

Unusual State Capital Punishments

William W. Berry

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UNUSUAL STATE CAPITAL PUNISHMENTS

*William W. Berry III**

Abstract

This Article argues that many of the states that retain the death penalty currently violate their own state constitutions because their use of the death penalty is unusual. Specifically, an intrastate assessment of the death penalty in some states, particularly examining its use across counties, suggests that the rareness of its use might mean that it has become an unusual punishment. As a result, this Article explores the twenty-six capital states that proscribe “unusual” punishments and categorizes them based on the likelihood that their use of the death penalty violates their state constitutions.

Part I of this Article explains the concept of unusualness under the Eighth Amendment as developed by the United States Supreme Court in its capital cases. In Part II, this Article explores the Eighth Amendment analogues in state constitutions that similarly prohibit unusual punishments and the conjunctive and disjunctive language of the state constitutions, before demonstrating how the Eighth Amendment approach could translate to the analysis of unusualness under state constitutional law. Part III then examines the states that have unusual punishment proscriptions in their state constitutions and categorizes the states based on the likelihood that their use of the death penalty violates their state constitutions. Finally, in Part IV, this Article argues for an expansive application of state constitutions to bar unusual state capital punishments, exploring the policy reasons supporting this analytical move.

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INTRODUCTION

In 2018, there were twenty-five executions in the United States, one of the lowest numbers of executions since the Supreme Court reinstated the death penalty in 1976.¹ The number of new death sentences in 2018—forty-five—was also one of the lowest since 1976.² This continued a trend over the past two decades of declining use of the death penalty and declining death sentences.³

With the use of capital punishment decreasing to pre-*Furman v. Georgia*⁴ levels,⁵ many abolitionists hoped that the Supreme Court might again find that the death penalty violated the Eighth Amendment, as the increasing rareness of its use is making it an increasingly unusual punishment, even for aggravated murder.⁶ Adding support to this movement was Justice Breyer's lengthy dissent in *Glossip v. Gross*⁷ in 2015, also joined by Justice Ginsburg, which highlighted the panoply of problems with the death penalty and its administration and further

1. See *The Death Penalty in 2018: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 14, 2018), <https://deathpenaltyinfo.org/YearEnd2018> [<https://perma.cc/56HG-TLNQ>].

2. *Death Penalty in 2018: Facts and Figures*, AMNESTY INT'L (Apr. 10, 2019, 1:01 UTC), <https://www.amnesty.org/en/latest/news/2019/04/death-penalty-facts-and-figures-2018/> [<https://perma.cc/99JK-5RUP>]. In 2016, there were only thirty-one new death sentences. *2016 Death Sentences by Name, Race, and County*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-by-name-race-and-county/2016-death-sentences-by-name-race-and-county> [<https://perma.cc/8EKP-2JN6>].

3. *The Death Penalty in 2018: Year End Report*, *supra* note 1 (showing these declines over time).

4. 408 U.S. 238 (1972) (per curiam).

5. The use of the death penalty was at an all-time low in the United States in the decade before the Supreme Court decided *Furman*, which held that the death penalty, as applied, violated the Eighth Amendment. See Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 19 (2007).

6. See *The Case Against the Death Penalty*, AM. CIV. LIBERTIES UNION (2012), <https://www.aclu.org/other/case-against-death-penalty> [<https://perma.cc/C9E4-GKYA>].

7. 135 S. Ct. 2726 (2015).

suggested that the Court revisit the question of its constitutionality.⁸ With a slim 5–4 majority that had created categorical limitations to the death penalty in 2002,⁹ 2005,¹⁰ 2008,¹¹ 2014,¹² and 2017,¹³ a grant of certiorari to reexamine the constitutionality of the death penalty seemed like a real possibility.¹⁴

In early 2018, however, the Supreme Court denied certiorari in *Hidalgo v. Arizona*,¹⁵ a case that posed the question of whether the death penalty itself, and as applied in Arizona, violated the Eighth Amendment.¹⁶ Four Justices—Ginsburg, Breyer, Sotomayor, and Kagan—wrote a four-page statement respecting the denial of certiorari, explaining in part that the record in *Hidalgo* was inadequately developed to assess the questions raised by the petitioner.¹⁷ At the end of the 2018 Term, Justice Kennedy, one of the five Justices in the majority of the recent decisions limiting the death penalty,¹⁸ retired from the Supreme Court.¹⁹ His replacement appears far less likely to embrace decisions limiting the scope of the death penalty, much less abolition.²⁰

Even though the Supreme Court seems unlikely to address the constitutionality of the death penalty in the near future, that does not mean that the death penalty will remain free from judicial scrutiny. In December 2018, the Washington Supreme Court declared the death penalty unconstitutional under state constitutional law.²¹ Specifically, the court held that the death penalty was arbitrary and racially discriminatory, making it a cruel and unusual punishment.²²

8. *Id.* at 2772 (Breyer, J., dissenting).

9. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

10. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

11. *Kennedy v. Louisiana*, 554 U.S. 407, 446, *modified*, 554 U.S. 945 (2008).

12. *Hall v. Florida*, 572 U.S. 701, 704 (2014).

13. *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017).

14. Justices on both sides of the political divide seem to devalue the concept of stare decisis under the Eighth Amendment. *See, e.g., Roper*, 543 U.S. at 556, 578, *rev'g* *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Atkins*, 536 U.S. 304, 310, 321, *abrogating* *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991), *abrogating* *Solem v. Helm*, 463 U.S. 277 (1983).

15. 138 S. Ct. 1054 (2018).

16. *Id.* at 1054.

17. *Id.* at 1057.

18. *See* cases cited *supra* notes 9–13.

19. *See, e.g.,* Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html> [https://perma.cc/66KS-EBRL].

20. *See, e.g.,* *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (upholding a brutal, torturous execution).

21. *State v. Gregory*, 427 P.3d 621, 642 (Wash. 2018).

22. *Id.*

The holding of the Washington Supreme Court raises the possibility that the death penalty might violate state constitutions in certain jurisdictions. While there are a number of possible theories that might support such a conclusion, this Article explores one—unusualness. As explored below, almost all of the states that retain the death penalty have language in their state constitutions analogous to the Eighth Amendment prohibiting unusual punishments.²³

Applying a theoretical approach similar to the U.S. Supreme Court in *Furman* and *Gregg v. Georgia*,²⁴ states could find that they use the death penalty so infrequently as to make it an unusual punishment. The Supreme Court's approach in these cases and its evolving-standards-of-decency doctrine more generally have focused on interstate comparisons to determine if the death penalty (or a particular manifestation of it) constitutes an unconstitutionally unusual punishment.²⁵ In other words, a type of death sentence might occur so infrequently as to make it unusual and, as a result, unconstitutional.²⁶

Replicating that type of analysis at the state level using an intrastate perspective, one can assess whether the infrequent use of the death penalty within a state might indicate that the state's capital punishment system is unusual, in contravention of the state's constitution. Instead of comparing states, as the Supreme Court does when examining applications of the death penalty under the federal constitution, the analysis under a state constitution would examine the use of the death penalty across the counties of a particular state.

In pursuing this line of analysis, this Article argues that many of the states that retain the death penalty currently violate their own constitutions because their use of the death penalty is unusual. An intrastate assessment of the death penalty in some states, particularly examining its use across counties, suggests that the rareness of its use might mean that it has become unusual punishment. As a result, this Article explores the twenty-six capital states that proscribe "unusual" punishments and categorizes them based on the likelihood that their use of the death penalty violates their state constitutions.

Part I of this Article explains the concept of unusualness under the Eighth Amendment as developed by the U.S. Supreme Court in its cases. In Part II, this Article explores the Eighth Amendment analogues in state

23. See *infra* Part II; William W. Berry III, *Cruel State Punishments*, [] N.C. L. REV. (forthcoming 2020) (exploring the conjunctive and disjunctive nature of such provisions).

24. 428 U.S. 153 (1976).

25. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 422–34, *modified*, 554 U.S. 945 (2008); *Roper v. Simmons*, 543 U.S. 551, 564–68 (2005); *Atkins v. Virginia*, 536 U.S. 304, 313–17 (2002).

26. See *generally* *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (noting that a punishment can be unusual if it is infrequently imposed).

constitutions that similarly prohibit unusual punishments and the conjunctive and disjunctive language of the state constitutions, before demonstrating how the Eighth Amendment approach could translate to the analysis of unusualness under state constitutional law. Part III then examines the states that have unusual punishment proscriptions in their state constitutions and categorizes the states based on the likelihood that their use of the death penalty violates their state constitutions. Finally, in Part IV, this Article argues for an expansive application of state constitutions to bar unusual state capital punishments, exploring the policy reasons supporting this analytical move.

I. EIGHTH AMENDMENT UNUSUALNESS

The Eighth Amendment to the U.S. Constitution proscribes “cruel and unusual punishments.”²⁷ Like much of the language of the Constitution, this phrase is rather open-ended and does not readily contain a particularized definition of what makes a punishment “unusual.”

Originalist scholar John Stinneford has argued that the meaning of unusual is “contrary to long usage.”²⁸ Further, he has claimed that the framers intended the meaning of the Eighth Amendment to evolve over time.²⁹ As such, his reading of the proscription against unusual punishments finds that the Eighth Amendment will evolve to bar punishments that become infrequently used over time as society matures.³⁰

Two of the Supreme Court’s early Eighth Amendment cases support the idea that the meaning of the Eighth Amendment evolves over time. In *Weems v. United States*,³¹ the Court explained that conditions surrounding a constitutional provision often change over time.³² Thus, according to the *Weems* Court, “a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.”³³

Building on this idea, the Court in *Trop v. Dulles*³⁴ cemented the idea that the Eighth Amendment changes over time.³⁵ Specifically, the Court

27. U.S. CONST. amend. VIII.

28. John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1767 (2008).

29. *See id.* at 1815–16 (explaining inherent flaws in the evolving-standards-of-decency test).

30. *Id.* at 1746.

31. 217 U.S. 349 (1910).

32. *Id.* at 373.

33. *Id.*

34. 356 U.S. 86 (1958).

35. *Id.* at 100–01.

explained that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”³⁶

As a result, it is without controversy that the meaning of the Eighth Amendment will evolve over time.³⁷ For the purposes of this Article, this means that one can evaluate state constitutional practices developed under Eighth Amendment standards as a moving target worthy of reexamination over time. In other words, certain punishment practices may, at some point, become cruel or unusual in light of the evolving standards of society or the evolving punishment practices of a state.

A. *Furman v. Georgia*

The Supreme Court did not really develop the idea of unusualness until its decision in *Furman*. In *Furman*, the Court held, in a short per curiam opinion, that the death penalty, as applied, constituted a cruel and unusual punishment in violation of the Eighth Amendment.³⁸

One reason why the *Furman* Court found the death penalty violated the Eighth Amendment related to the rarity with which states were using it.³⁹ For instance, Justice Douglas explained that unusual punishments were ones “arbitrarily or discriminatorily” imposed and extreme rarity of usage created a strong inference of arbitrariness.⁴⁰ Justice Brennan similarly added that where a punishment is “‘something different from that which is generally done’ in such cases there is a substantial likelihood that the State . . . is inflicting the punishment arbitrarily.”⁴¹ Justice Stewart also emphasized the relationship between rare usage and unusualness: “[I]t is equally clear that these sentences are ‘unusual’ in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare.”⁴² He continued,

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are

36. *Id.* at 101.

37. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 419, *modified*, 554 U.S. 945 (2008); *Roper v. Simmons*, 543 U.S. 551, 561 (2005); *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002).

38. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

39. *See generally id.* (holding the death penalty to be a cruel and unusual punishment as applied in three consolidated cases).

40. *Id.* at 249, 256 (Douglas, J., concurring) (quoting Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970)).

41. *Id.* at 276–77 (Brennan, J., concurring) (citation omitted) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 n.32 (1958)).

42. *Id.* at 309 (Stewart, J., concurring).

among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.⁴³

Beyond arbitrariness, Justice White's concurring opinion linked the infrequency of use to the failure of satisfying the purposes of punishment of retribution and deterrence.⁴⁴ He explained, "I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."⁴⁵

B. *The Evolving Standards of Decency*

In the aftermath of *Furman* and in light of its language in *Trop v. Dulles*, the Supreme Court developed its evolving-standards-of-decency jurisprudence by which it assesses the constitutionality of particular punishments under the Eighth Amendment.⁴⁶ This approach involves a two-step analytical framework.⁴⁷ The first step seeks to ascertain the current societal standard of decency by examining the practices of state legislatures with respect to the punishment at issue.⁴⁸ In doing so, the Court counts the states that use the punishment to determine its current usage—that is, whether it is unusual.⁴⁹ Rarely used punishments satisfy this initial step.⁵⁰ A second step allows the Court to "br[ing] to bear" its own judgment, which typically consists of whether the Court finds that one or more of the purposes of punishment justify the punishment at issue.⁵¹ One can frame this second part of the inquiry as an assessment of whether the punishment is cruel, in the sense that it is excessive and not justified by some legitimate purpose.

Ultimately, the idea behind the first part of the evolving-standards-of-decency test is to identify punishments that are, or have become, outliers. Once a significant portion of society has abandoned a particular punishment, it becomes unusual. Majoritarian in nature, this conceptualization of unusualness serves the important purpose of

43. *Id.* at 309–10 (footnote omitted).

44. *Id.* at 311–12 (White, J., concurring).

45. *Id.* at 313.

46. See *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002); *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Trop*, 356 U.S. at 101.

47. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 421, *modified*, 554 U.S. 945 (2008); *Roper v. Simmons*, 543 U.S. 551, 563 (2005); *Atkins*, 536 U.S. at 312.

