). Issuing a simple *per curiam* opinion but appending it with lengthy concurring and dissenting opinions, the Court damned capital punishment as unconstitutional because of the arbitrary and prejudicial manner in which state statutes and courts imposed the penalty. See generally *id.* For further discussion of the *Furman* decision, see generally Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995) (discussing the possible failure of historical attempts at constitutional regulations of capital punishment).

one paragraph *per curiam* opinion dissolving the thirty-nine existing capital sentencing statutes, provided nine separate commentaries on the relative constitutional merits or deficiencies of capital punishment.¹⁷ Although many opponents of the death penalty applauded the *Furman* decision and characterized it as the death of capital punishment, state and federal lawmakers quickly drafted and passed sentencing schemes to satisfy the mandate of the *Furman* court.¹⁸

Four years later, the Court revitalized capital punishment with its decision in *Gregg v. Georgia*.¹⁹ *Gregg*, and four accompanying cases decided on the same day, established that the death penalty was not *per se* unconstitutional under the Eighth Amendment.²⁰ This decision forced the Court to enumerate a methodology for evaluating and deciding Eighth Amendment challenges to capital punishment schemes, and transitively, Eighth Amendment challenges in general.²¹

The *Gregg* decision, however, did more. In addition to reinstating the validity of capital punishment, the decision articulated two distinct criteria for courts to use when evaluating Eighth Amendment challenges: evolving standards of decency and proportionality.²² The first, "evolving standards of decency,"²³ describes an inquiry into the accepted societal consensus surrounding a particular issue. This inquiry requires courts to take into account objective factors indicating support for, or opposition to, a particular statutory proposal or meas-

¹⁷ The opinions fall into three major categories. The first category reflects the idea that the death penalty is *per se* unconstitutional. The second expressly leaves open the question as to whether the death penalty is permissible under an acceptable statutory scheme. The third category states that the existing death penalty schemes did not violate the constitution. See generally *Furman*, 408 U.S. 238.

¹⁸ The Court's primary objection to state capital punishment schemes was the lack of statutory guidance to both judges and juries concerning the proper application and imposition of the sentence. See *Furman*, 408 U.S. at 253-58.

¹⁹ 428 U.S. 153 (1976) (upholding Georgia's statutory capital punishment scheme in the face of an Eighth Amendment challenge).

²⁰ See *id.* at 207; see also *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976) (upholding Florida's capital punishment statute); *Juerk v. Texas*, 428 U.S. 262, 276 (1976) (upholding Texas' capital punishment statute); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (striking down North Carolina's mandatory capital punishment scheme); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (striking down Louisiana's mandatory capital punishment scheme).

²¹ See 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, 459 (1996) (describing the evolution of the "evolving standards of decency" test applied by the Court in Eighth Amendment death penalty cases).

²² See *Gregg*, 428 U.S. at 181-87 (articulating criteria for courts to consider when deciding challenges to state sentencing statutes based upon the Eighth Amendment).

²³ The standard is drawn originally from Chief Justice Warren's opinion in *Trop v. Dulles*, where he stated that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101 (1958) (describing the necessity for a flexible and dynamic interpretation of the Eighth Amendment).

ure.²⁴ The objective factors used by the Court in *Gregg*, as well as each time the Court revisits the evolving standards of decency test, are legislative enactments and jury sentencing behavior.²⁵ These two factors, according to the *Gregg* plurality, constituted the most reliable evidence of the current status of societal opinions on legal issues.²⁶ The *Gregg* Court reasoned that interpreting legislative decisions and jury sentencing behavior would reveal the pulse of what punishments the whole nation considered "cruel and unusual."²⁷

The Court's implementation and description of this test reflects an implicit recognition of the need to have the Eighth Amendment operate as a malleable rule.²⁸ This recognition signified a departure from the idea that the Eighth Amendment should draw its meaning from a historical inquiry into what punishments were accepted at the time of ratification.²⁹ It is this portion of the *Gregg* opinion that originated the statistical analysis that prevails in more recent cases.³⁰ By placing such a high emphasis on the "objective indicia" of legislative and jury decision-making, the Court, possibly unknowingly, constructed an intellectual infrastructure wherein its independent judgment would ultimately become slave to a simple tally of state laws in favor of or against a challenged punishment. The Court looked to the aftermath of *Furman* and the response of state legislatures to illustrate that the death penalty enjoyed widespread support across the nation.³¹

²⁴ See Raeker-Jordan, *supra* note 21, at 460-62 (describing the general structure of an investigation into the evolving standards of decency described in *Gregg*).

²⁵ See *Gregg*, 428 U.S. at 179-82 (noting the most reliable objective factors that courts should consider when attempting to divine what is mandated by the evolving standards of decency test).

²⁶ See *id.* at 179-81 (discussing the best method to gauge the prevailing sentiment of the nation pertaining to the death penalty). The Court stated that:

[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Id. at 175.

²⁷ See *id.* at 179-81.

²⁸ See Raeker-Jordan *supra* note 21, at 461 (discussing the Court's calculated efforts to interpret and apply the Eighth Amendment in accordance with a "more contemporary 'meaning as public opinion becomes enlightened by a humane justice'" (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

²⁹ See *Gregg*, 428 U.S. at 176 ("We now consider specifically whether the sentence of death for the crime of murder is a *per se* violation of the Eighth and Fourteenth Amendments [H]istory and precedent strongly support a negative answer to this question.").

³⁰ See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 370-77 (1989) (implementing the statistical analysis originated in *Gregg*); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (same); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (same).

³¹ Following *Furman*, legislatures across the country drafted and passed statutes addressing the procedural problems that prompted the Court to declare the death penalty unconstitutional. In total, thirty-five states enacted capital punishment schemes. See Raeker-Jordan *supra*

The Court drew its conclusion on this issue from the willingness of state legislatures to re-draft capital sentencing schemes within the limitations and prescriptions of the *Furman* decision.³²

The second factor enumerated in *Gregg* was loosely termed "proportionality."³³ This factor seems to have combined two separate policy concerns into one analytical device. This portion of the Court's judicial inquiry recognized that the Eighth Amendment mandates that a punishment should comport with "the basic concept of human dignity,"³⁴ and must not be disproportionate to the crime.³⁵ The Court further noted that this extension of the already established "evolving standards of decency" was necessary to ensure that excessive punishment, no matter how supported in the public, remains prohibited.³⁶ Justice Stewart specifically referenced this requirement in his majority opinion in *Gregg* stating:

Judicial review, by definition, often involves a conflict between judicial and legislative judgement as to what the Constitution means or requires It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not.³⁷

Thus, the *Gregg* decision enumerated the fundamental Eighth Amendment limitations that state legislatures must adhere to in drafting and implementing their capital sentencing schemes. Although the death penalty enjoys historical support under the Eighth Amendment, the punishment must still exist within the "evolving standards of decency" and must further substantive penalogical goals proportional to the offense committed.³⁸

note 21, at 462 (opining that the legislative response to *Furman* showed a public desire for capital punishment).

³² *See id.* (discussing the basis of the *Gregg* Court's conclusion that capital punishment enjoyed widespread support across the United States).

³³ *See Gregg*, 428 U.S. at 173 ("A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment' First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the *severity* of the crime.") (emphasis added) (citations omitted).

³⁴ *Id.* at 182.

³⁵ *See id.* at 169 (discussing the Eighth Amendment's prohibition on punishments that are "disproportionate" to the offense).

³⁶ *See id.* at 168-73; *see also* Raeker-Jordan, *supra* note 21, at 467 (discussing the dual responsibility of courts in evaluating Eighth Amendment challenges to punitive statutes).

³⁷ *Gregg*, 428 U.S. at 174 (quoting *Furman v. Georgia*, 408 U.S. 238, 313-14 (1972)).

³⁸ *See Steiker & Steiker*, *supra* note 16, at 366-70 (delineating the analytical approach used in Eighth Amendment capital punishment challenges subsequent to the Court's decision in *Gregg*).

The Court's first opportunity to apply the *Gregg* test presented itself a year later in *Coker v. Georgia*.³⁹ *Coker* involved an Eighth Amendment challenge to a Georgia statute that allowed the imposition of the death penalty for the rape of an adult woman.⁴⁰ The *Coker* Court applied both prongs of the analysis enumerated in *Gregg* and determined that imposing the death penalty for the crime of rape was cruel and unusual under the Eighth Amendment.⁴¹ In reaching its decision, the Court followed the methodology of *Gregg* and looked to objective factors to inform its holding.⁴² The Court surveyed the number of states that approved the death sentence for the crime of rape and found that of the thirty-five states that re-enacted capital punishment statutes after *Furman*, only three included the maximum punishment for the rape of an adult woman.⁴³ For purposes of the *Coker* decision, no additional evidence was required to establish the "evolving standards of decency" required by *Gregg*.⁴⁴ After completing its survey of the "objective indicia" of *Gregg*, the Court proceeded to "analyze" whether the death penalty was proportional to the crime of rape, thereby implementing the second prong of *Gregg*.⁴⁵ However, the *Coker* Court failed to enumerate any substantive method for evaluating the relationship between the punishment and crime outside of its examination of the legislative behavior of the states.⁴⁶ Instead, Justice White reduced this analysis to a simple statement of the difference in severity between the crime of rape and the punishment of death.⁴⁷ Justice White's only concern was to use the "magic words" contained in *Gregg*'s proportionality analysis, and

³⁹ 433 U.S. 584 (1977). Justices Brennan, Marshall, and Powell concurred in part and dissented in part, and Justices Burger and Rehnquist dissented. See *id.* at 584.

⁴⁰ See *id.* at 587 (listing offenses punishable by death under Georgia law).

⁴¹ See *id.* at 600 (reversing the decision of the Georgia Supreme Court and invalidating the death sentence imposed on the defendant).

⁴² See *id.* at 592 ("[T]hese Eighth Amendment judgements should not be, or appear to be, merely the subjective views of individual Justices; judgement should be informed by objective factors to the maximum possible extent.").

⁴³ After *Furman*, Georgia, North Carolina and Louisiana passed statutes authorizing the death penalty for rape. See *id.* at 594. However, the statutes of the latter two were declared unconstitutional pursuant to *Woodson v. North Carolina*, 428 U.S. 280 (1976) (invalidating North Carolina's death penalty statute as a mandatory sentencing scheme) and *Roberts v. Louisiana*, 428 U.S. 325 (1976) (invalidating Louisiana's death penalty statute as a mandatory sentencing scheme). See *Coker*, 433 U.S. at 594.

⁴⁴ Although the Court did mention the applicability of jury sentencing behavior, the only substantive evidence of this factor used by the Court came from Georgia's court system. Seemingly no effort was made to investigate the behavior of juries across the nation. See *id.* at 596-97.

⁴⁵ See *id.* at 592-94.

⁴⁶ See Raeker-Jordan, *supra* note 21, at 474-76 (discussing the lack of rationale supplied by the Court in justifying their conclusions concerning proportionality).

⁴⁷ See *Coker*, 433 U.S. at 598 ("We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life.") (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)).

declare capital punishment "excessive" or disproportionate to the crime of rape.⁴⁸

Justice White's opinion failed to entice a majority of the Court, however, and the various concurring and dissenting opinions provided much of the framework for the future evolution of Eighth Amendment jurisprudence. Putting aside the opinions of Justices Brennan and Marshall, who wrote to express their belief that, despite *Gregg*, capital punishment is *per se* unconstitutional,⁴⁹ Justice Powell's concurrence and Chief Justice Burger's dissent, joined by Justice Rehnquist, are particularly important. Justice Powell wrote separately to evince his displeasure with the fact that the Court's opinion foreclosed imposing the death penalty for any rape.⁵⁰ Powell's opinion further stressed that the Court's investigation into the objective indicia proved only "that society finds the death penalty unacceptable for the crime of rape in the absence of excessive brutality or severe injury."⁵¹ In Powell's view, therefore, the plurality should have narrowed its holding to preserve as much of the state legislatures' discretion as possible.⁵² However, Powell's opinion did support the notion that the Court must, consistent with *Gregg*, employ their own conceptions of proportionality in addition to the analysis of "objective indicia."⁵³

Justices Burger and Rehnquist dissented on two separate grounds.⁵⁴ First, and similar to Justice Powell, they objected to the breadth of the plurality's holding.⁵⁵ The dissent questioned the scope of the issue addressed by the plurality and thought the Court would be better served asking whether the death penalty was unconstitutional as applied to the defendant, including his entire criminal history.⁵⁶ Sec-

⁴⁸ See *id.*

⁴⁹ See *Coker*, 433 U.S. at 600 (Brennan, J., concurring in judgment), 600-01 (Marshall, J., concurring in judgment).

⁵⁰ See *id.* at 601-04. Justice Powell believes that the plurality reaches too far into the discretion of the state legislatures by declaring capital punishment unconstitutional as applied to the crime of rape. His concurring opinion stresses that the legislatures must be allowed to determine when rape, aggravated by certain factors, and may merit the maximum sentence of death. See *id.* at 601.

⁵¹ *Id.* at 604.

⁵² See *id.* at 601.

⁵³ See *id.* at 603-04 (noting the continuing viability of the *Gregg* proportionality analysis); see also Steiker & Steiker, *supra* note 16, at 376 (discussing the continuing viability of "proportionality" review following *Coker*).

⁵⁴ See *Coker*, 433 U.S. at 604-21 (Burger, C.J. & Rehnquist, J., dissenting).

⁵⁵ See *id.* at 606-608 (discussing the failure of the plurality to allow for states to consider aggravating factors such as brutality, prior criminal record, and dangerous propensity in drafting and implementing their sentencing guidelines for rapists).

⁵⁶ See *id.* at 607 (stating that the Court should have asked whether a societal consensus exists in opposition to imposing the death penalty on a man who has, "within the space of three years, raped three separate women, killing one and attempting to kill another, who is serving

ond, Burger and Rehnquist objected to the plurality's characterization of the death penalty as disproportionate to the crime of rape.⁵⁷ The dissent also included an implicit criticism of *Gregg's* "proportionality" analysis as a whole.⁵⁸ Proportionality, as enumerated in *Gregg* and facially applied in *Coker*, requires the Court to examine, using its independent judgement, whether or not a punishment is excessive as compared to the crime committed.⁵⁹ The dissent in *Coker* seems to take issue with this methodology, especially the component that asks the Court to use its own judgement to determine proportionality:

Our task is not to give effect to our individual views on capital punishment; rather, we must determine what the Constitution permits a State to do under its reserved powers. In striking down the death penalty imposed . . . in this case, the Court has overstepped the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature.⁶⁰

This sentiment, coupled with other portions of the *Coker* plurality opinion, was the first indication that "proportionality" as defined in *Gregg* was less important as a basis for decision than the "objective" analysis of the "evolving standards of decency."⁶¹ Even the majority recognized that the "objective indicia" of *Gregg* should carry more dispositive weight than an inquiry into *Gregg's* proportionality concept.⁶² Even though this concern resided primarily with the dissenters in *Coker*, the tenor of even the controlling opinion calls into question

prison terms exceeding his probable lifetime and who has not hesitated to escape confinement at the first available opportunity").

⁵⁷ See *id.* at 619 (outlining the failure of the plurality to list or describe their reasons for their conclusion that capital punishment is "disproportionate" to rape, and the further failure to explain the constitutional necessity of such an inquiry).

⁵⁸ The dissent stated that "[t]he subjective judgment that the death penalty is simply disproportionate to the crime of rape is even more disturbing than the 'objective' analysis discussed *supra*." *Id.* Chief Justice Burger further explained his discomfort with the plurality opinion, stating that:

Rape . . . is not a crime 'light years' removed from murder in the degree of heinousness; it certainly poses a serious potential danger to the life and safety of innocent victims — apart from the devastating psychic consequences. It would seem to follow therefore that, affording the States proper leeway under the broad standard of the Eighth Amendment, if murder is properly punishable by death, rape should be also, if that is the considered judgment of the legislators.

Id. at 620-21.

⁵⁹ See *supra* notes 33-38 and accompanying text (discussing the meaning of "proportionality" review as created in *Gregg v. Georgia*).

⁶⁰ *Coker*, 433 U.S. at 604.

⁶¹ See *id.* at 592 (stating that the analysis of objective indicia ought to inform the judgment of the Court to the "maximum possible extent").

⁶² See *id.* ("Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by [the *Gregg*] objective factors to the maximum possible extent.").

how much support existed for *Gregg's* call for proportionality.⁶³ However, for the immediate future following *Coker*, "proportionality" analysis still enjoyed the support of the majority of the Court.⁶⁴

Another Eighth Amendment challenge to the imposition of the death penalty soon presented itself to the Court in *Enmund v. Florida*.⁶⁵ In *Enmund*, a 5-4 decision of the Court overturned Florida's capital punishment scheme as unconstitutional because it authorized the maximum sentence for a simple accomplice to a felony-murder.⁶⁶ The plurality was separated on much the same intellectual lines as in *Coker*, with some Justices taking the position that capital punishment is *per se* unconstitutional, and others taking the position that the Court's decision was too broad an imposition into the discretion of the states.⁶⁷ *Enmund*, however, evinces a shift that strengthened the position enunciated in Chief Justice Burger's dissent in *Coker*.⁶⁸ The dissent's argument ran the same general course as Chief Justice Burger's opinion in *Coker*, with only a few subtle differences. The dissenters in *Enmund* agreed with the plurality's investigation into the "evolving standards of decency"⁶⁹ as set forth in *Gregg*, but wanted a more narrow "proportionality" analysis to include only the specific circumstances surrounding the offenses of each individual defendant.⁷⁰ This is an intellectual shift from the *Coker* decision where the majority interpreted "proportionality" broadly and invalidated any

⁶³ See *id.* at 597 ("These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment. Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment.").

⁶⁴ See Raker-Jordan, *supra* note 21, at 475-76.

⁶⁵ 458 U.S. 782 (1982).

⁶⁶ See *id.* at 801 (reversing the decision of the Florida Supreme Court and vacating the death sentence imposed on the defendant, Earl Enmund). In *Enmund*, the defendant drove the getaway vehicle while his partners committed a robbery and a murder. See *id.* at 784.

⁶⁷ Justice White, writing the majority opinion, for example, held that the imposition of the death penalty for an accomplice to felony murder is unconstitutional. See *id.* at 801. Justice O'Connor dissented, arguing that the "proportionality" review conducted by the majority was overly broad. See *id.* at 812-31.

⁶⁸ The opinion in *Enmund*, authored by Justice White, attracted three supporters on the Court, see *id.* at 783, with the abolitionist Justice Brennan concurring in the result. See *id.* at 801. However, unlike *Coker* where only Chief Justice Burger and Justice Rehnquist dissented, see *Coker v. Georgia*, 433 U.S. 584, 604 (1977), Justices O'Connor, Powell, Rehnquist, and Chief Justice Burger dissented in *Enmund*. See *Enmund*, 458 U.S. at 801.

⁶⁹ *Id.* at 823. It should be noted that the dissent conducted a similar investigation into the evolving standards of decency and resolved that the national consensus *supported* rather than opposed the imposition of the death sentence in this case. See *id.* at 816-23.

⁷⁰ See *id.* at 815 ("[B]ecause [the magnitude of punishment] turn[s] on considerations unique to each defendant's case, these latter factors underlying the concept of proportionality are reflected in this Court's conclusion . . . that 'individualized consideration [is] a constitutional requirement in imposing the death sentence.'" (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978))).

statutory imposition of the death penalty for the crime of rape.⁷¹ Thus, the holding of *Enmund* complicated the previously simple methodology for judicially evaluating Eighth Amendment challenges to the death penalty.⁷² There was no longer a majority of the Court supporting the two-pronged method espoused in *Gregg*, and the Court was split 4-4 on the correct interpretation of *Gregg's* 'proportionality' inquiry, with Justice Brennan still staunchly opposing the death penalty as unconstitutional.⁷³ Four Justices now supported the idea that *Gregg's* "evolving standards of decency" test, with its attendant statistical analysis of objective indicia, should control Eighth Amendment challenges, and that only a very narrow proportionality analysis should be included.⁷⁴

The next opportunity for the Court to re-visit this controversy occurred five years later in *Tison v. Arizona*.⁷⁵ The decision in this case modified *Enmund* to allow the death penalty for felony-murderers who participated in a crime evincing a disregard for human life.⁷⁶ Justice O'Connor's majority opinion did not expressly use the proportionality test enunciated in *Gregg*; instead, the opinion constructed a two-pronged proportionality test.⁷⁷ Under the first prong, Justice O'Connor examined how many states viewed the death pen-

⁷¹ The broad definition of proportionality was the primary motivation for the concurring opinion of Justice Powell, as well as one of the objections raised by the dissenting opinion of Chief Justice Burger and Justice Rehnquist. See *Coker*, 433 U.S. 584, 600-04 (Powell, J., concurring), 615-22 (Burger, C.J., dissenting); see also Steiker & Steiker, *supra* note 16, at 375-77 (discussing the evolution of Eighth Amendment proportionality analysis in capital punishment cases).