48. See, e.g., *Kennedy*, 554 U.S. at 421; *Roper*, 543 U.S. at 563; *Atkins*, 536 U.S. at 312.
49. See, e.g., *Kennedy*, 554 U.S. at 423; *Roper*, 543 U.S. at 564–65; *Atkins*, 536 U.S. at 314–15.

50. See, e.g., *Kennedy*, 554 U.S. at 426; *Roper*, 543 U.S. at 567; *Atkins*, 536 U.S. at 315–16.

51. *Coker*, 433 U.S. at 597–98.

eliminating the ability of certain jurisdictions to continue to engage in punishment practices that society writ large has rejected and replaced.

Given that the first step of the evolving-standards-of-decency test provides the basis for the state constitutional law application advocated for below, it is instructive to examine how the Court has used the test in particular cases to find the practice in question to be unusual. Generally, the Court has relied on the practices of state legislatures to establish the objective indicia of the evolving-standards-of-decency test,⁵² but it has also looked to jury sentencing decisions,⁵³ the direction of change,⁵⁴ and international norms.⁵⁵

In *Coker v. Georgia*,⁵⁶ the Court first looked to the practices of state legislatures to assess the constitutionality of a punishment—in that case, the death penalty as a punishment for rape.⁵⁷ Prior to *Furman*, sixteen states permitted death as a punishment for rape,⁵⁸ but at the time of *Coker*, Georgia was the only state that made the rape of a woman a capital offense.⁵⁹ The evidence of the practices of state legislatures clearly indicated that the practice in question was unusual.⁶⁰

The Court in *Coker* also examined jury sentencing decisions and found that Georgia had, since the reinstatement of the death penalty, sentenced five rapists to death out of sixty-three cases.⁶¹ Georgia juries thus imposed a capital sentence for rape in less than 10% of such cases.⁶² The combination of the Court's finding the death penalty an unusual punishment for rape in Georgia—in light of the survey of state legislatures and the sentencing decisions of Georgia juries—and the Court's view that the death penalty was a disproportionate and cruel punishment for rape resulted in the Court holding that Georgia's statute violated the Eighth Amendment.⁶³

52. See, e.g., *Kennedy*, 554 U.S. at 421; *Roper*, 543 U.S. at 563; *Atkins*, 536 U.S. at 312; *Coker*, 433 U.S. at 593–94.

53. See, e.g., *Coker*, 433 U.S. at 596.

54. See, e.g., *Roper*, 543 U.S. at 565–66.

55. See, e.g., *id.* at 575.

56. 433 U.S. 584 (1976).

57. *Id.* at 594–96.

58. *Id.* at 593.

59. *Id.* at 595–96. As the Court noted, Florida, Mississippi, and Tennessee authorized the death penalty for child rape at the time of *Coker*. *Id.* at 595.

60. *Id.* at 592 n.4.

61. *Id.* at 596–97 (noting that a jury sentenced six of the defendants to death, but one was set aside).

62. *Id.*

63. *Id.* The Court in *Coker* did not explicitly consider the purposes of punishment as it did in later evolving-standards-of-decency cases, but the concept of proportionality implicitly refers to such aims, as I have explained previously. See William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 93 (2011).

In *Enmund v. Florida*,⁶⁴ the Court applied the same majoritarian evolving-standards-of-decency analysis as in *Coker*.⁶⁵ *Enmund* concerned the use of the death penalty for a felony murder conviction where the crime was robbery and another committed the killing.⁶⁶ Of the thirty-six jurisdictions that permitted the death penalty at the time, the Court noted that only eight authorized the death penalty for accomplices in felony murder robbery cases like *Enmund* without proof of additional aggravating circumstances.⁶⁷ In addition, another nine states allowed death sentences for felony murder accomplices where other aggravating factors were present.⁶⁸ The Court found that the legislative practice “weigh[ed] on the side of rejecting capital punishment for the crime at issue.”⁶⁹ The Court also considered jury sentences, although that was a difficult proposition given the variety in felony murder cases and state felony murder laws.⁷⁰

After finding the punishment unusual under the objective indicia, the Court in *Enmund* assessed whether the death sentence was appropriate in light of the purposes of punishment.⁷¹ The Court concluded that Earl Enmund’s sentence constituted a cruel and unusual punishment—the crime of felony murder, as applied in his case, was unconstitutional.⁷²

The Court narrowed the scope of *Enmund* five years later in *Tison v. Arizona*,⁷³ where it reconsidered the Eighth Amendment limitations on felony murder in capital cases, again developing the scope of unusualness.⁷⁴ *Tison* involved the prosecution of Ricky and Raymond Tison, both the sons of Gary Tison, who brutally murdered a family after carjacking their car.⁷⁵ The sons participated both in helping Tison break out of prison and in the carjacking.⁷⁶ They were not directly present,

64. 458 U.S. 782 (1982).

65. *Id.* at 788–89.

66. *Id.* at 783–87.

67. *Id.* at 789.

68. *Id.* at 791.

69. *Id.* at 793.

70. *Id.* at 794–95.

71. *Id.* at 797–801.

72. *Id.* at 800–01.

73. 481 U.S. 137 (1987).

74. *Id.* at 152–58.

75. *Id.* at 139–41. See generally JAMES W. CLARKE, LAST RAMPAGE: THE ESCAPE OF GARY TISON (1988) (providing a chilling account of Tison’s escape from prison and subsequent crime spree).

76. *Tison*, 481 U.S. at 139–40.

however, when their father killed the family, and were unaware that he intended to do so.⁷⁷

The Court in *Tison* applied the same counting of state legislatures as in *Enmund* but combined the jurisdictions that allowed felony murder for any accomplice with those that only allowed felony murder with additional aggravating circumstances.⁷⁸ The Court reasoned that, unlike *Enmund*, the *Tison* sons played an active role in the crime (particularly the prison escape), and as a result both categories of jurisdictions should count, leading to a finding that only eleven jurisdictions did not allow death sentences in felony murder cases like *Tison*.⁷⁹

The Court, under its subjective analysis, likewise found that the death sentences imposed on the *Tison* sons were not disproportionate.⁸⁰ Specifically, the Court cited the reckless endangerment of the *Tison* sons as providing a level of intent that made a death sentence appropriate even though the sons did not participate in the killing itself.⁸¹ The distinction, then, between the outcomes in *Enmund* and *Tison* was the intent of the felony murder accomplices.⁸² Unlike in *Enmund* and *Coker*, the Court made clear that the majority of state legislatures did not provide a consensus view in favor of eliminating the application of the punishment at issue, meaning that the punishment was not unusual under the circumstances.⁸³

For fifteen years after *Enmund*, the Court did not apply the evolving-standards-of-decency doctrine or the Eighth Amendment to a substantive punishment. Then, in 2002, the Court began applying the doctrine to a series of cases, deciding six cases over the next twelve years.

In *Atkins v. Virginia*,⁸⁴ the Court held that the evolving standards of decency and the Eighth Amendment prohibited death sentences for intellectually disabled offenders.⁸⁵ The Court again applied the

77. *See id.* at 139–41. *Tison* died of exposure in the desert after a police manhunt. *Id.* at 141. His death may have increased the public desire (or at least that of the prosecutor) to seek death sentences for his sons. *See generally* CLARKE, *supra* note 75.

78. *Tison*, 481 U.S. at 152–55.

79. *Id.* at 152–55. The Court focused on the recklessness demonstrated by the sons in breaking *Tison* out of prison, particularly considering their knowledge of his dangerous character and criminal past. *See id.* at 151–52.

80. *Id.* at 155–58.

81. *Id.* at 157–58.

82. *Id.* For an argument that a recklessness *mens rea* should be required for capital punishment for felony murder, see Guyora Binder et al., *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1149–52 (2017), which argued for a *mens rea* standard of recklessness in capital felony murder cases.

83. *See Tison*, 481 U.S. at 157–58.

84. 536 U.S. 304 (2002).

85. *Id.* at 321.

majoritarian objective indicia, focusing on state legislative practices that permitted such sentences.⁸⁶ The Court found that thirty states, including twelve states that prohibited capital punishment, proscribed the execution of intellectually disabled offenders, making it an unusual punishment.⁸⁷

Further, the Court emphasized that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change[,]”⁸⁸ noting that seventeen of the states that banned the execution of intellectually disabled offenders had done so in the decade since the Court’s prior decision on this issue in *Penry v. Lynaugh*.⁸⁹ Finally, the Court gave weight to the absence of new state legislation authorizing executions of intellectually disabled offenders, as well as the small number of executions (five inmates) after *Penry*.⁹⁰

With respect to the subjective indicia, the Court in *Atkins* determined that none of the purposes of punishment justified the execution of intellectually disabled offenders.⁹¹ The purpose of retribution did not justify execution of intellectually disabled offenders, according to the Court, because such offenders by definition did not possess the required culpability.⁹² The Court similarly found that exempting the intellectually disabled from the death penalty would have no effect on the ability of the death penalty to deter criminal offenders.⁹³

86. *Id.* at 313–17.

87. *See* *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (citing *Atkins*, 536 U.S. at 313). Justice Scalia’s dissent in *Atkins* took issue with the counting method, instead claiming that eighteen out of thirty-eight death penalty states (47%) banning such executions was not enough to establish a national consensus. *Atkins*, 536 U.S. at 342 (Scalia, J., dissenting).

88. *Atkins*, 536 U.S. at 315. Interestingly, the Court also cited three other states that currently had bills pending that would ban the execution of intellectually disabled offenders. *Id.* at 315 n.17.

89. *Id.* at 314–15; *see also* *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated by* *Atkins*, 536 U.S. 304. The Court had reached the opposite conclusion in *Penry* but reversed that decision in *Atkins* based in part on the legislative shift that demonstrated national consensus. *Atkins*, 536 U.S. at 314–16.

90. *Atkins*, 536 U.S. at 316.

91. *Id.* at 318–20.

92. *Id.* at 319.

93. *Id.* at 319–20. The Court also focused on the likelihood of error as a reason for abolishing the execution of intellectually disabled offenders. *Id.* at 320 n.25. The likelihood of false confessions and the offender’s inability to aid the lawyer in his defense rested at the heart of this concern. *Id.* Interestingly, the Court in *Atkins* did not address the broader question of whether the holding applied to mental illness as well as mental retardation. And it failed to even define mental retardation, leaving that determination up to individual states. *Id.* at 317. For an exploration of possible applications of *Atkins* to mentally ill offenders through the intersection of the Eighth and Fourteenth Amendments, *see generally* Nita A. Farahany, *Cruel and Unequal Punishment*, 86 WASH. U. L. REV. 859 (2009).

Three years later, the Court applied similar reasoning in *Roper v. Simmons*,⁹⁴ holding that the evolving standards of decency and the Eighth Amendment prohibited death sentences for juvenile offenders.⁹⁵ As in *Atkins*, the application of the unusualness objective indicia commenced with counting the state laws, and like *Atkins*, thirty states had prohibited the execution of juvenile offenders (twelve of which had banned the death penalty altogether).⁹⁶ Also like *Atkins*, the Court in *Roper* assessed whether the evolving standards of decency provided enough evidence of changed circumstances to reverse a prior decision—its decision in *Stanford v. Kentucky*⁹⁷ sixteen years earlier.⁹⁸

The Court also noted the presence of objective evidence moving toward ending juvenile executions, although only five states (as compared to sixteen in *Atkins*) had abandoned the juvenile death penalty since *Stanford*.⁹⁹ Also, as in *Atkins*, no state had reinstated the juvenile death penalty since *Stanford*.¹⁰⁰

With respect to the subjective standards, the Court developed the idea that juveniles were offenders that, by definition, possessed a diminished level of culpability.¹⁰¹ Specifically, the Court cited (1) the lack of maturity and undeveloped sense of responsibility of juveniles; (2) the susceptibility of juveniles to outside pressures and negative influences; and (3) the unformed nature of juveniles' character as compared to adults.¹⁰²

In light of the diminished level of culpability, the purposes of punishment, in the Court's view, failed to justify the imposition of juvenile death sentences.¹⁰³ Such death sentences failed to achieve the purpose of retribution in light of the diminished culpability.¹⁰⁴ Likewise, the Court concluded that the execution of juveniles did not achieve a deterrent effect because offenders with diminished capacity are unlikely to be susceptible to deterrence.¹⁰⁵ In addition, the Court found no

94. 543 U.S. 551 (2005).

95. *Id.* at 578–79.

96. *Id.* at 564–65.

97. 492 U.S. 361 (1989), *abrogated by Roper*, 543 U.S. 551.

98. *Roper*, 543 U.S. at 564–65. *Stanford* held that the execution of seventeen-year-old offenders did not violate the Eighth Amendment. *Stanford*, 492 U.S. at 380.

99. *Roper*, 543 U.S. at 565. Even though the change in *Roper* was less pronounced than in *Atkins*, the Court still emphasized that it found it “significant.” *Id.*

100. *Id.* at 566.

101. *Id.* at 569–70.

102. *Id.*

103. *Id.* at 570–71.

104. *Id.* at 571.