⁷² It may be worthwhile to state that although the decision in *Enmund* was a plurality, the distribution of the Justices in the plurality and concurring opinions suggests that the strength of the *Gregg* standard was in danger, with two additional Justices agreeing with the dissenting opinion offered by Justice Burger in *Coker*. See *Coker*, 433 U.S. at 604; *Enmund* 458 U.S. at 801.

⁷³ See generally *Enmund v. Florida*, 458 U.S. 782 (1982). Interestingly, Justice Marshall joined in Justice White's plurality opinion in *Enmund* despite his previously abolitionist position. See *id.* at 782. Justice Marshall's history of *per se* opposition to capital punishment might further weaken the strength of the plurality position in *Enmund* because only three Justices actually supported the constitutionality of capital punishment under the specific facts of the case. See *id.* For evidence of Justice Marshall's position concerning the death penalty, see generally his dissenting opinion in *Gregg v. Georgia*, 428 U.S. 153, 231 (1972) and his concurring opinion in *Coker v. Georgia*, 433 U.S. 584, 600 (1977).

⁷⁴ See *Enmund*, 458 U.S. at 801-31 (O'Connor, J., Powell, J., Rehnquist, J., & Burger, C.J., dissenting). The other four justices, including the previously abolitionist Justice Marshall, agreed that the proportionality review from *Gregg* could be used as a tool to broadly invalidate punishments in situations like *Enmund* and *Coker*. See *id.* at 782-801.

⁷⁵ 481 U.S. 137 (1987).

⁷⁶ See *id.* at 158; see also Raeker-Jordan, *supra* note 21, at 479 (discussing the effect that the *Tison* decision had on the rule of *Enmund*).

⁷⁷ See Raeker-Jordan, *supra* note 21, at 479-80 (describing the judicial test used in Justice O'Connor's opinion in *Tison*).

ality as proportional to the crimes of the defendants.⁷⁸ This prong seemingly inculcated an element of the *Gregg* "evolving standards of decency" test, yet Justice O'Connor couched her opinion in terms of "proportionality."⁷⁹ Noting that a majority of states supported the death sentence for participants in felony murders, the majority concluded that there was no national consensus that the death penalty in this instance was disproportionate.⁸⁰ The only difference in analysis between *Tison* and *Gregg* with respect to the evolving standards of decency is that in *Tison*, the Court did not examine the behavior of sentencing juries to discern a consensus.⁸¹ The opinion then went on to its second analytical prong, asking whether the mental state of the defendant should have any bearing on the proportionality of the sentence imposed.⁸² Here, the Court noted the historical support for the assertion that the mental state of a criminal is nearly as important as his actions.⁸³ The opinion went on to state that because the legislative evidence suggested that the punishment was proportional, and because there was widespread support for including the degree of mental culpability in criminal sentencing decisions, capital punishment was constitutional in this instance.⁸⁴

The *Tison* opinion, therefore, fundamentally altered the Eighth Amendment analysis from *Gregg* and *Coker*. Following the *Tison* decision, it is unclear what factors a court should consider when weighing an Eighth Amendment challenge. As previously mentioned, *Gregg* required an inquiry into legislative and jury sentencing

⁷⁸ See *Tison*, 481 U.S. at 152-55 (discussing the special relevance of the decisions of state legislatures in determining the proportionality of the death sentence to a particular crime).

⁷⁹ See *id.*; see also Raeker-Jordan, *supra* note 21, at n.215 (discussing Justice O'Connor's opinion in *Tison v. Arizona* as combining elements of an objective inquiry with proportionality analysis).

⁸⁰ See *Tison*, 481 U.S. at 154 ("This substantial and recent legislative authorization of the death penalty for the crime of felony murder regardless of the absence of a finding of an intent to kill powerfully suggests that our society does not reject the death penalty as grossly excessive under these circumstances.") (citations omitted).

⁸¹ This fact is clearly evidenced by a quick comparison between the description of the "evolving standards of decency" in *Gregg*, and Justice O'Connor's construction in *Tison*. Compare *Gregg v. Georgia*, 428 U.S. 153 (1976) (creating the evolving standards of decency analysis) with *Tison*, 481 U.S. 137 (implementing a modified evolving standard of decency test).

⁸² See *Tison*, 481 U.S. at 156 (describing the relevance of the mental state of the defendant when determining the level of punishment merited by his or her criminal actions).

⁸³ See *id.* ("A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.")

⁸⁴ See *id.* at 158 (remanding the case for further hearings consistent with the notion that the Constitution did not bar the imposition of the death penalty for felony murders absent a finding of an intent to kill); see also Raeker-Jordan, *supra* note 21, at 479-80 (noting *Tison's* consideration of the importance of a defendant's mental state in determining culpability, and its finding that reckless indifference to human life can satisfy the culpability requirement for proportionality and render constitutional the imposition of the death penalty).

behavior.⁸⁵ *Tison*, although using the same basic approach, failed to include any evidence of jury sentencing behavior in its investigation of the "evolving standards of decency."⁸⁶ Further, in *Tison*, the independent 'proportionality' review became more similar to the consensus building of the evolving standards of decency, as the Court based its decision concerning *mens rea* as an aggravating factor⁸⁷ almost exclusively on the notion that the entire nation accepts this judicial strategy as legitimate.⁸⁸ Taken as a whole, the changes emanating from *Tison* presage the controversy that would soon confront the Court in *Thompson v. Oklahoma*.⁸⁹

A little more than a year after *Tison*, the Court again confronted the issue of an Eighth Amendment challenge to the death penalty, and moved Eighth Amendment jurisprudence even farther away from the *Gregg* Court's original analytical instruction.⁹⁰ *Thompson v. Oklahoma* involved a challenge to an Oklahoma statute that authorized the imposition of the death penalty on a fifteen-year-old defendant.⁹¹ In 4-1-3⁹² decision, the Court reversed the imposition of the death penalty, concluding that "it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense."⁹³ The plurality based this conclusion on an exhaustive survey of state statutes including not only death penalty statutes,

⁸⁵ See *supra* notes 30-32 and accompanying text (discussing the evolving standards of decency" test created in the *Gregg* decision).

⁸⁶ See Raeker-Jordan, *supra* note 21, at 479 (discussing the factors employed by the Court in the decision in *Tison*).

⁸⁷ Aggravating factors are defined as the circumstances surrounding the commission of a crime that make the crime more deserving of punishment. In the context of capital sentencing, the Court requires that states include these factors in their sentencing statutes to distinguish between murderers who are eligible for the death penalty and those that are not. See Steiker & Steiker, *supra* note 16, at 372-74 (discussing the Court's attempt to require state legislatures to narrowly define the class of offenders subject to the death penalty by enumerating specific aggravating circumstances that elevate a crime to a capital offense); see also *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (holding that the class of those convicted for murder who are eligible for the death penalty must be narrowed by state legislatures, either by narrowly defining capital offenses or by allowing the jury to account for findings of aggravated circumstances at the penalty phase).

⁸⁸ See *Tison*, 481 U.S. at 156 (describing the historical support for the proposition that criminals should receive punishments commensurate not only with their actions, but with their intentions as well).

⁸⁹ 487 U.S. 815 (1988).

⁹⁰ See Raeker-Jordan, *supra* note 21, at 546-51 (discussing the effects of the Court's most recent decisions in cases challenging capital punishment under the Eighth Amendment).

⁹¹ See *Thompson*, 487 U.S. at 818-19 (stating that the question before the Court was whether the Eighth Amendment would bar the imposition of the death sentence on a 15-year-old boy as cruel and unusual).

⁹² Justice Stevens wrote for the plurality, joined by Justices Marshall, Brennan and, and Blackmun. Justice O'Connor concurred in the judgment. Justices Rehnquist and White joined the dissenting opinion of Justice. Justice Kennedy took no part in the decision of the case. See *id.* at 815.

⁹³ *Thompson*, 487 U.S. at 830.

but also gambling, pornography and tort laws, all of which revealed that there was little, if any, support for the proposition that fifteen-year-olds should be sentenced as adults.⁹⁴ The plurality also considered the sentencing behavior of juries and conducted an individual review of the proportionality of executing a fifteen-year-old, returning for the time being to the initial framework established in *Gregg*.⁹⁵ Justice O'Connor concurred in the result, but disagreed with the broad scope of the plurality opinion, and preferred a more balanced approach between the plurality and dissent.⁹⁶ Justice O'Connor also disputed that a consensus existed against executing fifteen-year-old defendants, and instead preferred that the Court allow state legislatures to determine minimum age limits for adult sentencing treatment.⁹⁷

The dissent in *Thompson* represents the first explicit statement in support of dismissing the 'proportionality' prong of *Gregg* and instead relying exclusively on the surveys of state legislatures involved in the 'evolving standards of decency' prong of the *Gregg* opinion.⁹⁸ Justice Scalia's dissent, joined by Chief Justice Rehnquist and Justice White, represents the first clear enunciation of the test that currently controls the Court in Eighth Amendment cases:

It is assuredly "for us ultimately to judge" what the Eighth Amendment permits, but that means it is for us to judge whether certain punishments are forbidden because . . . they come within current understanding of what is "cruel and unusual," because of the "evolving standards of decency" of our national society; but not because they are out of accord with the perceptions of decency, or of penology, or of mercy, entertained -- or strongly entertained, or even held as an "abiding conviction"-- by a majority of the small and unrepresentative segment of our society that sits on this Court.⁹⁹

Interestingly, Justice O'Connor's concurrence in *Thompson* seems more in line with the reasoning of the dissent than the plurality. Jus-

⁹⁴ See *id.* at 823-830 nn.10-30 (referencing the laws of nearly all fifty states that treat individuals under the age of sixteen as children for all legal purposes, including criminal sentencing) & apps. A-F (listing the state statutes referenced in the Court's opinion).

⁹⁵ See *id.* at 833-34 (determining that the youth of the defendant was "more than a chronological fact" and acted as a "special mitigating force").

⁹⁶ See *id.* at 848 (discussing the need for a balanced approach between deference to state legislatures and an independent judicial analysis of particular punishments).

⁹⁷ See *id.* at 858-59 ("[T]he approach I take allows the ultimate moral issue at stake in the constitutional question to be addressed in the first instance by those best suited to do so, the people's elected representatives.").

⁹⁸ See Raeker-Jordan, *supra* note 21, at 484-88 (discussing the meaning of Justice Scalia's dissent in *Thompson*).

⁹⁹ *Thompson*, 487 U.S. at 873 (Scalia, J., dissenting) (emphasis in original).

tice O'Connor concurs in the result of the plurality, but spends much of her time discussing her preference for allowing the legislative judgements of the various states to determine the appropriate minimum age for the imposition of the death penalty.¹⁰⁰ Thus, after *Thompson*, it seems that the conflict on the Court over the continued viability of *Gregg's* 'evolving standards' and 'proportionality' analyses has shifted to a 4-4 tie, with the opinion of Justice Kennedy uncertain. On one hand are the supporters of the *Gregg* method,¹⁰¹ involving a two-tiered inquiry into national consensus and proportionality, and on the other, the newly entrenched supporters of Scalia's position in *Thompson*.¹⁰²

The next, and perhaps most significant, case in the evolution of Eighth Amendment jurisprudence is *Stanford v. Kentucky*.¹⁰³ A case factually similar to *Thompson*, *Stanford* presented the question whether the Eighth Amendment permits the imposition of death penalty on a defendant either sixteen or seventeen-years old.¹⁰⁴ Yet again, a 4-4-1 plurality¹⁰⁵ decided the issue, with Justice Scalia writing for the plurality. Scalia's opinion began by reaffirming the belief that the only relevant factors in determining whether the Eighth Amendment bars a particular punishment are the legislative enactments of state legislatures.¹⁰⁶ The opinion goes on to directly address the proportionality review that it dismisses. "[S]everal of our cases have engaged in so-called 'proportionality' analysis . . . [but] we have never invalidated a punishment on this basis alone. All of our cases condemning a punishment under this mode of analysis also found that

¹⁰⁰ See *id.* at 874 (O'Connor, J., concurring) ("I would not substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation's legislatures.").

¹⁰¹ These Justices support the inclusion of both the "evolving standards of decency" and the independent "proportionality" review. See *supra* notes 22-39 and accompanying text (discussing *Gregg's* "evolving standards of decency" and "proportionality" tests).

¹⁰² See *Thompson*, 487 U.S. at 854 (Scalia, J., dissenting) (stating that the only factor the Court ought to consider when evaluating an Eighth Amendment challenge is the behavior and judgment of the state legislatures concerning a given situation).

¹⁰³ 492 U.S. 361 (1989).

¹⁰⁴ See *id.* at 364-65 (questioning whether the Eighth Amendment prohibited capital punishment for a defendant over the age of fifteen, but under the age of eighteen). The defendant in *Stanford* was sentenced for a crime he committed when he was sixteen-years-old. *Id.*

¹⁰⁵ Chief Justice Rehnquist and Justices White and Kennedy joined Justice Scalia's opinion. Justice O'Connor concurred in the decision. Justice Brennan wrote a dissenting opinion in which Justices Marshall, Blackmun and Stevens joined. See *id.* at 361.

¹⁰⁶ See *id.* at 362 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)) ("In determining whether a punishment violates evolving standards of decency, this Court looks not to its own subjective conceptions, but, rather, to the conceptions of modern American society as reflected by objective evidence. The primary and most reliable evidence of national consensus [is] the pattern of federal and state laws . . .").

the objective indicators of state laws or jury determinations evidenced a societal consensus against that penalty."¹⁰⁷

The *Stanford* decision, especially Justice Scalia's plurality opinion, epitomizes the jurisprudential shift from the use of *Gregg's* two-pronged Eighth Amendment test, which included a proportionality inquiry, to the almost entirely deferential test currently in place for Eighth Amendment capital punishment cases.¹⁰⁸ In *Stanford*, four members of the Court specifically agreed that the only appropriate measure of Eighth Amendment sufficiency was a "national consensus" as evidenced by the legislative decisions of the various state legislatures.¹⁰⁹ The plurality examined the statutory records of the 37 states authorizing capital punishment, and determined that because no majority existed opposing the death sentence for defendants aged 16 or 17, the punishment applied in Kentucky was constitutional.¹¹⁰ Justice Scalia's opinion cited no additional basis for its decision beyond references to the "national consensus" established through the behavior of state legislatures.¹¹¹

The decision in *Stanford* would seem to serve notice of a subtle shift in the Court's treatment of Eighth Amendment challenges. Before *Stanford*, in cases like *Enmund*, *Tison*, and *Thompson*, the Court supported using the two-pronged *Gregg* analysis in some form or another.¹¹² Following *Stanford*, however, it is clear that the tenor of the Court¹¹³ turned toward affording total deference to the "national consensus" drawn from state legislatures when determining the constitutionality of a particular punishment under the Eighth Amendment.¹¹⁴ The only thing that kept *Stanford* from entirely destroying any reliance on *Gregg's* "proportionality" analysis was the concurring opin-

¹⁰⁷ *Id.* at 379 (citations omitted). Justice Brennan argues in his dissent that by failing to examine the legislative opinions of states that do not permit capital punishment, the plurality failed to include all of the states that would not authorize the death penalty for defendants in *Stanford*. *See id.* at 384-85. Justice Scalia answers this criticism in a footnote to his own opinion arguing that including anti-death penalty states would be necessary if the question concerned the penalty as a whole, but not where the inquiry is specific to the age of the defendant to be executed. *See id.* at 370 n.2 ("The dissent's position is rather like discerning a national consensus that wagering on cockfights is inhumane by counting within that consensus those States that bar all wagering.").

¹⁰⁸ *See* Raeker-Jordan, *supra* note 21, at 546-50 (discussing the analytical impact of the *Stanford* decision on future Eighth Amendment capital punishment jurisprudence).

¹⁰⁹ *See Stanford*, 492 U.S. at 362.

¹¹⁰ *See id.*

¹¹¹ *See id.* at 373.

¹¹² *See supra* notes 65-73 (discussing the *Enmund* decision), 71-84 (discussing the *Tison* decision), 85-97 (discussing the *Thompson* decision) and accompanying text.

¹¹³ It should be noted that at the time of *Stanford*, only four Justices specifically endorsed an entirely deferential standard to state legislative enactments in Eighth Amendment cases.

¹¹⁴ *See* Raeker-Jordan, *supra* note 21, at 491 (noting the inappropriateness, following *Stanford*, of relying on anything other than the words of the Constitution and the current national consensus in determining a punishment's constitutionality).

ion of Justice O'Connor; Justice O'Connor's support of the plurality's conclusion in *Stanford* was tempered by her rejection of Justice Scalia's criticism of the usefulness of 'proportionality' review.¹¹⁵ Justice O'Connor explicitly confirmed her continued belief in the propriety of the use of an independent proportionality analysis, in accordance with *Gregg*.¹¹⁶

However, on the same day that it decided *Stanford*, the Court also handed down its decision in *Penry v. Lynaugh*,¹¹⁷ further sounding the death knell of *Gregg's* proportionality review. *Penry* presented the Court with the question whether the Eighth Amendment forbade the execution of mentally retarded defendants.¹¹⁸ Justice O'Connor, fresh from her staunch defense of proportionality review in *Stanford*, authored the opinion in *Penry*, wherein she retreated from her allegiance to an independent proportionality review and instead conducted a proportionality review buttressed exclusively by evidence of juries and legislatures.¹¹⁹ The survey of legislatures, juries, and also the findings of the American Association of Mental Retardation led her to conclude that no consensus existed to suggest that execution of mentally retarded defendants was cruel and unusual.¹²⁰ Despite her opinion in *Stanford*, Justice O'Connor's *Penry* opinion never mentions an independent review in accordance with *Gregg*, an omission that Justice O'Connor never attempts to explain.¹²¹ This opinion, combining the 'proportionality' analysis from *Gregg* with the statistical analysis of societal consensus from *Stanford*, fits squarely within Justice Scalia's assertion in *Stanford* that 'proportionality' analysis fundamentally rests on the opinions of the nation.¹²² The decision also provided an additional platform for Justice Scalia to assert that the Court's job was only to give effect to the

¹¹⁵ See *Stanford*, 492 U.S. at 381-82 (discussing Justice O'Connor's disagreement with the plurality concerning proportionality review).

¹¹⁶ See *id.* at 382 ("I reject the suggestion that the use of [proportionality] analysis is improper as a matter of Eighth Amendment jurisprudence.").

¹¹⁷ 492 U.S. 302 (1989) (holding that the Eighth Amendment does not bar the execution of mentally retarded defendants).

¹¹⁸ See *id.* at 307.

¹¹⁹ See *id.* at 335 ("Relying largely on objective evidence such as the judgments of legislatures and juries, we have also considered whether application of the death penalty to particular . . . classes of offenders violates the Eighth Amendment . . .").

¹²⁰ See *id.* at 338-40 (discussing the lack of any consistent precedent, either judicial or legislative, to suggest a societal sentiment that executing mentally retarded defendants was against the "evolving standards of decency that mark the progress of a maturing society") (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1957)).

¹²¹ See generally *Lynaugh*, 492 U.S. 302 (1989) (O'Connor, J.).

¹²² As Justice Scalia explained, "[i]n fact, the two methodologies blend into one another, since 'proportionality' analysis itself can only be conducted on the basis of the standards set by our own society; the only alternative, once again, would be our personal preferences." *Stanford*, 492 U.S. at 380.

societal consensus as evidenced by state legislatures and jury determinations.¹²³ Taken together, the opinions in *Stanford* and *Penry* describe the final stop in the evolution of the judicial test applied to Eighth Amendment challenges to capital sentencing, and effectively spell the death of *Gregg* proportionality review.¹²⁴

The balance of this note will endeavor to expose the dangerous result of the foregoing history. The decisions in *Stanford* and *Penry* solidified the strength of Scalia's position, identifying an analysis of *Gregg's* objective indicia as the dispositive factor in determining the constitutionality of a particular punishment. This position, also supported by Justices Kennedy and Thomas and by Chief Justice Rehnquist, completely ignores the importance of any independent judicial determination of *Gregg's* proportionality requirement. Given Justice O'Connor's concurrence in *Stanford* and her opinion in *Penry*, not to mention the loss of Justices Brennan, Marshall and Blackmun, there may be a majority of the Court willing to dispense with *Gregg's* proportionality requirement altogether.