105. *Id.* at 571–72.

evidence that a juvenile death sentence would add any deterrent value beyond that achieved by a life-without-parole sentence.¹⁰⁶

One other important aspect of the decision in *Roper* bears mentioning. At the end of its analysis, the Court also cited to the relevance of international standards and practices in determining the meaning of the evolving standards.¹⁰⁷ In particular, the Court emphasized that the United States was the only country in the world that permitted the juvenile death penalty.¹⁰⁸ Again, the focus on unusualness in judicial review partially explains the Court's decision to strike down the statute—the broad consensus, at home and abroad—justified the Court's action and captured the political shift since its prior decision in *Stanford*.¹⁰⁹

Three years later, the Court expanded its holding from *Coker* in *Kennedy v. Louisiana*,¹¹⁰ striking down Louisiana's child rape statute under the Eighth Amendment.¹¹¹ Specifically, the Court held that the evolving standards of decency foreclosed the imposition of a death sentence for child rape.¹¹²

In applying the unusualness objective indicia, the Court determined that forty-four states did not allow capital punishment for child rape.¹¹³ As this number exceeded the number of states in *Atkins* (thirty), *Roper* (thirty), and *Enmund* (forty-two), the Court concluded that the objective consensus banned the death penalty for child rape.¹¹⁴ In other words, the Court found that the death penalty for child rape was an unusual punishment.¹¹⁵

With respect to the subjective indicia, the *Kennedy* Court explained that retribution did not justify a penalty of death for a child rape because, as indicated in *Coker*, such a penalty was disproportionate.¹¹⁶ With respect to deterrence, the Court concluded that the crime of child rape is underreported and allowing the death penalty as a punishment would only

106. *Id.*

107. *Id.* at 575–78; see David Fontana, *Refined Comparativism in Constitutional Law*, 49 *UCLA L. REV.* 539, 589 (2001).

108. *Roper*, 543 U.S. at 575.

109. *Id.*

110. 554 U.S. 407, *modified*, 554 U.S. 945 (2008).

111. *Id.* at 421.

112. *Id.* at 447.

113. *Id.* at 423.

114. *Id.* at 426. Interestingly, the Court discounted the direction of change, as six states had adopted statutes allowing the death penalty for child rape in the five years prior to *Kennedy*. *Id.* at 431. The Court dismissed this change as insignificant when compared to *Atkins* and *Roper*. *Id.* Another implicit reason for the Court's view here might be the idea that the evolving standards of decency only evolve in one direction—away from severe punishments. See Stinneford, *supra* note 28, at 1816.

115. *Kennedy*, 554 U.S. at 435.

116. *Id.* at 442.

increase the incentive to hide the crime.¹¹⁷ As such, death for child rape would likely not advance the purpose of deterrence.¹¹⁸

What these cases show, among other things, is the scope of the Court's finding of unusualness by state counting. The punishments were unusual when one (*Coker*), six (*Kennedy*), eight (*Enmund*), or twenty (*Atkins* and *Roper*) states allowed the punishment but not unusual where thirty-eight (*Tison*) allowed the punishment. It is worth noting that in *Atkins* and *Roper*, the Court found a punishment to be unusual when 40% of jurisdictions used the punishment, albeit with some additional factors—direction of change and international consensus—supporting the conclusion that a punishment was an outlier. In other words, any state punishment used in less than 40% of counties arguably might be an unusual punishment.

II. STATE CONSTITUTIONAL UNUSUALNESS

The U.S. Constitution, as discussed above, proscribes “cruel and unusual punishments.”¹¹⁹ Many state constitutions contain similar language or, at the very least, proscribe “unusual” punishments.¹²⁰ As explored below, while there is variation in the language of state constitutions, almost all of the death penalty states include the word “unusual” in their constitutions.¹²¹ This means that, with respect to capital punishment, there exists a clear application of federal constitutional principles to the regulation of the death penalty under state constitutional

117. *Id.* at 444.

118. *Id.* at 445.

119. U.S. CONST. amend. VIII.

120. *See, e.g.*, ALA. CONST. art. I, § 15; ALASKA CONST. art. I, § 12; ARIZ. CONST. art. II, § 15; ARK. CONST. art. II, § 9; CAL. CONST. art. I § 17; COLO. CONST. art. II, § 20; DEL. CONST. art. I, § 11; FLA. CONST. art. I, § 17; GA. CONST. art. I, § 1, ¶ XVII; HAW. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; IND. CONST. art. I, § 16; IOWA CONST. art. I, § 17; KAN. CONST. Bill of Rights, § 9; KY. CONST. § 17; LA. CONST. art. I, § 20; ME. CONST. art. I, § 9; MD. CONST. Declaration of Rights, art. XVI; MASS. CONST. pt. I, art. XXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. III, § 28; MO. CONST. art. I, § 21; MONT. CONST. art. II, § 22; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 6; N.H. CONST. pt. I, art. XXXIII; N.J. CONST. art. I, ¶ 12; N.M. CONST. art. II, § 13; N.Y. CONST. art. I, § 5; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § II-9; OR. CONST. art. I, § 16; PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8; S.C. CONST. art. I, § 15; TENN. CONST. art. I, § 16; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 9; VA. CONST. art. I, § 9; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 6; WYO. CONST. art. I, § 14.

121. The exceptions to this are Connecticut (CONN. CONST. art. I, § 8), Illinois (ILL. CONST. art. I, § 11), and Vermont (VT. CONST. ch. II, § 39).

law.¹²² It is important, though, to distinguish such an approach from using an identical test to the Eighth Amendment.

For instance, on the federal level, the objective test for the evolving standards of decency examines the practices of state legislatures to assess the interstate consensus with respect to a particular punishment practice. One approach a state could use is to assume that punishments that satisfy the national consensus (and thus meet the federal constitutional standard) are sufficient under the state constitution.

The assumption, though, that the content of the state and federal constitutions are identical is unnecessary and certainly contrary to the language of state constitutions in many cases.¹²³ Instead, state courts should use the principles inherent in the Eighth Amendment as the basis for developing a test for constitutionality under their state constitutions. Thus, an evolving-standards-of-decency test under a state constitution would examine the intrastate consensus to determine whether a particular punishment violated the Eighth Amendment, not simply assume that the result would be the same under the state constitution as under the Eighth Amendment.

A. *State Constitutional Analogues to the Eighth Amendment*

Twenty-six out of the twenty-nine states that still retain the death penalty have constitutional provisions that proscribe “unusual” punishments.¹²⁴ While there is some variation, most states bar cruel and unusual punishments, cruel or unusual punishments, or combine this type of provision with some additional guiding principles.¹²⁵

The similarity in language of these provisions to the Eighth Amendment suggests, at the very least, some potential conceptual overlap between the Eighth Amendment and state constitutions. In the capital context, this means assessing cases in light of the principles articulated in *Furman*, as well as the evolving-standards-of-decency doctrine.¹²⁶ When punishments are rare, as an intrastate matter, they can be unusual under state constitutions, just as rare punishments under the Eighth Amendment

122. Indeed, many states use an approach identical to the Eighth Amendment or, alternatively, use principles from the Eighth Amendment to define the scope of their state constitutions. *See Berry, supra* note 23 (manuscript at 14).

123. Some states, for instance, proscribe “cruel or unusual” punishments instead of “cruel and unusual” punishments. *See id.* at 13–14, 27.

124. *See* sources cited *supra* notes 120–21.

125. *See; Stinneford, supra* note 28, at 1799. *See generally* *Berry, supra* note 23 (discussing the various approaches).

126. *See* discussion *supra* Part I.

can fail to satisfy the objective indicia of the evolving-standards-of-decency test.¹²⁷

It is also worth noting, just as under the Eighth Amendment, punishments under state constitutions can be unconstitutional in two senses—as categorical proscriptions that arise under a constitution or in the form of as-applied violations. Most of the Court’s applications of the Eighth Amendment have served to exclude the death penalty categorically in certain situations—when the crime is rape¹²⁸ or child rape¹²⁹ or when the offender is intellectually disabled¹³⁰ or a juvenile.¹³¹ But the Court has also held the death penalty unconstitutional as applied in *Furman*¹³² and as applied to felony murders in certain circumstances in *Enmund*.¹³³

The same can be true under state constitutions. Certain manifestations of the death penalty might be unusual under state constitutions categorically, similar to those limitations arising under the Eighth Amendment. A state, for instance, could require a minimum *mens rea* in a felony murder case to make a capital sentence constitutional.¹³⁴

A state could also find the death penalty, as applied intrastate, to be unconstitutional for the same reasons that the Court found it unconstitutional in *Furman*.¹³⁵ In other words, state courts could determine that a particular application of a punishment is unconstitutional without creating a categorical proscription for the punishment.¹³⁶

127. See Stinneford, *supra* note 28, at 1823.

128. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

129. *Kennedy v. Louisiana*, 554 U.S. 407, 413, *modified*, 554 U.S. 945 (2008).

130. *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017); *Hall v. Florida*, 572 U.S. 701, 708 (2014); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

131. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

132. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

133. *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

134. Felony murder cases do not require any proof of an intent to kill, but a state could require some level of criminal intent under the state constitution in such cases as a minimum threshold for capital sentences. See *Binder et al.*, *supra* note 82, at 1152, 1199; see also William W. Berry III, *Rethinking Capital Felony Murder*, JOTWELL (Feb. 12, 2018), <https://crim.jotwell.com/rethinking-capital-felony-murder/> [<https://perma.cc/FE6K-CYE8>] (reviewing Guyora Binder et al., *supra* note 82, at 1141).

135. See generally *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (holding the imposition of the death penalty unconstitutional as applied to that case for reasons described in various concurring opinions).

136. As discussed in Part I, the Supreme Court found that the death penalty as applied to a felony murder in *Enmund* violated the Eighth Amendment, 458 U.S. at 788, but was constitutional as applied to a felony murder in *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

B. *Conjunctives and Disjunctives*

While some states read their state constitutional analogues to the Eighth Amendment as being identical in scope to the Eighth Amendment,¹³⁷ this is a choice of the state courts, not a mandatory, required reading. As this Section explains, this is true irrespective of whether the state constitutional language is identical to the Eighth Amendment or contains linguistic differences that give rise to unique readings of the state constitution.

One category of difference between some state constitutional analogues and the text of the Eighth Amendment relates to the disjunctive nature of the state provisions. Sixteen states have disjunctive state constitutional analogues to the Eighth Amendment, meaning that their constitutions proscribe “cruel or unusual” punishments instead of “cruel and unusual” punishments.¹³⁸ On its face, this means that state courts, at least in capital cases, can split the evolving-standards-of-decency inquiry. If “or” really means “or,” then the state constitution bars a punishment that meets one of the parameters of cruelty and unusualness. A cruel punishment violates the state constitution irrespective of whether it is also unusual; an unusual punishment violates the state constitution irrespective of whether it is also cruel. A punishment that fails either the objective jurisdiction-counting test or fails to satisfy one of the purposes of punishment would be unconstitutional under the state constitution. Within the context of this Article, then, capital punishments imposed by state legislatures and courts that are unusual are unconstitutional if arising in states with disjunctive constitutional language.

Other state constitutions have linguistic differences that make separate consideration of unusualness without the need for a showing of cruelty unlikely. For instance, several states proscribe cruel punishments, but not unusual ones.¹³⁹ It would be difficult to read these provisions as proscribing punishments that are merely unusual, unless the state courts read such a requirement into the provisions. The state courts of Connecticut, for example, read in an entire proscription against cruel and unusual punishments even though there is no explicit language to that

137. See, e.g., Berry, *supra* note 23 (manuscript at 14–23).

138. The states are Alabama, Arkansas, California, Hawaii, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, Texas, and Wyoming. See ALA. CONST. art. I, § 15; ARK. CONST. art. II, § 9; CAL. CONST. art. I, § 17; HAW. CONST. art. I, § 12; KAN. CONST. Bill of Rights, § 9; MASS. CONST. pt. 1, art. XXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. 3, § 28; NEV. CONST. art. I, § 6; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OKLA. CONST. art. II, § II-9; S.C. CONST. art. I, § 15; TEX. CONST. art. I, § 13; WYO. CONST. art. I, § 14.

139. See, e.g., DEL. CONST. art. I, § 11; KY. CONST. § 17; PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8; S.D. CONST. art. VI, § 23; WASH. CONST. art. I, § 14.

effect in its constitution.¹⁴⁰ It is possible that state courts could do this with respect to unusual punishment, but unlikely states would read unusual in as a separate requirement.¹⁴¹

Even where states use identical or almost identical language to the Eighth Amendment, state constitutions can give rise to different interpretations of the same language. This is because the conjunction “and” in cruel and unusual is ambiguous—it gives rise to multiple possible readings.

First, “and” can be conjunctive, meaning “and.” This reading would proscribe punishments that are both cruel and unusual. Scholars have most commonly read the Eighth Amendment in this way.¹⁴² Under this reading, it is unlikely that unusual state punishments would be unconstitutional under a state constitution unless they were also cruel.

A second reading of the conjunction “and” is disjunctive, meaning “or.” This reading would proscribe both punishments that are cruel and punishments that are unusual. Although a plausible reading, the general consensus is that such a reading may be in tension with the more natural conjunctive reading of the text.¹⁴³ Under this reading, unusual punishments would violate a state constitution without needing to be cruel as well.

A third reading of “cruel and unusual” could be as a singular, unitary concept that interlocks the two words. Under this approach, “cruel and

140. See CONN. CONST. art. I, §§ 8, 9.

141. Indeed, the states that omit “unusual” typically apply the Eighth Amendment tests in their cases. See Berry, *supra* note 23 (manuscript at 36–38).

142. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 14 (1980); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 116 (2012); Akhil Reed Amar, *America’s Lived Constitution*, 120 *YALE L.J.* 1734, 1777–79 (2011); Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 *NOTRE DAME L. REV.* 1149, 1200 (2006); Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 120 (1997); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249, 1253 (1997); David B. Hershenov, *Why Must Punishment Be Unusual as Well as Cruel to Be Unconstitutional?*, 16 *PUB. AFF. Q.* 77, 77 (2002); Michael J. Zydney Mannheim, *When the Federal Death Penalty Is “Cruel and Unusual,”* 74 *U. CIN. L. REV.* 819, 831–32 (2006); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that Are Both Cruel and Unusual?*, 87 *WASH. U. L. REV.* 567, 569 (2010).

143. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 376 (1972) (Burger, C.J., dissenting) (per curiam) (“Although the Eighth Amendment literally reads as prohibiting only those punishments that are both ‘cruel’ and ‘unusual’”); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 *N.Y.U. L. REV.* 881, 883 n.3 (2009) (“The conjunction ‘and’ in ‘cruel and unusual’ notwithstanding”); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 *WM. & MARY BILL RTS. J.* 475, 491 (2005) (“The Justices sometimes have said that an unconstitutional punishment must be both cruel and unusual, just as the literal text provides.”).

unusual” comprises a single, inseparable idea.¹⁴⁴ In other words, there is something in the nature of cruel punishments that is unusual and something in the nature of unusual punishments that is cruel.¹⁴⁵ Under this reading, an unusual punishment would need to also satisfy the other prong of the evolving-standards-of-decency test to be unconstitutional under state constitutions. This is because the unitary nature of the concept must include some conception of disproportionality.

A fourth reading of “cruel and usual” could be as a tautology. This would mean that cruel and unusual are essentially synonyms or two ways of saying the same thing.¹⁴⁶ Thus, cruel punishments are unusual punishments and unusual punishments are cruel punishments.¹⁴⁷ In this case, unusual punishments would violate a state constitution without additional proof of cruelty because the unusualness would be enough to demonstrate cruelty.

Finally, one can read “cruel and unusual” as a hendiadys, meaning that the second term essentially modifies the first.¹⁴⁸ Under this interpretive approach, cruel and unusual means “unusually cruel.”¹⁴⁹ Such an approach could potentially serve as the basis for as-applied challenges to punishments that are unusual but not necessarily disproportionate. The Court’s decision in *Furman* provides an applicable example.¹⁵⁰ The idea concerns the cruelty of the death penalty, which becomes a cruel punishment when it is executed in an unusual manner. The unusualness—described in terms of arbitrariness by the Court—is what makes the death penalty “unusually cruel” as applied.¹⁵¹

C. Counties as Analogues for States

If state courts hope to give their state constitutions their own independent meanings, state courts must read the provisions of their state

144. See, e.g., HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 96 (1987); KENT GREENAWALT, *INTERPRETING THE CONSTITUTION* 119 (2015); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 545 n.120 (2003); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 968–69 (2011).

145. See, e.g., sources cited *supra* note 144.

146. JOHN D. BESSLER, *CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS’ EIGHTH AMENDMENT* 180–81 (2012).

147. *Id.*

148. Samuel L. Bray, “*Necessary AND Proper*” and “*Cruel AND Unusual*”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 695, 712 (2016).

149. *Id.* at 690.

150. See discussion *supra* Section I.A. See generally *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (finding that the death sentence in that case was cruel and unusual punishment in violation of the Eighth Amendment).

151. See discussion *supra* Section I.A. See generally *Furman*, 408 U.S. 238 (discussing the likelihood that the death penalty is being arbitrarily given).

constitutions as doing more than simply identically importing the national constitutional analysis of the Eighth Amendment. This intellectually lazy approach simply equates the meaning of a state constitution to the meaning of the Eighth Amendment, such that the analysis is identical and there is no distinction or intellectual space between a state constitution and the federal constitution. If a state constitution contains no distinct meaning from the federal constitution, it is essentially a dead letter. Under such an approach, erasing the language from a state constitution would be inconsequential. This is because the Eighth Amendment would still provide the same protections or, in many cases, be devoid of protections for criminal defendants.

State constitutional provisions, where possible, should have their own separate meanings from their federal constitutional counterparts. Where states use analogues to the federal constitution, as in the context of the Eighth Amendment, one possibility for states is to apply the federal rule on the state level. The evolving-standards-of-decency doctrine offers the ability to make this kind of intellectual move.

As explained above, the evolving-standards-of-decency test requires the Court to assess the practices of state legislatures and juries with respect to a particular punishment practice. This application of “objective indicia” surveys states to assess whether the practice in question is a common one or an unusual one.

When a state court is determining whether a punishment is unusual under its state constitution, it does not make sense to assess the national consensus. The acceptability of a punishment practice in one state, in the initial analysis, should not depend on what another state is doing, at least with respect to the meaning of the state constitution.¹⁵² Looking to other states in the context of the meaning of a state constitution is similar to the Supreme Court looking to punishment practices of other countries in determining the meaning of the Eighth Amendment. While the inquiry may be relevant to the question, it provides support to the primary inquiry, as opposed to being the sole inquiry.¹⁵³

Instead, a state court should initially look to the practices of counties within the state to assess whether a punishment is unusual under the state constitution. In capital cases, juries make sentencing decisions within a particular county based on the decision of the county to seek the death penalty in the initial instance. Whether capital punishment is unusual under a state constitution relates to an intrastate analysis of punishment practices. While the Supreme Court engages in state counting to determine the constitutionality of a punishment under the Eighth

152. See *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

153. *Id.* at 575–78; see Fontana, *supra* note 107, at 546.

Amendment, state courts should similarly engage in county counting to determine the constitutionality of a punishment under state constitutions.

Rather than simply copying the analysis of the Supreme Court, this approach adapts the federal process to the state. It stays true to the evolving-standards-of-decency test and the cruel/unusual punishment language but adapts the inquiry to one that is within the state instead of within the entire country. Here, state courts are interpreting the meaning of their state constitutions, not the federal constitution.

The county counting approach could take several forms. The most obvious way to conduct this inquiry is to count the total number of counties and the number of counties that have used the death penalty since 1976. If the total number of counties using the death penalty amounts to 40% or less, the use of the death penalty would in theory be unusual.

To be sure, state courts could adopt a shorter time span, but dating back to the 1976 reinstatement of the death penalty in *Gregg* allows for full assessment of counties where aggravated murders have occurred less often. If there have been no capital cases in over a forty-year period, it does not seem difficult to conclude that the county is not using the death penalty. As the standards of decency evolve over time, choosing a sample from the last ten years or even the last five years may also be appropriate.

With respect to the 40% threshold, this number parallels the Supreme Court's decisions in *Atkins* and *Roper*. In those cases, thirty of fifty states barred a particular practice, which made it unusual under the objective test of the evolving standards of decency. At the very least, a practice used by 16% of counties or less—the percentage for the as-applied inquiry in *Enmund*—would constitute an unusual punishment.

A more circumscribed version of this approach could require a minimum number of capital sentences to qualify a county as a “death penalty county” for county counting purposes. A county with less than five death sentences since 1976 could easily qualify as a non-death county under such an approach.

Irrespective of how a court chooses to draw these lines, creating an intrastate, county-by-county assessment approach is necessary to determine whether capital sentences are unusual within a state and therefore at least partially in contravention of the state constitution.

It is also important to note the difference between a categorical and an as-applied challenge in this context. If certain counties have banned the death penalty, even by policy of the district attorney, then the inquiry would have a categorical focus—as with the Supreme Court decisions in

Coker,¹⁵⁴ *Atkins*,¹⁵⁵ *Roper*,¹⁵⁶ and *Kennedy*.¹⁵⁷ By contrast, if the focus is simply whether particular counties are using the death penalty, then the question is an as-applied one like in *Furman*¹⁵⁸ and *Enmund*.¹⁵⁹

Within as-applied challenges, an examination of the intrastate practices by county directly mirrors the Court's analysis in *Furman*.¹⁶⁰ Exploring state capital sentencing practices can reveal whether and when death sentences are rare, arbitrary, or even random. Though beyond the scope of this Article, capital sentencing disparities based on race, geography, and unguided discretion create constitutional problems and raise questions as to the legitimacy of capital punishment.¹⁶¹ What the proposed approach does is offer a window into the collective unusualness of capital sentencing practices in states as a means to remedy the broader problems.

Such a state constitutional approach becomes particularly important in light of the Supreme Court's mantra that "death is different."¹⁶² As a punishment, the death penalty is unique both in its severity and irrevocability.¹⁶³ As such, unusualness that might be tolerable with lesser punishments—such as the arbitrariness of regulating speeding on highways—is not tolerable when death is the punishment.

154. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (discussing whether the death penalty is categorically appropriate in cases of rape).

155. See *Atkins v. Virginia*, 536 U.S. 304, 307 (2002) (discussing whether the death penalty is categorically appropriate where the defendant is "mentally retarded").

156. See *Roper*, 543 U.S. at 555–56 (discussing whether the death penalty is categorically appropriate where the defendant is a minor).

157. See *Kennedy v. Louisiana*, 554 U.S. 407, 413 (discussing whether the death penalty is categorically appropriate in cases involving rape of a child), *modified*, 554 U.S. 945 (2008).

158. See *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (per curiam) (discussing whether the death penalty was appropriate under the circumstances of each of three consolidated cases).

159. See *Enmund v. Florida*, 458 U.S. 782, 826 (1982).

160. See discussion *supra* Section I.A.; see also *Furman*, 408 U.S. at 298 nn.52–53 (Brennan, J., concurring) (examining states that abolished death as a punishment or stopped using it).

161. See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2762, 2764, 2772 (2015) (Breyer, J., dissenting).

162. Justice Brennan's concurrence in this case is apparently the origin of the Court's death-is-different capital jurisprudence. See *Furman*, 408 U.S. at 286 ("Death is a unique punishment in the United States."); see also Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118 (2004) (discussing the Court's death-is-different jurisprudence and requesting additional procedural safeguards "when humans play at God"); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument).

163. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978) (stating that the penalty of death is "qualitatively" and "profoundly different" from other penalties); *Woodson v. North Carolina*, 428 U.S. 280, 287 (1976) (distinguishing the penalty of death as "unique and irreversible").

III. UNUSUAL STATE CAPITAL PUNISHMENTS

Applying the theoretical frame described in Part II, it quickly becomes clear that state capital punishment practices fall into different categories in light of their use of the death penalty.¹⁶⁴ For ease of analysis, this Article divides the twenty-nine capital states into three broad categories—“de facto abolition” states, “evolved standards” states, and “status quo” states.

De facto abolition states are states that technically permit the death penalty but have rarely sentenced individuals to death or executed criminal offenders. As a practical matter, these states do not use the death penalty, even though it is still a valid punishment under state law. In the de facto abolition states, the death penalty is clearly unusual, as the state never, or almost never, uses it. Given that a death sentence or execution is a remote possibility in such states, the death penalty would clearly be unusual under a state constitution.

The second category, the evolved standards states, includes states in which the overwhelming majority of the counties in the state do not sentence offenders to death or rarely do so. In these states, the majoritarian consensus is not to use the death penalty, thus making it an unusual punishment. The analysis here tracks the Supreme Court’s objective indicia in its evolving-standards-of-decency inquiry but engages an intrastate analysis of counties instead of an interstate analysis of states.

The third category, the status quo states, includes states in which the death penalty remains widely used in terms of both new death sentences and executions. These states might one day evolve their standards such that the death penalty becomes rare but have not yet reached that point.

A. *De Facto Abolition States*

1. The States (California, Colorado, Idaho, Kansas, Kentucky, Montana, Nebraska, Oregon, Pennsylvania, South Dakota, Utah, and Wyoming)

a. California

California has executed thirteen offenders since 1976, from eleven of its fifty-eight counties (19%).¹⁶⁵ At the same time, California houses the

164. The numbers that provide the basis for this analysis date from April 1, 2019.

165. See DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A.: SPRING 2019, at 8 (2019); *California Counties by Population*, CAL. DEMOGRAPHICS (Dec. 6, 2018), https://www.california-demographics.com/counties_by_population [<https://perma.cc/B7K4-EXKG>]; *The Clustering of the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/clustering-death-penalty#DR> [<https://perma.cc/A9CV-Z8VE>].

largest death row in the United States, with approximately 740 inmates from thirty-seven of its fifty-eight counties (64%).¹⁶⁶ California has not executed anyone since 2006,¹⁶⁷ despite continuing to sentence offenders to death in significant numbers (typically ten or more) annually.¹⁶⁸ The state shows no signs of pursuing an execution, particularly now that the new governor has imposed an indefinite moratorium on the death penalty.¹⁶⁹ Even though the distribution of death sentences by county is not unusual, the number of executions is, and as a result, California's death penalty is probably unusual with respect to its state constitution.

b. Colorado

Examining Colorado county by county, it is clear that the death penalty is unusual as an intrastate matter because there is almost de facto abolition. Colorado has only executed one individual since the reinstatement of the death penalty in 1976.¹⁷⁰ In addition, Colorado only has three individuals on its death row, all sentenced in Arapahoe County.¹⁷¹ As a result, less than 2% of Colorado's counties (one out of sixty-four) have sentenced an individual to death, and only one county has been responsible for an execution (one out of sixty-four).¹⁷²

c. Idaho

Idaho has executed three offenders since 1976¹⁷³ and has only eight offenders on death row,¹⁷⁴ indicating an almost de facto abolition. Of

166. See FINS, *supra* note 165, at 43; *California Counties by Population*, *supra* note 165; *The Clustering of the Death Penalty*, *supra* note 165; see also *Death Row*, DEATH PENALTY INFO. CTR., [https://deathpenaltyinfo.org/death-row/overview?scid=9&did=188_\[https://perma.cc/2KWG-LFJ4\]](https://deathpenaltyinfo.org/death-row/overview?scid=9&did=188_[https://perma.cc/2KWG-LFJ4]) (estimating that there are 732 inmates currently on death row in California).