¹²³ See *Penry*, 492 U.S. at 351 (Scalia, J., concurring in part and dissenting in part) ("The punishment is either 'cruel and unusual' . . . or it is not.' If it is not unusual, that is, if an objective examination of laws and jury determinations fails to demonstrate society's disapproval of it, the punishment is not unconstitutional . . . ") (quoting *Stanford*, 492 U.S. at 378-79).

¹²⁴ Subsequent cases have addressed some of the issues involved in the foregoing history. For an interesting perspective on the current tenor of the Court, see generally W. Lindman, Comment, "Cruel and Unusual" Checks and Balances: The Supreme Court Writes a Rubber Check, 30 DUQ. L. REV. 937 (1992) (detailing the Court's treatment of a procedural challenge to Pennsylvania's capital sentencing scheme in 1990, and criticizing the standard used by the Court). This author argues that:

Furthermore, attempts by the Court to discern popular opinion [through the polling of state legislatures and juries] constitute circular reasoning: the Constitution is interpreted by the Court to protect, among other things, individual rights from majority despotism; the majority elects the representatives who pass laws; those laws are then used by the Court to define constitutional limits.

Id. at 958. The author further states that "[i]f protections can be diminished by the judiciary under the guise of a 'living' or 'evolving' Constitution, as the United States Supreme Court has repeatedly acknowledged, then they are certainly not absolute protections." *Id.* at 938.

II. ANALYSIS

A. The Current Eighth Amendment Test Applied by the Supreme Court is an Unconstitutional Delegation of the Court's Authority to the States.

"The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded . . . as a fundamental law. It therefore belongs to [the courts] to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body."¹²⁵ The preceding sentiment encapsulates the most obvious problem faced by the modern Eighth Amendment test used by the Court in capital sentencing challenges. In the context of Eighth Amendment capital sentencing challenges, the Supreme Court is no longer interpreting the Constitution or conducting an independent evaluation of the laws. However, before concluding that the Court has erred in deferring to state legislative behavior, one must establish that the Court has the responsibility and the power to review and decide constitutional issues independently.

Going as far back as *Marbury v. Madison*, the Supreme Court has recognized that it is the unique privilege and duty of the Court to interpret the Constitution.¹²⁶ However, even before the decisions in *Marbury* or *McCulloch v. Maryland*,¹²⁷ many believed that the Court's exclusive interpretive function was essential to the formulation of a democratic republic.¹²⁸ While this view dominated the thinking of James Madison and Alexander Hamilton,¹²⁹ it was certainly not the only view.¹³⁰ However, no matter how strong or vehe-

¹²⁵ THE FEDERALIST NO. 78, at 395 (Alexander Hamilton) (Buccaneer Books 1992).

¹²⁶ See *supra* notes 1-3 and accompanying text (discussing the implications and import of *Marbury v. Madison* on the role of the federal judiciary and the Supreme Court).

¹²⁷ 17 U.S. (4 Wheat.) 316 (1819) (holding that the Court has the authority to review federal and state legislation, and that no one state can make law affecting the nation).

¹²⁸ See generally THE FEDERALIST NO. 78 (Alexander Hamilton) (discussing the need for an effective and objective check on the legislature vested in the judiciary, who would have the sole power to interpret the "fundamental" law of the nation as written in the Constitution).

¹²⁹ James Madison and Alexander Hamilton are the authors of THE FEDERALIST PAPERS. See generally *The Federalist Papers* (Buccaneer Books 1992).

¹³⁰ Madison and Hamilton are the traditional archetypes for Federalism, and took part in the "Federalist/Anti-Federalist" debates of the early 1800's. Thomas Jefferson, who took the position that the Constitution was meant as a tool for each branch of the government to interpret and employ, most notably opposed their view. In a letter to Abigail Adams, Jefferson wrote:

[The Constitution] meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and the executive also, in their spheres, would make the judiciary a despotic branch.

ment the debate over which branch of government has the authority to interpret the Constitution, the current controlling sentiment is that the Supreme Court is the final arbiter of all constitutional questions, and its judgment is unassailable.¹³¹ While the reasons for reaching this conclusion are varied and important, the most compelling reason to interpret the Constitution as placing authority over its meaning in the hands of the judiciary is that doing so insulates the process of constitutional interpretation from the fractionalization and partisanship that dominates all elected offices.¹³² The fear that the Constitution would

Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON, at 51 (Andrew A. Lipscomb and Albert Ellery Bergh eds., 1st ed. 1905). For more commentary and argument agreeing with Jefferson see Andrew Jackson, Veto Message, in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, at 576 (James D. Richardson ed. 1896) (arguing that the Constitution vests each public officer, agency, or political body with the authority and duty to personally evaluate the "constitutionality" of his or her actions and act in accordance with its principles); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985-86 (1987) ("The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution -- the executive and legislative no less than the judicial -- has a duty to interpret the Constitution in the performance of its official functions.").

¹³¹ See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("Article VI of the Constitution makes the Constitution the 'supreme Law of the Land' . . . [The *Marbury*] decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that constitutional interpretation is "emphatically the province and duty of the judicial department"). See generally *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316 (1819) (deciding that the Supreme Court has the authority to review, and hold invalid, federal and state legislation in light of the overriding tenets of the Constitution); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (establishing the Court's constitutional authority to review the decisions of state courts).

¹³² See MARTIN SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 32 (1966) ("[T]he lawmaker to whom the nasty old undemocratic Supreme Court is supposed to yield so reverently because of his greater democratic virtues is the entire mass of majoritarian-anti-majoritarian, elected-appointed, special interest-general interest, irresponsible elements that make up American national politics. If we are off on a democratic quest, the dragon begins to look better and better, and St. George worse and worse."); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1050 (1984) ("When the Court tests some recent congressional initiative against its interpretation of past constitutional solutions, it is not engaged in an anti-democratic form of ancestor worship. By declaring a statute unconstitutional, the Court is discharging a critical dualistic function. It is signaling to the mass of private citizens of the United States that something special is happening in the halls of power; that their would-be representatives are attempting to legislate in ways that few political movements in American history have done with credibility; and that the moment has come, once again, to determine whether our generation will respond by making the political effort required to redefine, as private citizens, our collective identity."). But see JAMES BRADLEY THAYER, JOHN MARSHALL 103-107 (Da Capo Press 1974) (suggesting that substantive evils might result from the judiciary correcting constitutional errors of the legislature or executive because it would handicap the public's ability to learn from and reverse their mistakes); Paul Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175 (1986) (arguing that Ackerman's conception of constitutional politics as separated in virtue from "normal" politics is naïve and that 'constitutional politics' are marred by the same deficiencies); Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 664 (1985) (arguing that the Supreme Court is unsuited to deciding for the nation what the Constitution says because they are "far from a representative cross section of American society"); cf. Frank I. Michelman, *The Supreme Court, 1985 Term --*

become a slave to the myriad and changing inclinations of a 'democratic' republic led the Framers to safeguard its provisions by placing constitutional interpretation in the hands of the least political, least influenced, and most objective branch of the government—the federal judiciary.

In the context of the Eighth Amendment, the Court's role as constitutional guardian is not only important, but necessary. Each time a challenge to a death sentence comes before the Court, it is bound to conduct an independent review of the constitutionality of the sentence as applied to the particular defendant.¹³³ Following *Furman* and *Gregg*, this included an actual investigation into the constitutionality of the sentence, totally apart from any acknowledgement paid to a legislative or national consensus.¹³⁴ Beyond simply looking at the number of state legislatures that approved a punishment, the *Gregg* and *Furman* courts were dedicated to conducting an independent review of whether a punishment is proportional to the crime committed.¹³⁵ This sentiment found support in subsequent cases, and, until recently, controlled Eighth Amendment capital sentencing jurisprudence.¹³⁶ This test survived until 1989, when a shift in the plurality on the Court occurred, and Kevin Stanford, aged 17, challenged his death sentence on the grounds that it violated the Eighth Amendment.¹³⁷ Justice Scalia authored the plurality opinion and affirmatively attacked the independent proportionality review from *Gregg*

Foreword: Traces of Self-Government, 100 HARV. L. REV. 4, 75 (1986) ("As a constituted nation we are, it seems, necessarily committed to the sovereign separation of rulers from ruled . . . Congress is not us. The President is not us . . . 'We' are not 'in' those bodies . . . [T]he judges also, obviously, are not us. Their actions may augment our freedom. As usual, it all depends.").

¹³³ See *Lockett v. Ohio*, 438 U.S. 586, 597-609 (1978) (holding that the Court has a heightened responsibility to consider the individual circumstances of each defendant in capital punishment cases).

¹³⁴ As the *Gregg* court explained:

Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not.

Gregg v. Georgia, 428 U.S. 153, 174 (1972) (quoting *Furman v. Georgia*, 408 U.S. 238, 313-14 (1972)).

¹³⁵ See generally *id.* (holding that the death sentence is not *per se* unconstitutional); *Furman*, 408 U.S. 238 (holding that existing capital sentencing statutes were unconstitutional).

¹³⁶ See *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (stating that the Court is duty bound to conduct an independent proportionality review in addition to the national survey). See generally *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that Eighth Amendment inquiry does not end with a survey of legislative and jury behavior; the Court must conduct its own review of the proportionality of the punishment challenged).

¹³⁷ See generally *Stanford v. Kentucky*, 492 U.S. 361 (1989) (challenging the validity of a death sentence imposed on a criminal who was age 17 at the time he committed the offense).

and questioned the continuing necessity of that analytical prong.¹³⁸ Justice O'Connor concurred in the result of *Stanford*, but defended the use of proportionality review, thus establishing a plurality instead of a pure majority.¹³⁹

The *Stanford* decision, taken with *Penry*, places Eighth Amendment jurisprudence squarely in the hands of state legislatures, and not the Supreme Court. By deferring to the judgments of legislators and jurors, although the latter may also be out of favor following *Stanford*,¹⁴⁰ the Court places the decision as to what the Constitution 'says' outside the federal judiciary. This delegation, or deference, is unconstitutional because it takes away protections, both political and judicial, that the Constitution specifically sought to ensure. The members of the federal judiciary are not elected. The federal judiciary is not a political body in the traditional sense. It is bound by duty to objectively interpret the Constitution without passion or prejudice.¹⁴¹ The Court is privileged with the power to oversee and, where necessary, invalidate any federal or state law that is inimical to the mandates of the Constitution.¹⁴² By deciding Eighth Amendment cases solely on the basis of the prevalence or scarcity of state laws supporting a particular measure, the Court fails to conduct any meaningful inquiry into whether the Constitution contemplates or condones the punishment challenged. In failing to conduct this independent evaluation, the Court makes the Eighth Amendment a slave to majority whims concerning the severity and necessity of punishment.¹⁴³

¹³⁸ See *id.* at 379-80 (arguing that the proportionality review is nothing more than an expression of the statistical factors gathered in examining *Gregg's* objective factors).

¹³⁹ See *supra* notes 114-18 and accompanying text.

¹⁴⁰ See *Stanford*, 492 U.S. 361, 361-382 (basing the Court's decision on laws enacted by state legislative bodies and making no survey or mention of jury decisions on the issue of capital punishment as applied to individuals under the age of eighteen).

¹⁴¹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 177, 180 (1803) ("I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution and the laws of the United States."). The judicial oath of office cited in *Marbury* is important because it further underscores the duty of jurists, especially in the federal judiciary, to decide cases based upon an objective rendering of constitutional or federal law; an opinion appropriately divorced from any and all political influence.

¹⁴² See *supra* notes 123-30 and accompanying text (discussing the role and power of the Supreme Court and judicial review).

¹⁴³ The use of the term "majority" may be misleading since the Court generally only evaluates those states that authorize capital punishment. Therefore, an inquiry might turn up eleven states in opposition to implementing the death sentence for individuals under the age of 18 out of 36 states that authorize capital punishment. In taking for granted that the fourteen states that oppose capital punishment would also oppose its imposition on individuals under the age of 18, the Court creates a clear parity. Twenty-five states are 'in favor' of the measure, and twenty-five are opposed. Yet the Court concluded in *Stanford*, in nearly identical statistical circumstances, that a consensus *in favor* of the punishment existed. See *Stanford*, 492 U.S. at 370-73.

The constitutional duty of the Court, whether gleaned directly from the text of the Constitution or the attendant commentary and judicial activity, is to protect against exactly this type of majoritarian rule.¹⁴⁴ The entire framework of the American democratic republic is premised on the notion that no one individual or constituency should have the ability to gain dominion over the fundamental controls of the government. The goal of the Constitution is to ensure that no branch of the government obtains the authority to control or manipulate the decisions or powers of the others.¹⁴⁵ In deferring to the legislative decisions of the states in deciding Eighth Amendment capital punishment challenges, the Court has effectively given the legislative branch the authority to decide issues that the Constitution specifically reserves for the judiciary.

The Framers contemplated the possibility of a national consensus so overwhelming as to require modification or addition to the Constitution when they included Article V, the amendment process.¹⁴⁶ The current test of Eighth Amendment sufficiency allows for state legislatures to “end run” this process. By declaring certain punishments “constitutional” based solely on the findings of a majority of death penalty states,¹⁴⁷ the Court is allowing national questions to be decided by states. This approach runs in direct contradiction to *McCulloch*, which specifically disallows any state from making law that governs the citizens of the nation.¹⁴⁸ The Court, therefore, has effectively given the power both to interpret and, at least in some respects, change the Constitution without the safety net of national legislative action contained in Article V. As previously discussed, this grant of power fundamentally impedes the Constitution’s ability to effectively separate power amongst the branches of government, and prevent a tyrannical majority from rising to prominence.¹⁴⁹

The current Eighth Amendment test is unconstitutional because it allots power to states that is specifically reserved for the Courts. Just as Congress cannot limit the jurisdiction of the Supreme Court in

¹⁴⁴ See *supra* notes 123-30 and accompanying text (discussing the protective function of the federal judiciary in the American democratic scheme).

¹⁴⁵ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 1 (1997) (discussing the intent and initial purpose of the Constitution).

¹⁴⁶ See U.S. CONST. art. V.

¹⁴⁷ Currently there are thirty-six states that authorize capital punishment.

¹⁴⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 316, 358-60 (1819) (holding that the states cannot make law that governs the nation as a whole, or requirements that apply to others outside the state’s voting constituency). This is, of course, not to say that states cannot make laws, applicable within their own borders, changing or modifying the applicability of constitutional law, so long as those changes do not offend constitutional doctrine.

¹⁴⁹ See *supra* notes 123-30 & 137-38 and accompanying text.

contradiction to the language of the Constitution,¹⁵⁰ the Court cannot confer power upon the states that is specifically earmarked for the Court. The structural mandates of the Constitution are just that: mandates.¹⁵¹ The Court, like the legislature and the executive, has specific and circumscribed powers.¹⁵² Assigning additional powers to individuals or entities not mentioned or singled out in the Constitution is not one of the Court's duties or privileges.¹⁵³ The Constitution confers great power upon the federal judiciary, especially the Supreme Court.¹⁵⁴ In doing so, the Constitution entrusted the judiciary with an immense responsibility, deciding issues for the United States that cannot be resolved legislatively by the citizenry. Just as the legislature may not grant the executive the ability to make law, the judiciary, even the Supreme Court, cannot grant legislatures the authority to decide constitutional issues.¹⁵⁵

B. The Current Eighth Amendment Test Departs from Traditional Constitutional Jurisprudence by Affording an Excessive Amount of Deference to the Decisions of State Legislatures.

An additional difficulty presented by the Eighth Amendment test adopted and applied by the current Court is that it places too much emphasis on the decisions of state legislatures. Without including the "proportionality" analysis from *Gregg*, the Court applies a test of considerable deference to state legislatures and fails to meaningfully evaluate the constitutional implications of those decisions. An appropriate comparison is to the "rational basis"¹⁵⁶ test applied in the equal protection context.¹⁵⁷ In this context, the Court defers to the decisions or findings of legislators because some "lesser" constitutional value is

¹⁵⁰ See generally *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868) (holding that Congress could take away any jurisdictional grant that it conferred upon the Supreme Court, but that it could not take away the jurisdictional grants of the Constitution).

¹⁵¹ See generally *id.*

¹⁵² See U.S. CONST. arts. I-III (enumerating the individual powers of the legislative, executive and judicial branches, respectively).

¹⁵³ See *id.* at art. III (delineating the powers of the federal judiciary).

¹⁵⁴ See CHEMERINSKY, *supra* note 145, at 25-28 (discussing the authority vested in the federal judiciary, especially the Supreme Court, by the Constitution).

¹⁵⁵ See U.S. CONST. art. III (delineating the powers of the federal judiciary, and specifically not including the ability to confer judicial authority on the federal legislature).

¹⁵⁶ "Rational basis" describes a judicial inquiry wherein the Court asks merely if the legislative action is "rationally related" to a legitimate governmental goal or interest. In this context, a "rational relation" need only exist on a theoretical level; no actual empirical connection is necessary. See generally *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

¹⁵⁷ The "equal protection context" refers to the voluminous case law and scholarly treatment of the impact and import of the Fourteenth Amendment, which guarantees equal protection of law to all citizens of the United States. See U.S. CONST. amend. XIV.

at stake.¹⁵⁸ Barring the presence of a value “fundamental” to the constitutional rights of every citizen of the United States,¹⁵⁹ the Court is satisfied to allow the judgment of legislators, both local and federal, to affect constitutional rights.¹⁶⁰

In the equal protection arena, the Court defers to state legislatures because the challenged regulation does not single out a “suspect class”¹⁶¹ of individuals for differential treatment. Given that no concern exists that the individuals most harmed by a particular legislative action were not a part of the political process that created the law, the Court has no reason to suspect the motives or intent of the legislature.¹⁶² How then does this apply in the context of Eighth Amendment challenges to capital sentencing? It can clearly be said that following *Stanford* and *Penry*, the Court is not committed to conducting an in-depth examination of the motives of legislatures, nor is the Court concerned with any independent proportionality review.¹⁶³ The Court simply defers to the determinations of the state legislatures, if in sufficient number,¹⁶⁴ and determines that the Eighth Amendment does not bar the challenged punishment.

However, in the presence of a “suspect class” in Equal Protection cases, the Court conducts a much more searching inquiry and defers very little, if at all, to the decisions of state legislatures.¹⁶⁵ Ad-

¹⁵⁸ See CHEMERINSKY, *supra* note 145, at 533-45 (describing a class of cases where a low level of scrutiny is applied because the challenged law implicates rights less important to the democratic scheme, such as economic advertising freedom and the right to become a harbor pilot).

¹⁵⁹ See *id.* at 750-56, 1020-22 (providing freedom of speech and freedom of religion as examples of fundamental rights and detailing a much more searching judicial inquiry used where such rights are implicated by a challenged law).

¹⁶⁰ See *id.* at 533 (discussing the “rational basis” test applied by courts, wherein a simple showing of a “legitimate purpose” on the part of the legislature, coupled with a law “reasonably related” to the achievement of that purpose, will suffice to pass constitutional muster).

¹⁶¹ The term “suspect class” comes from Justice Stone’s famous “Footnote 4” from *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). The text of this footnote describes a concern that the political process is prejudiced against “discrete and insular” minorities, and deference to the legislature where such a class is harmed by a law is unwise. See *id.* at 152-53 n.4. For a discussion of “Footnote 4,” see Chemerinsky, *supra* note 138, at 414-17.

¹⁶² See *Carolene Products*, 304 U.S. at 152-53 n.4 (“Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . .”).

¹⁶³ See *supra* notes 102-121 and accompanying text (discussing the evolution of the Court’s analysis of Eighth Amendment capital sentencing challenges and the Court’s shift away from conducting proportionality review in Eighth Amendment capital sentencing review).

¹⁶⁴ It should be noted that the Court has never expressed how numerically prevalent state laws in this area must be to establish a national consensus. Presumably, at least a majority, in some form or another, of the thirty-six capital punishment states is required.

¹⁶⁵ In the presence of a suspect classification, generally racial, the Court applies a test described as strict scrutiny. This test asks whether the regulation furthers a compelling governmental interest and if the regulation is the least restrictive means of achieving that goal. See CHEMERINSKY, *supra* note 145, at 416.

ditionally, courts are less willing to defer to the decisions of legislatures where the value at stake is of high or "fundamental" importance.¹⁶⁶ While criminals typically are not considered a suspect class, there are reasons, similar to those that prompt the use of strict scrutiny in certain equal protection cases, that the Court should apply a higher standard of review in Eighth Amendment capital sentencing challenges.¹⁶⁷

First, like the right to vote¹⁶⁸ or the right to speak freely concerning politics or religion,¹⁶⁹ the right at stake in Eighth Amendment capital punishment cases merits more extensive protection than that provided by the current judicial test applied in these cases. The constitutional right asserted in these challenges is not only the right to be punished in a humane and usual fashion, but also the right to life. That is what is at stake for every single defendant whose appeal makes it to the Supreme Court.