167. See *The Clustering of the Death Penalty*, *supra* note 165.

168. See *California*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/california-1> [<https://perma.cc/9W8C-747F>].

169. See Don Thompson, *California's New Governor Signs Moratorium on Executions*, BOS. GLOBE (Mar. 13, 2019, 6:36 PM), <https://www.bostonglobe.com/news/nation/2019/03/13/california-new-governor-signs-moratorium-executions/AANYgqLNjVBXIT4z6x0xUL/story.html> [<http://perma.cc/2HDJ-HXKZ>].

170. See FINS, *supra* note 165, at 9; see also *Colorado*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/colorado> [<https://perma.cc/8R8D-QT7V>].

171. See FINS, *supra* note 165, at 49; *The Clustering of the Death Penalty*, *supra* note 165.

172. See *Colorado Counties*, UNCOVER COLO., <https://www.uncovercolorado.com/counties/> [<https://perma.cc/37MT-B9TQ>]; *The Clustering of the Death Penalty*, *supra* note 165.

173. See FINS, *supra* note 165, at 9; see also *Idaho*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/idaho> [<https://perma.cc/9WWX-PLHG>].

174. See FINS, *supra* note 165, at 52; *Death Row*, IDAHO DEP'T CORRECTION, https://www.idoc.idaho.gov/content/prisons/death_row [<https://perma.cc/B644-Q6Y9>].

Idaho's forty-four counties, two have been responsible for the three executions (less than 5%).¹⁷⁵ Similarly, only five counties have convicted offenders currently on death row (11%), with Ada County responsible for four of the eight (50%).¹⁷⁶ Given the miniscule percentage of Idaho counties engaged in capital punishment and in light of the overall disinclination to sentence inmates to death or execute them, it seems clear that the death penalty in Idaho is unusual as a matter of intrastate inquiry under the state constitution.

d. Kansas

Kansas has not executed anyone since the reinstatement of the death penalty in 1976.¹⁷⁷ In addition, Kansas only has ten offenders on death row, from eight different counties.¹⁷⁸ In a state of 105 counties, this means that less than 7% of the counties have sentenced an offender to death.¹⁷⁹ As a result, Kansas's use of the death penalty is unusual as a matter of intrastate county counting.

e. Kentucky

Kentucky has only executed three offenders since 1976 and has thirty-one inmates currently on its death row.¹⁸⁰ Of Kentucky's 120 counties, only three are responsible for executions (2.5%) and only fourteen (12%) have inmates on death row.¹⁸¹ The state has also not had an execution in over a decade¹⁸² and has sentenced only three people to death in the past decade.¹⁸³ By all accounts, Kentucky's use of the death penalty is unusual on an intrastate county level.

175. See *Idaho Counties*, IDAHO.GOV, <https://www.idaho.gov/counties/> [<https://perma.cc/GJK2-GPPD>]; *The Clustering of the Death Penalty*, *supra* note 165.

176. *The Clustering of the Death Penalty*, *supra* note 165.

177. See FINS, *supra* note 165, at 8–9; see also *Kansas*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/kansas> [<https://perma.cc/BZ2G-G8L5>].

178. See FINS, *supra* note 165, at 52; *The Clustering of the Death Penalty*, *supra* note 165.

179. See *Kansas Counties*, KAN. HIST. SOC'Y, <https://www.kshs.org/p/kansas-counties/11304> [<https://perma.cc/3TV6-4W4A>]; *The Clustering of the Death Penalty*, *supra* note 165.

180. See FINS, *supra* note 165, at 9, 52; see also *Kentucky*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/kentucky> [<https://perma.cc/DC8D-679B>].

181. See *Commonwealth of Kentucky*, KY. ATLAS & GAZETTEER, <https://www.kyatlas.com/kentucky-counties.html> [<https://perma.cc/HPY9-DW23>]; *The Clustering of the Death Penalty*, *supra* note 165.

182. See *Kentucky*, *supra* note 180.

183. *Id.*

f. Montana

Montana's lack of use of the death penalty suggests that it is another de facto abolition state. The state has only executed three offenders since the reinstatement of the death penalty in 1976¹⁸⁴ and currently has only two offenders on death row.¹⁸⁵ Of the fifty-six counties, three have been responsible for an execution (5%) and two are responsible for a current death row inmate (2%).¹⁸⁶ Montana's intrastate use of the death penalty is clearly unusual.

g. Nebraska

Nebraska's legislature abolished the death penalty in 2015, but its citizens voted to reinstate it during a referendum in 2016.¹⁸⁷ Even so, Nebraska's use of the death penalty since 1976 has been rare, with only four executions¹⁸⁸ and twelve inmates on death row.¹⁸⁹ Only three of out of the state's ninety-three counties have been responsible for executions (3%) and only six counties are responsible for the current inmates on death row (6%).¹⁹⁰ Given the small number of counties participating in the death penalty, it is clear that, as an intrastate matter, Nebraska's use of the death penalty is unusual.

184. See FINS, *supra* note 165, at 9; see also *Montana*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/montana> [<https://perma.cc/5F45-EFVB>].

185. See FINS, *supra* note 165, at 54; *The Clustering of the Death Penalty*, *supra* note 165.

186. See *Montana Counties by Population*, MONT. DEMOGRAPHICS, https://www.montana-demographics.com/counties_by_population [<https://perma.cc/HY4N-Q8U3>]; *The Clustering of the Death Penalty*, *supra* note 165.

187. Paul Hammel, *Nebraskans Vote Overwhelmingly to Restore Death Penalty, Nullify Historic 2015 Vote by State Legislature*, OMAHA WORLD-HERALD (Nov. 9, 2016), https://www.omaha.com/news/politics/nebraskans-vote-overwhelmingly-to-restore-death-penalty-nullify-historic-vote/article_38823d54-a5df-11e6-9a5e-d7a71d75611a.html [<https://perma.cc/PJ8T-QBJH>].

188. See FINS, *supra* note 165, at 9; see also *Nebraska*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nebraska> [<https://perma.cc/BZ4G-P3CA>].

189. See FINS, *supra* note 165, at 54; *Death Row*, *supra* note 166; *The Clustering of the Death Penalty*, *supra* note 165.

190. See *Nebraska Counties by Population*, NEB. DEMOGRAPHICS (Dec. 6, 2018), https://www.nebraska-demographics.com/counties_by_population [<https://perma.cc/9SSQ-BHXV>]; *The Clustering of the Death Penalty*, *supra* note 165.

h. Oregon

Oregon has conducted two executions since 1976 and has a current death row population of thirty-two inmates.¹⁹¹ Of the state's thirty-six counties, two have executed an inmate (6%) and ten have sentenced an inmate to death (31%) in the post-*Gregg* era.¹⁹² In the past decade, Oregon has not executed any inmates and has only sentenced five people to death.¹⁹³ By any measure, Oregon's use of the death penalty is unusual on the county level.

i. Pennsylvania

Pennsylvania has only executed three inmates since 1976, all coming from different counties, meaning that less than 4% (three out of sixty-seven) of Pennsylvania counties are responsible for an execution.¹⁹⁴ Its current death row contains around 150 inmates sentenced in thirty-six different counties (54%).¹⁹⁵ Philadelphia County (fifty-three) alone accounts for around 35% of the death row population, and when it is paired with Allegheny (nine) and York (twelve), the three counties comprise just under half of the Pennsylvania death sentences.¹⁹⁶ As with California, there is a real disconnect in Pennsylvania between the high death row population (around 150) and the low number of executions (three).¹⁹⁷

Pennsylvania has not executed anyone in twenty years and has sentenced fifteen offenders from ten counties to death (15%) in the past decade.¹⁹⁸ The absence of executions makes Pennsylvania's capital

191. See FINS, *supra* note 165, at 9, 58; see also Oregon, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/oregon> [<https://perma.cc/2P5Y-NSDP>].

192. See Oregon Counties by Population, OR. DEMOGRAPHICS (May 2019), https://www.oregon-demographics.com/counties_by_population [<https://perma.cc/V56A-FYF7>]; *The Clustering of the Death Penalty*, *supra* note 165.

193. Oregon, *supra* note 191.

194. See FINS, *supra* note 165, at 9; see also Pennsylvania, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/pennsylvania> [<https://perma.cc/NF7B-VHA9>]; Pennsylvania Counties by Population, PA. DEMOGRAPHICS (May 2019), https://www.pennsylvania-demographics.com/counties_by_population [<https://perma.cc/HDZ2-RQCG>]; *The Clustering of the Death Penalty*, *supra* note 165.

195. See FINS, *supra* note 165, at 58; *The Clustering of the Death Penalty*, *supra* note 165; see also PA. DEP'T OF CORR., PERSONS SENTENCED TO EXECUTION IN PENNSYLVANIA AS OF AUGUST 1, 2019, at 6 (2019) (estimating that 139 inmates are currently on death row).

196. See *The Clustering of the Death Penalty*, *supra* note 165; see also PA. DEP'T OF CORR., *supra* note 195 (estimating that forty-five inmates are currently on death row in Philadelphia County).

197. FINS, *supra* note 165, at 9, 58; see also Pennsylvania, *supra* note 194.

198. See Pennsylvania, *supra* note 194; *The Clustering of the Death Penalty*, *supra* note 165.

sentencing unusual, and its decreasing percentage of counties sentencing offenders to death in the past decade confirms this conclusion.

j. South Dakota

South Dakota has similarly used the death penalty in such a rare manner as to constitute de facto abolition. It has only executed four inmates since 1976, and currently has only three offenders on death row.¹⁹⁹ Of the sixty-six counties in South Dakota, only two (3%) have been responsible for the execution of a criminal offender²⁰⁰ and two are responsible for the offenders currently on death row (3%).²⁰¹ South Dakota's use of the death penalty is clearly unusual as an intrastate matter, with a small percentage of counties responsible for the rare cases that receive a death sentence and result in an execution.

k. Utah

Utah has executed seven inmates since 1976, representing four of the state's twenty-nine counties (14%).²⁰² Utah's death row is sparse, containing only eight offenders from seven counties (24%).²⁰³ Utah has not executed anyone since 2010 and has not sentenced anyone to death since 2008.²⁰⁴ Given Utah's near de facto abolition of the death penalty and rare use across its counties, its intrastate usage is unusual on the county level.

199. See FINS, *supra* note 165, at 9, 60; *The Clustering of the Death Penalty*, *supra* note 165; see also *South Dakota*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/south-dakota> [<https://perma.cc/N5AV-9B92>] (estimating that there are three offenders on death row).

200. See *South Dakota Counties by Population*, S.D. DEMOGRAPHICS (Dec. 6, 2018), https://www.southdakota-demographics.com/counties_by_population [<https://perma.cc/7KXG-8FDC>]; *The Clustering of the Death Penalty*, *supra* note 165. Minnehaha County is responsible for two of the four executions conducted in South Dakota since 1977. See *The Clustering of the Death Penalty*, *supra* note 165.

201. See *South Dakota Counties by Population*, *supra* note 200; *The Clustering of the Death Penalty*, *supra* note 165.

202. See FINS, *supra* note 165, at 9; *The Clustering of the Death Penalty*, *supra* note 165; *Utah Counties by Population*, UTAH DEMOGRAPHICS (Dec. 6, 2018), https://www.utah-demographics.com/counties_by_population [<https://perma.cc/KCV5-APKC>]; see also *Utah*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/utah> [<https://perma.cc/466V-TSC>] (stating that six executions have taken place in Utah since 1976).

203. See FINS, *supra* note 165, at 62; *The Clustering of the Death Penalty*, *supra* note 165.

204. See *Utah*, *supra* note 202.

1. Wyoming

Wyoming is another state that has de facto abolished the death penalty, executing only one offender since 1976 and currently housing only one offender on death row.²⁰⁵ Thus, of the twenty-three counties in Wyoming, less than 5% (one out of twenty-three) have been responsible for the execution of an offender since 1976 and the same number (less than 5%) have actually sentenced an offender to death since 1976.²⁰⁶ Wyoming's use of the death penalty is clearly unusual as a matter of intrastate inquiry for state constitutional purposes.

2. Possible State Constitutional Consequences

Of the de facto abolition states, California,²⁰⁷ Kansas,²⁰⁸ Pennsylvania,²⁰⁹ and Wyoming²¹⁰ have disjunctive constitutional language that bars cruel "or" unusual punishments. Given the clear evidence that the death penalty is unusual under the evolving-standards-of-decency test as applied in an intrastate fashion to their counties, the California, Kansas, Pennsylvania, and Wyoming state courts could declare the death penalty unconstitutional, as applied, under the California constitution, the Kansas constitution, the Pennsylvania constitution, and the Wyoming constitution, respectively. The "or" in a state constitution means that unusualness is enough; the death penalty, as applied, violates the state constitution, irrespective of whether the state courts find the death penalty to also be cruel.²¹¹

In Colorado,²¹² Idaho,²¹³ and Utah,²¹⁴ the state constitutions use identical language to the Eighth Amendment, proscribing "cruel and unusual" punishments. As indicated above, it is possible for those state courts to interpret this language disjunctively or as a tautology, meaning that proof of unusualness would be sufficient to demonstrate a state constitutional violation.²¹⁵ The more likely readings, though, are reading

205. See FINS, *supra* note 165, at 9, 62; Wyoming, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/wyoming> [<https://perma.cc/HZX5-QKV8>].

206. See *The Clustering of the Death Penalty*, *supra* note 165; Wyoming, *supra* note 205; Wyoming Counties by Population, WYO. DEMOGRAPHICS (Dec. 6, 2018), https://www.wyoming-demographics.com/counties_by_population [<https://perma.cc/YLJ4-M86K>].