When judicial treatment of a particular case implicates a right so fundamental, so important, the Court, generally, takes it upon itself to do more than simply defer to states.¹⁷⁰ In this situation, the Court imposes standards like "least restrictive means,"¹⁷¹ and "compelling governmental purpose"¹⁷² and asks whether legislatures can justify the challenged laws in terms not indicating a discriminatory motive or improper purpose.¹⁷³ Criminals and their treatment under law is a hugely political issue. Generally, the more lax or "soft" on crime an administration or candidate is, the less support for that candidate or administration will result.¹⁷⁴ Therefore, politically speaking, there is

¹⁶⁶ See *supra* note 159 and accompanying text (discussing the impact of the presence of a "fundamental" right on the manner a court will treat a challenged statute or law).

¹⁶⁷ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 78 (1980) ("What the system . . . does *not* ensure is the effective protection of minorities whose interests differ from the interests of most of the rest of us. For if it is not the 'many' who are being treated unreasonably but rather only some minority, the situation will not be so comfortably amenable to political correction. Indeed there may be political pressures to *encourage* our representatives to pass laws that treat the majority coalition on whose continued support they depend in one way, and one or more minorities whose backing they don't need less favorably.") (emphasis in original).

¹⁶⁸ See generally U.S. CONST. amend. XIV-XV (guaranteeing to every citizen of the United States the right to vote).

¹⁶⁹ See *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting) (arguing that freedom of political speech is fundamental to a democratic system of government).

¹⁷⁰ See *supra* note 159 and accompanying text (discussing the implications on judicial treatment of the presence of a "fundamental" right).

¹⁷¹ Courts sometimes use this term when stating the requirements of a strict scrutiny test. See CHEMERINSKY, *supra* note 145, at 550-52 (discussing the application of strict scrutiny in cases involving race-based classifications).

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ I am reminded of the damage done to Michael Dukakis' presidential bid in 1984 when it was discovered that he had pardoned convicted murderer Willie Horton, who subsequently committed another murder. See Peter L. Decoursey, *Is a Governor to Blame When Inmates Flee Their Prisons?*, HARRISBURG PATRIOT & EVENING NEWS, Aug. 22, 1999, at F1.

a self-interested motive, among other legitimate motives, for taking a "hard line" approach to crime. This would be especially true in states whose legislatures and people have historically supported capital punishment.

The logical extension of this point is that the constitutional rights of criminals are held in less esteem than those of law-abiding citizens, thus creating a quasi-suspect class. In light of the concerns surrounding the motivations of legislators and politicians pertaining to the treatment of criminals, the Court should, if for no other reason than judicial consistency, go beyond simply counting state legislatures when defining the constitutionality of a particular punishment. If the Court does not defer to state legislatures when they decide to differentiate in drinking age laws between males and females,¹⁷⁵ why should it defer when the legislature decides to execute the mentally handicapped?¹⁷⁶

C. The Current Eighth Amendment Test is Inconsistent with the Philosophical Framework of the Democratic Republic Created in the United States Constitution.

The Constitution is more than simply an instruction manual about how to construct the machinery of the American political system. The document itself is a philosophical statement, inculcating a vast array of moral and political concepts geared towards creating not only an effective political system, but also a 'good' or 'virtuous' one:

[T]he aim of every political constitution is, or ought to be, first to obtain for rulers men who possess the wisdom to discern, and most virtue to pursue, the common good of society; and in the next place, to take the most effectual precautions for keeping them virtuous while they continue to hold the public trust.¹⁷⁷

The Constitution then, is a document meant to create a situation wherein the system itself is based on the notion that virtue¹⁷⁸ and politics are inseparable parts of a unified governmental organization. While this may seem naïve, the Constitution was written at a time

¹⁷⁵ See *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating an Oklahoma law that made it illegal to sell alcohol of males under the age of 21, and to females under the age of 18).

¹⁷⁶ See *supra* notes 116-21 (discussing the decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), wherein the Court upheld the death penalty as imposed on mentally handicapped defendants).

¹⁷⁷ THE FEDERALIST NO. 57 (James Madison).

¹⁷⁸ It should probably be said that the "virtue" of which Madison speaks likens most to a general concept of public welfare and civic involvement, not an overarching normative moral system.

when the idea that government was only a reflection of society's economic and security needs garnered little, if any support.¹⁷⁹

In seeking a system of government that would advance the idea that politics was a tool for fostering free thought and unencumbered civil involvement, the Framers recognized that precautions were necessary to ensure that no all-powerful majority emerged.¹⁸⁰ This concern is well warranted, especially in light of the historical perspective of the Framers at the time the Constitution was written. France had recently been through a terrible, violent civil revolution, during which the Jacobins,¹⁸¹ ascribing to a misguided interpretation of Rousseau's "General Will"¹⁸² ran the affairs of the state. Madison especially worried that a poorly constructed system would deteriorate into "mob rule" and expressed his concerns in Federalist 51.

This view of the subject must particularly recommend a proper federal system . . . [s]ince it shows that in exact proportion as the territory of the union may be formed into more circumscribed confederacies . . . oppressive combinations of a majority will be facilitated, the best security under republican form, for the rights of every class of citizens, will be diminished; and consequently the stability and independence of some member of the government . . . must be proportionally increased.¹⁸³

¹⁷⁹ See generally THE FEDERALIST NOS. 10, 51 (James Madison), NO. 78 (Alexander Hamilton) (discussing the notion of civic virtue and involvement that prompted the creation of the American democratic system); Ackerman, *supra* note 3 (discussing the distinct environment of political involvement existing at the time the Constitution was passed).

¹⁸⁰ See THE FEDERALIST NO. 51, at 264-65 (James Madison) (Buccaneer Books 1992) ("It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part."); see also THE FEDERALIST NO. 10 (James Madison) (1992) (arguing that the danger of having one viewpoint gain prominence and dominate the nation must be offset by having only one, non-political body, interpret the Constitution).

¹⁸¹ The "Jacobins" is the name given to the party led by Robespierre who came to power during the nascent stages of the French Revolution. Their rule was marked by some of the most violent bloodshed of the time, and was premised on the idea that the "will" of the people should be effectuated at all costs. For a discussion of the Jacobins' political beliefs as well as the French Revolution in general, see SIMON SCHAMA, *CITIZENS* (1989).

¹⁸² Rousseauian "general will" describes the philosophical extension of public opinion. Rousseau believed that where questions existed concerning the best and most virtuous way to govern, the "will of the people" should command governmental action. Rousseau also steadfastly believed in the purity and benevolence of human nature, and therefore assumed that the "general will" would produce peace. See JEAN-JACQUES ROUSSEAU, *On the Social Contract, or Principles of Political Right*, in THE BASIC POLITICAL WRITINGS 154-56 (Donald A. Cress trans., Hackett Publishing, 1987).

¹⁸³ THE FEDERALIST NO. 51, at 264-65 (James Madison) (Buccaneer Books 1992). This statement further illustrates Madison's belief that the Constitution must contain protections against the possibility of an immensely powerful majority contingent. In the absence of representative opposition in Congress, the executive is empowered only with the veto, and the only remaining safeguard is the Supreme Court.

Both Madison's and Hamilton's fears of unfettered democratic rule, combined with the Constitution's faith in the ability of the federal judiciary to act independently of the weaknesses that plague the legislative and executive branches, leads to the realization that the Court is analogous to Plato's "Guardians"—a comparison the Court has not embraced.¹⁸⁴

In his "Republic," Plato sets forth a diagram for his conception of a virtuous state, devoted to the right and the good.¹⁸⁵ Toward this end, Plato constructed a system, sometimes called "Platonic Functionalism,"¹⁸⁶ in which society was split into categories,¹⁸⁷ each with its own purpose. The lowest rung of society were the workers, so placed because they lacked the intellectual capacity to understand the moral and philosophical considerations necessary for an active civic life.¹⁸⁸ The second class were something akin to the modern middle class of America. This class of people was possessed of enough intelligence to comprehend philosophical debates and political situations and, under certain circumstances, contribute to those debates.¹⁸⁹ The third class was called "the Guardians." It was the function of the Platonic Guardian to oversee and monitor the virtue of society—to advise, counsel, and, if necessary, correct members of society concerning matters pertaining to the state.¹⁹⁰ It is this last category that

¹⁸⁴ See *infra* note 192 (noting instances where members of the Court have objected to a comparison between the Court and a Platonic construction).

¹⁸⁵ The "right and good" are concepts that describe the culmination of man's search for truth and knowledge out of the darkness of ignorance:

[I]n the knowable the last thing to be seen, and that with considerable effort, is the *idea* of the good; but once seen, it must be concluded that this is in fact the cause of all that is right and fair in everything—in the visible it gave birth to light and its sovereign; in the intelligible, itself sovereign, it provided truth and intelligence—and that the man who is going to act prudently in private or in public must see it.

PLATO, *THE REPUBLIC* 196 (Allan Bloom trans., Basic Books 2d ed. 1991).

¹⁸⁶ This is an academic term used with some regularity to describe the societal system created in "Republic." In the system, individuals are assigned roles within society that they are morally and intellectually suited for. Their "function" is to fulfill the responsibilities of the class of which they are a part. Therefore, Guardians oversee the moral and political virtue of society, slaves/workers provide sustenance and labor, and the Philosopher King directs and oversees the body politic. See *id.* at 46-70; see also *id.* at 344-353 (discussing the implications of Socrates' fictional city in the author's Interpretive Essay).

¹⁸⁷ See generally *id.* §§ II-III (discussing the separate categories into which people in a "good" city would fall).

¹⁸⁸ See *id.* at 46 (describing the first and most base need of any "city" (read society), as a supply of food and farmers to work to provide the food).

¹⁸⁹ See *id.* at 48-53 (discussing the need for individuals to work and bring goods to the market for exchange, where they can provide services and discussion).