207. CAL. CONST. art. I, § 17.

208. KAN. CONST. Bill of Rights, § 9.

209. PA. CONST. art. I, § 13.

210. WYO. CONST. art. I, § 14.

211. See discussion *supra* Section II.B.

212. COLO. CONST. art. II, § 20.

213. IDAHO CONST. art. I, § 6.

214. UTAH CONST. art. I, § 9.

215. See discussion *supra* Section II.B.

cruel and unusual as interconnected requirements or as separate requirements. In the first case, the unusualness would have a bearing on whether the punishment is also cruel.²¹⁶ As in *Furman*, the rare nature of the punishment connotes arbitrariness.²¹⁷ Arbitrary punishments can be cruel.²¹⁸

Alternatively, those courts could read cruelty as a separate requirement. As under the evolving-standards-of-decency subjective test, this analysis would relate to whether the death penalty is a proportional punishment, as applied, or whether it satisfies one or more purposes of punishment.²¹⁹ The proportionality inquiry would relate to the criminal conduct and personal characteristics of the offenders and their relationships to the punishment.²²⁰ An inquiry into the purposes of punishment would focus on retribution and deterrence.²²¹ While some have argued that the death penalty does not satisfy the purposes of retribution,²²² it seems unlikely that state supreme courts with elected judges would accept such an argument. The social science evidence demonstrates that the death penalty, particularly as used in the United States, does not deter,²²³ but states may not accept that argument either.

The Nebraska constitution²²⁴ is almost identical to the Eighth Amendment but proscribes the infliction of a singular punishment that is cruel and unusual instead of the plural punishments of the Eighth Amendment. The analysis here would likely be the same as with the identical provisions in Colorado, Idaho, and Utah.

216. See discussion *supra* Section II.B.

217. See discussion *supra* Section I.A.

218. See discussion *supra* Section II.B.

219. See discussion *supra* Section I.B.

220. See generally William W. Berry III, *Separating Retribution from Proportionality*, 97 VA. L. REV. IN BRIEF (2011) (discussing the proportionality inquiry and advocating for “a broader concept of proportionality” to “better achieve the goal of a more intelligible and robust Eighth Amendment”); Stinneford, *supra* note 144 (discussing proportionality and advocating that it “should be measured primarily in relation to prior punishment practice”).

221. See discussion *supra* Section I.A. Dangerousness is not usually relevant as a justification for the death penalty. See William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 893 (2010). While the death penalty also usually does not satisfy the purpose of rehabilitation, some have argued that it is relevant nonetheless. See Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1234 (2013).

222. See Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 407, 458–60 (2005).

223. See John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005); Carol S. Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 753–56 (2005).

224. NEB. CONST. art. I, § 9.

The Montana constitution²²⁵ likewise uses identical language to the Eighth Amendment but also adds a separate provision that requires that government action respect the dignity of the offender. If Montana courts examined only the cruel and unusual question, the analysis would be similar to Colorado, Idaho, and Utah. If Montana courts focused on the dignity question, the analysis would be broader and center on the ways in which capital punishment might infringe on the offender's dignity, both as a substantive matter and with respect to methods of execution.²²⁶

The Oregon constitution²²⁷ uses identical "cruel and unusual punishments" language but also adds a requirement that all penalties be proportional to the offense. This state would engage in a similar analysis to Colorado, Idaho, and Utah. The difference is that the proportionality analysis that might be part of the Colorado, Idaho, and Utah analysis would definitely be part of the Oregon analysis.

The constitutions of Kentucky²²⁸ and South Dakota²²⁹ prohibit cruel punishments but not unusual ones. This means that Kentucky courts would have to read the requirement of unusual into the state constitution and make the second step of deciding that unusual punishments alone violate the state constitution. As discussed above, the first analytical move seems possible, but the second one seems far less likely.

B. *Evolved Standards States*

1. The States (Arizona, Arkansas, Georgia, Indiana, Louisiana, Mississippi, Missouri, South Carolina, Tennessee, and Virginia)

a. Arizona

Of Arizona's fifteen counties, eight are represented on death row and eight have executed an offender since 1976.²³⁰ On its face, then, Arizona's death penalty, as an intrastate inquiry, does not seem to be unusual.

A closer examination, though, of Arizona's county-by-county practices may suggest that the standards are evolving toward abolition in Arizona. Of the thirty-seven executions conducted by the state since

225. MONT. CONST. art. II, §§ 4, 22.

226. See William W. Berry III & Meghan J. Ryan, *Cruel Techniques, Unusual Secrets*, 78 OHIO ST. L.J. 403, 437 (2017); Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2131 (2016).

227. OR. CONST. art. I, § 16.

228. KY. CONST. § 17.

229. S.D. CONST. art. VI, § 23.

230. See *Arizona Counties by Population*, ARIZ. DEMOGRAPHICS (Dec. 6, 2018), https://www.arizona-demographics.com/counties_by_population [<https://perma.cc/S9GZ-BJES>]; see also *The Clustering of the Death Penalty*, *supra* note 165.

1976, twenty-four of them have come from convictions in Pima (thirteen) and Maricopa (eleven) counties.²³¹ Of the 121 inmates currently on death row, the overwhelming majority (over 80%) were convicted in Pima (twenty) and Maricopa (eighty-four) counties.²³²

With two out of fifteen counties (13%) responsible for roughly 80% of the death sentences and executions in Arizona, the death penalty increasingly appears to be unusual in Arizona, as it is almost nonexistent in counties other than Pima and Maricopa.

b. Arkansas

Despite its wild execution spree in 2017,²³³ Arkansas arguably engages in execution practices that are unusual intrastate or that are at least moving in that direction. Of the thirty-two inmates on death row in Arkansas, only twenty-two of the state's seventy-five counties (29%) are represented.²³⁴ Similarly, of the state's thirty-two executions since the reinstatement of the death penalty, the convictions came from nineteen different counties (25%).²³⁵

Pulaski County in Arkansas is responsible for six executions and four of the inmates on death row, making it an outlier in the state.²³⁶ Removing the 20% of death row that Pulaski is responsible for makes Arkansas look even less like a state regularly engaged in the use of the death penalty.

c. Georgia

Georgia has executed seventy-two inmates since 1976, with convictions from thirty-nine of the state's 159 counties (23%).²³⁷ Of the fifty-three inmates currently on Georgia's death row, thirty-one counties

231. See FINS, *supra* note 165, at 8; *The Clustering of the Death Penalty*, *supra* note 165.

232. See FINS, *supra* note 165, at 42; *The Clustering of the Death Penalty*, *supra* note 165; see also Arizona, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/arizona> [<https://perma.cc/XX77-CEJF>] (discussing the history of the death penalty in Arizona).

233. *Arkansas Performs Double Execution Amid Allegations of Botched Lethal Injection*, DEATH PENALTY INFO. CTR., <https://archive.deathpenaltyinfo.org/node/6747> [<https://perma.cc/JRV3-R4LP>].

234. See *Arkansas Counties by Population*, ARK. DEMOGRAPHICS (Dec. 6, 2018), https://www.arkansas-demographics.com/counties_by_population [<https://perma.cc/FPD5-KA5Z>]; *The Clustering of the Death Penalty*, *supra* note 165.

235. See FINS, *supra* note 165, at 42; *Death Row*, *supra* note 166; *The Clustering of the Death Penalty*, *supra* note 165.

236. See *The Clustering of the Death Penalty*, *supra* note 165.

237. See FINS, *supra* note 165, at 8; *Georgia Counties by Population*, GA. DEMOGRAPHICS (Dec. 6, 2018), https://www.georgia-demographics.com/counties_by_population [<https://perma.cc/H2YE-8K29>]; *The Clustering of the Death Penalty*, *supra* note 165.

(19%) are represented.²³⁸ Over one-third of the current death row inmates in Georgia come from four counties: Baldwin (three), Chatham (four), Cobb (five), and Fulton (five).²³⁹ Georgia has also only sentenced four offenders to death in the last decade.²⁴⁰ In light of the low percentage of counties using the death penalty and sentencing offenders to death, one can reasonably conclude that the use of the death penalty in Georgia is unusual, particularly in recent years given its intrastate use across its 159 counties.

d. Indiana

Indiana has used the death penalty only rarely since its reinstatement in 1976, executing twenty inmates during that time period.²⁴¹ The current Indiana death row is sparse as well, with only nine inmates.²⁴² Of Indiana's ninety-two counties, only thirteen (14%) have been responsible for the execution of an inmate.²⁴³ Similarly, only nine counties (10%) currently have convicted individuals on death row in Indiana.²⁴⁴ As a result, it is not difficult to determine, as a matter of intrastate county counting, that Indiana's death penalty is an unusual punishment.

e. Louisiana

Louisiana has executed twenty-eight inmates since the reinstatement of the death penalty and currently has sixty-nine offenders on death row.²⁴⁵ Of the sixty-four parishes in Louisiana, fourteen have been responsible for executions (22%) and twenty have imposed death

238. See FINS, *supra* note 165, at 51; *Death Row*, *supra* note 166; *Georgia Counties by Population*, *supra* note 237; *The Clustering of the Death Penalty*, *supra* note 165 (estimating that there are fifty-six inmates currently on death row); see also *Georgia*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/georgia-1> [<https://perma.cc/G7RQ-XADV>] (discussing the history of the death penalty in Georgia).

239. See *The Clustering of the Death Penalty*, *supra* note 165.

240. See *Georgia*, *supra* note 238.

241. See FINS, *supra* note 165, at 8; *The Clustering of the Death Penalty*, *supra* note 165.

242. See FINS, *supra* note 165, at 52; *Indiana*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/indiana> [<https://perma.cc/CHP5-WSQ8>] (estimating that there are eleven inmates currently on death row).

243. See *Indiana Counties by Population*, IND. DEMOGRAPHICS (Dec. 6, 2018), https://www.indiana-demographics.com/counties_by_population [<https://perma.cc/PKA5-MD8N>]; *The Clustering of the Death Penalty*, *supra* note 165.

244. See *Indiana Counties by Population*, *supra* note 243; *The Clustering of the Death Penalty*, *supra* note 165.

245. See FINS, *supra* note 165, at 8, 53; see also *Louisiana*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/louisiana> [<https://perma.cc/BT35-UZXM>] (estimating that there are seventy inmates currently on death row).

sentences on the offenders currently on death row (31%).²⁴⁶ Four parishes in particular are collectively responsible for 59% (forty-one out of sixty-nine) of the current death sentences: Caddo (thirteen), East Baton Rouge (fifteen), Jefferson (seven), and Orleans (six).²⁴⁷ Although closer to the margin, it is possible in light of these facts to find that, as a matter of intrastate comparison, Louisiana's use of the death penalty is unusual.

f. Mississippi

Since the reinstatement of the death penalty in 1976, Mississippi has executed twenty-one inmates convicted in fourteen different counties out of the eighty-two in the state (17%).²⁴⁸ The death row inmates in Mississippi received their death sentences in twenty-five different counties (30% of counties).²⁴⁹ The current death sentences are fairly evenly distributed among the counties in the state, but the overwhelming percentage of counties that have not been responsible for an execution²⁵⁰ and the fairly large percentage of counties that have not sentenced anyone on death row both suggest that the Mississippi death penalty is unusual, at least with respect to county counting as a proxy for evolving standards.

g. Missouri

Missouri has been a fairly active death penalty state by comparison, executing eighty-eight offenders from twenty-nine of the state's 114 counties (25%) since 1976.²⁵¹ Missouri also currently incarcerates twenty-four inmates on its death row from fifteen counties (13%).²⁵² Of these twenty-four inmates, six (25%) were sentenced in St. Louis County

246. See *Louisiana Counties by Population*, LA. DEMOGRAPHICS (Dec. 6, 2018), https://www.louisiana-demographics.com/counties_by_population [<https://perma.cc/PTU5-SB3F>]; *The Clustering of the Death Penalty*, *supra* note 165.

247. See *The Clustering of the Death Penalty*, *supra* note 165.

248. See FINS, *supra* note 165, at 8; *Mississippi Counties by Population*, MISS. DEMOGRAPHICS (Dec. 6, 2018), https://www.mississippi-demographics.com/counties_by_population [<https://perma.cc/KQ7Q-KXMU>]; *The Clustering of the Death Penalty*, *supra* note 165; *Mississippi*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/mississippi> [<https://perma.cc/DS8H-8RN6>].

249. See *The Clustering of the Death Penalty*, *supra* note 165.

250. See *id.*

251. See FINS, *supra* note 165, at 8; *Missouri Counties by Population*, MO. DEMOGRAPHICS (Dec. 6, 2018), https://www.missouri-demographics.com/counties_by_population [<https://perma.cc/5TMW-F4BB>] (listing the number of counties in Missouri); *The Clustering of the Death Penalty*, *supra* note 165.

252. See FINS, *supra* note 165, at 54; *The Clustering of the Death Penalty*, *supra* note 165; see also *Current Inmates*, MO. DEATH ROW, <https://missourideathrow.com/current-inmates/> [<https://perma.cc/DC9L-EVVE>] (estimating the number of inmates currently on death row to be as high as forty inmates in twenty-three counties).

or St. Louis City.²⁵³ Given the reduced percentage of counties involved in executing inmates and sentencing inmates to death, it is possible to conclude that the death penalty in Missouri is unusual, at least in terms of county counting under the evolving standards of decency.

h. South Carolina

In South Carolina, forty-three inmates from nineteen of the state's forty-six counties (41%) have been executed since 1976.²⁵⁴ The South Carolina death row currently houses thirty-eight inmates from twenty-one counties (48%).²⁵⁵ These numbers would typically not lead to a conclusion that the state's use of the death penalty is unusual in light of its intrastate usage.