¹⁹⁰ The "Guardians," theoretically, act as the protectors of the virtue of the city and are possessed of qualities not found in the, for lack of a better term, lower classes of farmers and merchants. "Then the man who's going to be a fine and good guardian of the city for us will in his nature be philosophic, spirited, swift, and strong." *Id.* at 53. It should be noted here that the term "philosophic" in the preceding quote refers to an individual dedicated to virtue and the pursuit of wisdom. See *id.* at n.34.

the Court compares most neatly with, considering their constitutional role.¹⁹¹

Historically, the Court has opposed comparisons between itself and any particular component of Plato's Republic.¹⁹² However, the opposition seems to stem from a misunderstanding as to what the comparison actually implies. The Supreme Court sits in judgment over the constitutional affairs of this nation. Its members are not elected; they are appointed for their service, wisdom, experience and yes, their virtue. The Court is tasked with confronting the most divisive issues in the nation, and then asked to solve them.¹⁹³ The Court's judgment can only be overridden by a huge majority of the Congress, theoretically reflecting a huge majority of the American people, via amendment. What, then, is the difference between the role of the Court in American constitutional philosophy and the role of the Guardians in Platonic political philosophy? There is no difference. Guardians in Plato's Republic were not responsible to make policy or decide virtue, but only to ensure that it was followed, understood and protected in the City.¹⁹⁴ The responsibility of creating policy and protecting the philosophical, moral, and political virtue of society was the province of the Philosopher King.¹⁹⁵ When the Court rejects the role of making policy or acting as a third legislative branch, it rejects a comparison to the Philosopher King,¹⁹⁶ not the Guardians. While the Constitution likely did not contemplate a Court forever typifying he-

¹⁹¹ As previously discussed, the Court acts as overseer and interpreter of the Constitution in order to ensure that no branch of government or law acts in a manner prohibited by the Constitution. See *supra* notes 123-30 and accompanying text.

¹⁹² Justice Learned Hand objected to the Court's decision to overrule the judgments of Congress because he felt that such an action turned the Court into a legislative body, giving it the power of a "Platonic Guardian." As Learned Hand explained, "[f]or myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958). Justice Scalia echoed this objection some fifty-years later in his opinion in *Stanford*, stating that "for us to judge . . . on the basis of what we think 'proportionate' and 'measurably contributory to acceptable goals of punishment'—to say and mean that, is to replace judges of the law with a committee of *philosopher-kings*." *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (emphasis added).

¹⁹³ See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (deciding that "separate but equal" facilities for people of different racial heritage did not violate the Constitution); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (striking down segregated public school systems); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a woman has a constitutional right to choose to have an abortion).

¹⁹⁴ See PLATO, *supra* note 185, at 91-102 (describing the virtues and roles of proper Guardians in Socrates' ideal city).

¹⁹⁵ See *id.* at 153-54 (describing the necessity of having philosophers as kings).

¹⁹⁶ At this point I would like to state that I agree with the Court's rejection of this particular comparison. This note is not meant to support the notion that the Court should play some larger, quasi-legislative role in government.

gemony and making policy, the Constitution *did* contemplate that the Court would interpret for the nation what the law is.¹⁹⁷

This is an awesome responsibility to give any entity, especially a body so small and insulated from the democratic ideal it is supposed to protect. However, that is the way the Constitution is structured. Whether the comparison between the "Republic" and the Constitution is defensible as a matter of philosophical truth is unimportant. What is important is that the comparison works as a matter of logical deduction. Just as Plato did not trust the public, or even republican representatives, to interpret and implement political virtue,¹⁹⁸ the Constitution does not trust the states, the Congress, or the executive to interpret its language.¹⁹⁹ Instead, the Constitution trusts the Supreme Court. It is the duty of the Court, happy or otherwise, to act as the "Guardians" of the Constitution. To allow states to define their own constitutional rights under the Eighth Amendment by implementing a test which merely surveys the nation for a modicum of legislative approval is, in Platonic terms, akin to allowing the farmers to define the "good" for the Guardians, and elevating each one to the role of Philosopher King.

III. CONCLUSION

What then is the Court to do in the presence of an Eighth Amendment capital sentencing challenge? The most responsible action for the Court to take is a return to the two-pronged test first enumerated in *Gregg*.²⁰⁰ The *Gregg* test pays proper respect to the decisions of state legislatures and courts, while still preserving the Court's role as ultimate arbiter of constitutional questions. The beauty of the *Gregg* approach is in its singular, at least among the enumerated Eighth Amendment tests, ability to pay adequate respect to the police powers of the states, while at the same time ensuring that a vital check on legislative discretion remains vital. This is especially important in the context of cases dealing with a constitutional value as important as life. Criminals sentenced to death do not forfeit the sum

¹⁹⁷ See *supra* notes 123-30 and accompanying text (tracing history of Court's role in interpreting the Constitution).

¹⁹⁸ See PLATO, *supra* note 185, at 76 (discussing the inherent virtue of "find[ing] the shoemaker a shoemaker, and not a pilot along with his shoemaking, and the farmer a farmer, and not a judge along with his farming, and the skilled warrior a skilled warrior, and not a money-maker along with his warmaking, and so on with them all").

¹⁹⁹ As Alexander Hamilton explained, "[i]t is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." THE FEDERALIST NO. 78, at 395 (Alexander Hamilton) (Buccaneer Books 1992).

²⁰⁰ See *supra* notes 22-38 and accompanying text (discussing the dual standard of review enumerated in *Gregg*).

of their constitutional rights at the prison gate, and the Court cannot simply abdicate its responsibility to protect those rights to the states.

Proportionality review, as originally conceived of in *Gregg*, affords the Court, and each individual Justice, the opportunity to infuse the very sterile examination of legislative behavior as "national consensus" with an element of humanity. This infusion is necessary to combat the Court's tendency to defer to legislative behavior as evidence of societal acceptance of certain punishments. This is dubious evidence at best. In *Stanford*, Justice Brennan's dissent points out an important inconsistency in the approach used by the majority in that case. The majority based its determination of a "national consensus" on a survey of the thirty-six death penalty approving states, entirely ignoring the fourteen other states that bar the punishment.²⁰¹ While Brennan's opinion must be read in light of the knowledge that his objections are colored by his abolitionist history,²⁰² it does bring to light a troubling incongruity in the notion that the Court's decision was based on an *actual* "national consensus." By committing itself to conducting a proportionality review, the Court can avoid this problem.

The *Gregg* Court, faced with a much broader and more difficult question than any issue since facing the Court under the Eighth Amendment,²⁰³ constructed a test that satisfied the necessity of flexibility while at the same time, provided a safeguard to unfettered legislative discretion in imposing the death penalty. *Gregg's* creation of the "evolving standards of decency" test ensured that Eighth Amendment jurisprudence had the opportunity to evolve and change with the tenor of the nation. By including an investigation into the socio-political acceptance of certain punishments, the *Gregg* court recognized the importance of national opinion in determining the constitu-

²⁰¹ See *supra* note 107 and accompanying text (discussing Justice Brennan's objection to the statistical analysis conducted by the *Stanford* majority).

²⁰² Justice Brennan is an "abolitionist" in the sense that he opposes capital punishment under any and all circumstances.

²⁰³ The *Gregg* Court had to decide whether capital punishment itself was constitutional. See generally *Gregg v. Georgia*, 428 U.S. 153 (1976). Cases involving capital punishment since *Gregg* have raised issues of the permissible scope of the punishment. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989) (deciding whether the Eighth Amendment forbids the execution of mentally retarded defendants); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (deciding whether the Eighth Amendment permits the imposition of the death penalty of a defendant either 16 or 17 years old); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (deciding whether the Eighth Amendment allowed the state to impose the death penalty on a 15-year old defendant); *Tison v. Arizona*, 481 U.S. 137 (1987) (deciding whether the Eighth Amendment permits imposition of the death penalty on felony-murderers who participated in crime evincing a disregard for human life); *Enmund v. Georgia*, 458 U.S. 782 (1982) (deciding whether the Eighth Amendment permits imposition of the death penalty on felony-murderers); *Coker v. Georgia*, 433 U.S. 584 (1977) (deciding whether the state could impose the death penalty for the rape of an adult woman).

tional significance and mandate of the Eighth Amendment. *Gregg's* proportionality prong served a second, but equally important purpose. Just as an original intent of the Constitution was to limit the possibility of a tyrannical central government, the intent of *Gregg's* proportionality was to safeguard against the tyranny of the "national consensus" gleaned from the "evolving standards of decency" prong of the test.

Justices on the United States Supreme Court assume an awesome responsibility by accepting appointment to the Court. The Court must preserve the fundamental intent and integrity of the Constitution, while at the same time leave room for the document to reflect the changing face of the nation. Choosing to engage in the proportionality review envisioned in *Gregg* does not compromise the Court's ability to preserve both the integrity and the flexibility of the Constitution. Challenges to capital punishment under the Eighth Amendment present the Court with the duty to *individually* evaluate the case of each defendant. The Court, by its own instruction in *Lockett v. Ohio*²⁰⁴ must decide each capital sentencing appeal as an individual case, under its own unique set of circumstances. The ruling in *Stanford* that it is not *per se* unconstitutional to execute defendants under the age of eighteen does not preclude, for example, a seventeen year-old defendant from challenging his own death sentence based on the facts particular to his own case. The Court need not make broad, overarching rules each time it is faced with an Eighth Amendment challenge. The "evolving standards" prong of *Gregg* addresses the initial need to evaluate the breadth of a challenge under the Eighth Amendment. Proportionality allows the Court to properly consider the individual situation of a defendant, while keeping in mind the information gleaned from the Court's survey of "national consensus." Conducting *both* prongs of *Gregg's* test allows the Court to fully evaluate the constitutional implications of each Eighth Amendment challenge, and where necessary, to decide when legislatures, executives, and even other courts have overstepped their authority under the Constitution.

In the final analysis, the difficulties exposed by this note are unresolved. The current support for the test that gave rise to this criticism rests with a four-member plurality of the Court, and a fifth, seemingly unwilling member.²⁰⁵ The current uncertainty is both

²⁰⁴ 438 U.S. 586 (1978) (holding that courts are obligated to evaluate the individual circumstances of each defendant who challenges the imposition of the death penalty).

²⁰⁵ This group consists of Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas, with Justice O'Connor all but ascribing to their position. Justice O'Connor's position is made even more clear after a reading of her opinion in *Penry*. See *supra* notes 98-100 and accompanying text.

promising and disturbing. On one hand, the lack of a solid majority in support of the entirely deferential test enumerated in *Stanford* and *Penry* means that action addressing the concerns of this note is only one vote away. On the other hand, Justice O'Connor's opinion in *Penry* and the increasing strength of the conservatives on the Court, led by Chief Justice Rehnquist, may indicate additional future support for the *Stanford/Penry* approach. Only future additions to the Court, coupled with sufficiently interesting Eighth Amendment challenges will finally answer the question: Will the Court embrace their responsibility, or hide from it?

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