The state, however, has only sentenced three people to death since 2013 (7% of counties) and only one in the past five years.²⁵⁶ South Carolina has also conducted only three executions in the past decade (7% of counties) and none since 2011.²⁵⁷ South Carolina's recent move away from the death penalty supports a conclusion that its death penalty use is unusual, at least over the past decade, with respect to the counties that actually are using it.

i. Tennessee

Tennessee has executed nine inmates since 1976, from eight of the state's ninety-five counties (8%).²⁵⁸ Its current death row houses fifty-eight offenders, from seventeen of the state's ninety-five counties (18%).²⁵⁹ Almost 70% of Tennessee death row inmates come from four

253. See *The Clustering of the Death Penalty*, *supra* note 165; see also *Current Inmates*, *supra* note 252 (estimating the number of inmates currently on death row to be as high as sixteen inmates in two counties).

254. See FINS, *supra* note 165, at 8; *The Clustering of the Death Penalty*, *supra* note 165; see also *South Carolina Counties by Population*, S.C. DEMOGRAPHICS (Dec. 6, 2018), https://www.southcarolina-demographics.com/counties_by_population [<https://perma.cc/NEC9-25UE>] (listing the number of counties in South Carolina).

255. See FINS, *supra* note 165, at 59; *The Clustering of the Death Penalty*, *supra* note 165; see also S.C. DEP'T CORR., DEATH ROW LIST (2019), <http://www.doc.sc.gov/news/death-row-report.pdf> [<https://perma.cc/YK88-B6JG>] (estimating the number of inmates currently on death row to be as high as thirty-eight inmates in twenty-two counties).

256. See *South Carolina*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/south-carolina-1> [<https://perma.cc/7CM7-VXTE>]; *The Clustering of the Death Penalty*, *supra* note 165.

257. See *South Carolina*, *supra* note 256.

258. See FINS, *supra* note 165, at 9; *The Clustering of the Death Penalty*, *supra* note 165; see also *Tennessee Counties by Population*, TENN. DEMOGRAPHICS (Dec. 6, 2018), https://www.tennessee-demographics.com/counties_by_population [<https://perma.cc/GW9E-ZKKT>] (listing the number of counties in Tennessee).

259. See FINS, *supra* note 165, at 60; *The Clustering of the Death Penalty*, *supra* note 165; see also *Death Row Offenders*, TENN. DEP'T CORRECTION, <https://www.tn.gov/content/tn/>

counties: Shelby (twenty-seven), Davidson (six), Knox (four), and Hamilton (three).²⁶⁰ And almost 50% come from Shelby County. Given the narrow distribution of death sentences and the overall low percentage of Tennessee counties that have been responsible for executions or that have sentenced current death row inmates, it appears that Tennessee's use of the death penalty is unusual, at least at the county level.

j. Virginia

Virginia is one of the few states that do not have a decade-long gap between the imposition of a death sentence and the imposition of an execution.²⁶¹ Since 1976, Virginia has executed 113 inmates, drawn from forty-four of the Commonwealth's ninety-four counties (47%).²⁶² Currently, Virginia has a mere three inmates on death row—two from Norfolk and one from Fairfax County (2% of counties).²⁶³

Perhaps more telling, though, is that the Commonwealth of Virginia has not sentenced an offender to death in the past six years and has sentenced only three in the past decade, meaning that only 2% of Virginia counties are represented.²⁶⁴ Likewise, the Commonwealth has executed nine inmates in the past decade from eight counties (less than 10% of counties).²⁶⁵

Historically, Virginia's use of the death penalty has not been unusual, but a close examination of its use over the past decade suggests that the death penalty is presently unusual as applied, at least in light of the counting of counties under the evolving standards.

correction/statistics-and-information/death-row-facts/death-row-offenders.html [https://perma.cc/6M9S-KFJ6] (estimating the number of inmates currently on death row to be as high as fifty-five inmates in sixteen counties).

260. See *The Clustering of the Death Penalty*, *supra* note 165; see also *Death Row Facts*, TENN. DEP'T CORRECTION, <https://www.tn.gov/correction/statistics-and-information/death-row-facts.html> [https://perma.cc/JP9J-MRAW] (estimating that there are fifty-six people on death row).

261. See *Virginia*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/virginia> [https://perma.cc/6MC5-SFWL]; see also *Death Row*, *supra* note 166 (listing the number of death row prisoners in Virginia).

262. See FINS, *supra* note 165, at 8; *The Clustering of the Death Penalty*, *supra* note 165; *Virginia*, *supra* note 261; see also *Virginia Counties by Population*, VA. DEMOGRAPHICS (Dec. 6, 2018), https://www.virginia-demographics.com/counties_by_population [https://perma.cc/HZ4B-DD56] (listing the number of counties in Virginia).

263. See FINS, *supra* note 165, at 62; *The Clustering of the Death Penalty*, *supra* note 165; see also *Virginia's Death Row Inmates*, VIRGINIANS FOR ALTERNATIVES TO DEATH PENALTY, <https://www.vadp.org/dp-info/virginias-death-row-inmates/> [https://perma.cc/YG9W-4LXK].

264. See *The Clustering of the Death Penalty*, *supra* note 165; *Virginia*, *supra* note 261.

265. See *The Clustering of the Death Penalty*, *supra* note 165.

2. Possible State Constitutional Consequences

Two of the states in the evolved states category have disjunctive constitutions—Arkansas²⁶⁶ and Mississippi²⁶⁷—and thus the analysis would be the same as in California, Kansas, Pennsylvania, and Wyoming.²⁶⁸ Arkansas and Mississippi are the most obvious candidates for violating a state constitution, as a simple demonstration of unusualness violates the Eighth Amendment analogue.

Louisiana²⁶⁹ has disjunctive language but also proscribes excessive punishments. The best reading of this constitutional provision would be as having separate requirements like Arkansas and Mississippi, but a state court could also read the three ideas collectively as requiring that a punishment have some kind of cruelty or disproportionality to violate the state constitution.

South Carolina²⁷⁰ also has disjunctive language in its state constitution, as well as a proscription against corporal punishment. This difference should not be meaningful, at least with respect to the constitutionality of unusual punishments under the state constitution. The analysis should thus follow the analysis described above for California, Kansas, Pennsylvania, and Wyoming.²⁷¹

Several of the states—Arizona,²⁷² Georgia,²⁷³ Tennessee,²⁷⁴ and Virginia²⁷⁵—have identical state constitutional language to the Eighth Amendment.²⁷⁶ The analysis here should track that described above for Colorado, Idaho, and Utah.²⁷⁷

Missouri²⁷⁸ has identical language to the Eighth Amendment except that it uses the singular “punishment” instead of the plural “punishments.”²⁷⁹ This difference likely is not meaningful with respect to assessing unusual punishments. The analysis should thus track the analysis above for Colorado, Idaho, and Utah.²⁸⁰

266. ARK. CONST. art. II, § 9.

267. MISS. CONST. art. III, § 28.

268. See discussion *supra* Section III.A.2.

269. LA. CONST. art. I, § 20.

270. S.C. CONST. art. I, § 15.

271. See discussion *supra* Section III.A.2.

272. ARIZ. CONST. art. II, § 15.

273. GA. CONST. art. I, § I, ¶ XVII.

274. TENN. CONST. art. I, § 16.

275. VA. CONST. art. I, § 9.

276. U.S. CONST. amend. VIII.

277. See discussion *supra* Section III.A.2.

278. MO. CONST. art. I, § 21.

279. U.S. CONST. amend. VIII.

280. See discussion *supra* Section III.A.2.

Indiana²⁸¹ uses identical language to the Eighth Amendment in its state constitution but also adds a separate proportionality requirement. The analysis here should follow the same approach as described above for Oregon, which has a similar constitutional provision.

C. *Status Quo States (For Now)*

1. The States (Alabama, Florida, Nevada, North Carolina, Ohio, Oklahoma, and Texas)

a. Alabama

Alabama is a state where the intrastate standards of decency have not yet evolved to the level of unusualness, despite annual decreases in the number of new death sentences.²⁸² For the past decade, the state has sentenced ten or fewer offenders to death per year—a decline from prior practices.²⁸³

Of the sixty-seven counties in Alabama, forty-one (61%) have sentenced an offender to death since 1976, resulting in a total of 181 inmates on death row.²⁸⁴ By contrast, Alabama's executions since 1976 have been more narrowly distributed, with twenty-six out of twenty-seven counties (39%) having convicted an executed inmate. Of the sixty-four executions, two counties—Mobile (ten) and Jefferson (twelve)—are responsible for one-third of them.²⁸⁵

b. Florida

Since 1976, Florida has executed ninety-seven inmates from thirty-four of its sixty-seven counties (51%).²⁸⁶ The state currently has 349 inmates on its death row, from fifty of its sixty-seven counties (75%),²⁸⁷

281. IND. CONST. art. 1, § 16.

282. *Alabama*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/alabama-0#sent> [<https://perma.cc/L2JN-TFMW>].

283. *Id.*

284. See FINS, *supra* note 165, at 40; *Death Row*, *supra* note 166; *The Clustering of the Death Penalty*, *supra* note 165; see also *Alabama Counties by Population*, ALA. DEMOGRAPHICS (Dec. 6, 2018), https://www.alabama-demographics.com/counties_by_population [<https://perma.cc/5MQS-AEKB>] (listing the number of counties in Alabama).

285. See FINS, *supra* note 165, at 8; *The Clustering of the Death Penalty*, *supra* note 165 (estimating that sixty-six inmates were executed).

286. See FINS, *supra* note 165, at 8; *The Clustering of the Death Penalty*, *supra* note 165 (estimating that there have been ninety-nine executions); *Florida Counties by Population*, FLA. DEMOGRAPHICS (Dec. 6, 2018), https://www.florida-demographics.com/counties_by_population [<https://perma.cc/7RWU-8F69>].

287. See FINS, *supra* note 165, at 49; *Death Row*, *supra* note 166; *The Clustering of the Death Penalty*, *supra* note 165; see also *Corrections Offender Network: Death Row Roster*, FLA. DEP'T CORRECTIONS, <http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx> [<https://perma.cc/>]

although many have appeals pending in light of the Supreme Court's decision in *Hurst v. Florida*.²⁸⁸ By any measure, the frequency and breadth of Florida's death penalty is not unusual intrastate. Nonetheless, the number of new Florida death sentences continues to decrease over time, with less than ten new sentences in each of the past five years.²⁸⁹

c. Nevada

Nevada has only executed twelve offenders since the reinstatement of the death penalty in 1976.²⁹⁰ These executions came from just two of Nevada's seventeen counties (11.76%)—Clark (eight) and Washoe (four).²⁹¹ Nevada currently has seventy-four inmates on its death row but does not have a publicly available list that links each to a particular county.²⁹² Given the volume of sentences and the small number of counties, it is unlikely that Nevada's death penalty is unusual unless all of the sentences are clustered in one or two counties as the executions were.

d. North Carolina

North Carolina has executed forty-three inmates since 1976, with twenty-six of 100 counties (26%) responsible.²⁹³ North Carolina

A3CN-8KSN] (estimating that the number of inmates on death row, as of September 4, 2019, is 340).

288. 136 S. Ct. 616, 624 (2016) (holding that the judicial override violated the Sixth Amendment); see Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After Hurst*, 66 UCLA L. REV. 448, 476–77 (2019) (explaining that the Supreme Court's decision in *Hurst* invalidated Florida's capital sentencing system); *Hurst v. Florida*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/hurst-v-florida> [<https://perma.cc/3M2M-L5LB>] (discussing the impact on Florida post-*Hurst*, and noting that many sentences have been reviewed in light of *Hurst*, but more have still not been reviewed).

289. See *Florida*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/florida-1> [<https://perma.cc/V44L-L5EP>].

290. See FINS, *supra* note 165, at 8; see also *Nevada*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nevada> [<https://perma.cc/ELC3-7V63>].

291. See *Nevada Counties by Population*, NEV. DEMOGRAPHICS (Dec. 6, 2018), https://www.nevada-demographics.com/counties_by_population [<https://perma.cc/9C2E-TUVJ>]; *The Clustering of the Death Penalty*, *supra* note 165.

292. FINS, *supra* note 165, at 54; see also *Nevada*, *supra* note 290 (estimating that there are seventy-six inmates currently on death row).

293. See FINS, *supra* note 165, at 8; *North Carolina's 100 Counties*, NCPEDIA, <https://www.ncpedia.org/geography/counties> [<https://perma.cc/23RB-APZL>] (stating that the number of counties in North Carolina is 100); *The Clustering of the Death Penalty*, *supra* note 165; see also *North Carolina*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/north-carolina> [<https://perma.cc/WBD5-XLKG>] (discussing notable exonerations in North Carolina).

currently has 143 death row inmates, who are sentenced to death in fifty-three of the 100 counties (53%).²⁹⁴ Three counties—Forsyth (fourteen), Wake (eleven), and Cumberland (ten)—account for almost one-quarter of the current death row population.²⁹⁵

While its current county composition of death sentences does not rise to the level of unusual, North Carolina may be moving in that direction. The state has not executed anyone since 2006²⁹⁶ and has not imposed a new death sentence in three out of the past five years.²⁹⁷

e. Ohio

Ohio has executed fifty-six offenders since 1976, drawn from twenty of the state's eighty-eight counties (23%).²⁹⁸ Currently, Ohio has 141 inmates sentenced to death in thirty-six of the state's eighty-eight counties (36%).²⁹⁹ Almost 40% of Ohio's death row comes from three counties: Cuyahoga (nineteen), Hamilton (twenty-four), and Franklin (eleven).³⁰⁰ The breadth of the distribution of Ohio's death sentences suggests that it is not quite unusual on a county level but may not be that far from its standards evolving in that direction over time.

f. Oklahoma

Oklahoma has executed 112 offenders since 1976, with thirty-one of the state's seventy-seven counties (40%) responsible for those

294. See FINS, *supra* note 165, at 55; *North Carolina's 100 Counties*, *supra* note 293; *The Clustering of the Death Penalty*, *supra* note 165; see also *Death Row Roster*, N.C. DEP'T PUB. SAFETY, <https://www.ncdps.gov/adult-corrections/prisons/death-penalty/death-row-roster> [<https://perma.cc/3AB4-ZQRU>] (estimating that there are 142 inmates currently on death row).

295. See *Death Row Roster*, *supra* note 294 (estimating that there are thirteen inmates currently on death row in Forsyth); *North Carolina*, *supra* note 293; *The Clustering of the Death Penalty*, *supra* note 165.

296. See *North Carolina*, *supra* note 293.

297. *Id.*

298. See FINS, *supra* note 165, at 8; *The Clustering of the Death Penalty*, *supra* note 165; see also *Ohio*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/ohio> [<https://perma.cc/CMJ9-VJE6>] (discussing the history of the death penalty in Ohio); *Ohio Counties by Population*, OHIO DEMOGRAPHICS (Dec. 6, 2018), https://www.ohio-demographics.com/counties_by_population [<https://perma.cc/XF8Y-VU89>] (listing the number of counties in Ohio).

299. See FINS, *supra* note 165, at 56; *The Clustering of the Death Penalty*, *supra* note 165; see also *Death Row: Ohio*, OHIO DEP'T REHABILITATION & CORRECTION, <https://drc.ohio.gov/death-row> [<https://perma.cc/AS8S-RWPM>] (estimating that there are 138 inmates currently on death row sentenced in thirty-five of the state's counties).

300. See *The Clustering of the Death Penalty*, *supra* note 165; see also *Death Row: Ohio*, *supra* note 299 (estimating that twenty-three people were sentenced to death row in Cuyahoga and nineteen people were sentenced to death row in Hamilton).

executions.³⁰¹ Oklahoma has forty-seven inmates on its death row from fifteen different counties (19%).³⁰² Oklahoma County is responsible for an astounding forty-one of the 112 post-*Gregg* executions (37%) and twenty-five of the forty-seven death row inmates (53%).³⁰³ The small number of non-Oklahoma County inmates (twenty per seventy-six counties) adds to the idea that Oklahoma's use of the death penalty is unusual. Currently, though, it is not clear that Oklahoma's death penalty is unusual as applied, although it is arguably moving in that direction.

g. Texas

Texas has conducted far more executions (560) than any other state since 1976.³⁰⁴ These 560 executions came from ninety-six of Texas's 254 counties (38%).³⁰⁵ Four counties—Bexar (forty-five), Dallas (sixty-one), Harris (129), and Tarrant (forty-two)—are responsible for almost 70% of the executions in Texas post-*Gregg*.³⁰⁶

Texas currently houses roughly 225 inmates on death row, sentenced to death in fifty-three of Texas's 254 counties (21%).³⁰⁷ Again, four counties—Bexar (nine), Dallas (twenty-four), Harris (seventy-seven), and Tarrant (sixteen)—account for a significant percentage of the inmates (56%), with Harris County alone accounting for over one-third.³⁰⁸ The percentages of county participation do not quite lead to the conclusion

301. See FINS, *supra* note 165, at 8; *Oklahoma Counties by Population*, OKLA. DEMOGRAPHICS (Dec. 6, 2018), https://www.oklahoma-demographics.com/counties_by_population [<https://perma.cc/AWJ4-L36H>]; *The Clustering of the Death Penalty*, *supra* note 165; see also *Oklahoma*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/oklahoma> [<https://perma.cc/6JF6-XBM8>] (discussing, among other things, the history of the death penalty in Oklahoma).

302. See FINS, *supra* note 165, at 8; *Death Row*, *supra* note 166; *Death Row Monthly Roster*, OK.GOV, <http://doc.ok.gov/Websites/doc/images/Documents/DRMR%203-1-2019.pdf> [<https://perma.cc/G6LA-ZQQ9>]; *The Clustering of the Death Penalty*, *supra* note 165.

303. See *The Clustering of the Death Penalty*, *supra* note 165; *Death Row*, *supra* note 166.

304. See FINS, *supra* note 165, at 8; see also *Texas*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/texas> [<https://perma.cc/26Y2-TWXU>] (estimating that Texas has executed 566 inmates since 1976); *The Clustering of the Death Penalty*, *supra* note 165 (estimating that 565 inmates have been executed in Texas).

305. See *Texas Counties by Population*, TEX. DEMOGRAPHICS (Dec. 6, 2018), https://www.texas-demographics.com/counties_by_population [<https://perma.cc/UHM2-JYXN>]; *The Clustering of the Death Penalty*, *supra* note 165 (showing the executions by county in Texas).

306. See *The Clustering of the Death Penalty*, *supra* note 165.

307. See FINS, *supra* note 165, at 60; see also *Death Row Information: County of Conviction for Offenders on Death Row*, TEX. DEP'T CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_county_conviction_offenders.html [<https://perma.cc/KZ4T-QG9M>] (estimating that Texas currently has 215 inmates on death row); *The Clustering of the Death Penalty*, *supra* note 165 (estimating that there are 223 inmates currently on death row).

308. See *The Clustering of the Death Penalty*, *supra* note 165.

that the intrastate county sentencing practices make the death penalty unusual in Texas yet, but the clustering in a few counties suggests that future evolution might reach that point. The marked decrease in death sentences over the past decade in Texas likewise points in that direction.³⁰⁹

2. Possible State Constitutional Consequences

The states in this category likely do not currently violate their constitutions because their use of the death penalty is not (yet) unusual. If the states do evolve over time, it is worth assessing where their constitutions fall on the spectrum of Eighth Amendment analogues.

Five of the seven states in this category—Alabama,³¹⁰ Nevada,³¹¹ North Carolina,³¹² Oklahoma,³¹³ and Texas³¹⁴—have disjunctive constitutions that proscribe cruel “or” unusual punishments. As with Arkansas, California, Kansas, Louisiana, Mississippi, Pennsylvania, South Carolina, and Wyoming, simple recognition by state courts of the unusualness of the use of the death penalty would be enough to find that the death penalty, as applied, violates their state constitutions.

Ohio³¹⁵ employs identical language in its state constitution to that in the Eighth Amendment. As such, the analysis would follow the analysis described above for Arizona, Colorado, Georgia, Idaho, Tennessee, Utah, and Virginia.³¹⁶

The Florida constitution³¹⁷ explicitly references the Eighth Amendment and mandates that the meaning of the state constitution in capital cases follow directly from the meaning of the Eighth Amendment. Irrespective of how unusual the Florida death penalty might become, it will not violate the state constitution unless the U.S. Supreme Court declares the death penalty unconstitutional under the Eighth Amendment.

IV. THE CASE FOR BARRING UNUSUAL STATE CAPITAL PUNISHMENTS

Given the likelihood that many state capital punishment schemes violate their state constitutions because the death penalty has become unusual in their states, it seems appropriate that states should apply this concept to bar the death penalty. After emphasizing the importance of

309. See *Texas*, *supra* note 304 (depicting a decrease in death sentences over the past decade in Texas).

310. ALA. CONST. art. I, § 15.

311. NEV. CONST. art. I, § 6.

312. N.C. CONST. art. I, § 27.

313. OKLA. CONST. art. II, § 9.

314. TEX. CONST. art. I, § 13.

315. OHIO CONST. art. I, § 9.

316. See discussion *supra* Section III.A.2.

317. FLA. CONST. art. I, § 17.

according meaning to state constitutional provisions, this Part concludes by highlighting many of the policy reasons why state supreme courts should not hesitate to apply the argument advanced in Part III.

A. *Capital Punishments Are Unusual in Many States*

For a constitution to have value, one must accord meaning to its language. The concept of unusual punishments is not an idea embedded in an obscure corner of one or two state constitutions. Rather, it is a core idea that helps define the limits that states place on their ability to punish criminal offenders. And the prohibition against imposing unusual punishments remains ubiquitous in the language of state constitutions.

Given that so many states proscribe this kind of punishment, and that so many capital punishment states use the death penalty in an unusual manner, state supreme courts should decide to intervene and prevent current and future violations of their state constitutions.

At least eight states—Arkansas, California, Kansas, Louisiana, Mississippi, Pennsylvania, South Carolina, and Wyoming—have disjunctive constitutions and have an intrastate distribution of capital punishment that is unusual on the county level.³¹⁸ A move in this direction by these states has the potential benefit of safety in numbers. Nationally, only sixteen out of 3,143 counties (less than 1%) returned five or more death sentences in the six-year period between 2010 and 2015.³¹⁹

B. *Judicial Political Accountability*

Unlike the federal system where judges have life tenure, most state judges are elected. As a result, there exists a higher level of political accountability, at least in theory, for state supreme court justices than U.S. Supreme Court Justices. While the status of a justice as elected or appointed does not particularly matter in the abstract, it can help to address arguments against court application of state constitutional law to limit the actions of the legislature.

The counter-majoritarian difficulty posits the concern that judicial review of statutes under constitutions provides an opportunity for a few justices to negate or overturn the will of the people by striking down laws

318. See discussion *supra* Section III.A.2.

319. *Death Penalty*, FAIR PUNISHMENT PROJECT, <http://fairpunishment.org/category/death-penalty/> [https://perma.cc/D7SR-J7EA]. These counties were: Los Angeles (California), Riverside (California), Orange (California), Kern (California), San Bernardino (California), Maricopa (Arizona), Clark (Nevada), Dallas (Texas), Harris (Texas), Caddo Parish (Louisiana), Mobile (Alabama), Jefferson (Alabama), Duval (Florida), Miami-Dade (Florida), Pinellas (Florida), and Hillsborough (Florida). *Id.*

adopted by popularly elected officials.³²⁰ The general idea here relates to the concept of limited, circumspect judicial review. As the opinions of five justices (or a majority of the state supreme court whatever the size) should not overrule the will of the electorate based purely on differing normative views, the counter-majoritarian difficulty counsels against such “judicial activism” to the extent that constitutional interpretation serves as a pretext for imposing one’s ideological views.³²¹

In the context of applying unusualness to state capital punishments, the counter-majoritarian concerns do not carry significant weight. This is in part because the concept of unusualness relies on majoritarian norms, not counter-majoritarian norms. To the extent that a state supreme court suppresses the actions of a particular county in limiting its ability to impose the death penalty, it would be doing so in the name of the vast majority of counties within the state that approach the death penalty in a different way.

In addition to the majoritarian underpinnings of the doctrine in question, the elected character of state supreme court justices allows for political accountability. If constituents disagree with a court’s application of the state constitution to state punishments, constituents have the ability to vote justices out during the next election. While having elected justices may raise other concerns, the idea of unaccountable, overreaching judicial review is not one of them.

C. State Constitutions Are Not Fixed

A similar concern with the Supreme Court interpreting the meaning of the Constitution rests on the concept that the only way to undo such an interpretation is to have the Court overrule itself in a later decision. While certainly possible, the Court rejecting a prior opinion is unlikely particularly because the Court usually adheres to the doctrine of stare decisis in making decisions.

Further, the U.S. Constitution is extremely difficult to amend. Amending the Constitution requires a supermajority within each state and

320. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17 (1962); Barry Friedman, *The History of The Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 335 (1998) [hereinafter Friedman, *Part One*]; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Two: Reconstruction’s Political Court*, 91 GEO. L.J. 1, 1–2 (2002) [hereinafter Friedman, *Part Two*]; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1383 (2001) [hereinafter Friedman, *Part Three*]; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971, 984 (2000) [hereinafter Friedman, *Part Four*]; Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) [hereinafter Friedman, *Part Five*].

321. See Friedman, *Part Two*, *supra* note 320, at 24–25.

a supermajority of the states to approve an amendment.³²² As a result, the adoption of a constitutional amendment in response to, or to otherwise correct, a decision by the Supreme Court is unlikely in almost every situation.³²³

State constitutions, by contrast, are much more malleable. States often hold referenda or voting initiatives to amend the state constitution, or otherwise gain voter input on a particular issue. This also applies to the death penalty. In 2016, both California and Nebraska used ballot initiatives to assess whether to abolish or keep the death penalty.³²⁴

In short, an interpretation of state constitutional language by a state supreme court does not carry the same level of finality or irrevocability that an interpretation of the U.S. Constitution by the U.S. Supreme Court does. States often amend their constitutions; state supreme court justices do not often engage in interpretation that is not later subject to change if a majority of citizens disagree or do not embrace the consequences.

D. *A Check Against Rogue Prosecutors*

Another entirely unrelated policy rationale supports the robust limitation of unusual state capital punishments—the absence of any check against state prosecutors. While some prosecutors face political consequences through election, many such elections do not involve challenges, and incumbency among prosecutors remains extremely high.³²⁵ Further, many of the prosecutors that work in the district attorneys' offices are career employees and face no political electoral accountability.

The report on prosecutors from the Fair Punishment Project—*America's Five Deadliest Prosecutors*—highlights this problem.³²⁶ According to the report, five prosecutors³²⁷ are responsible for 440 death

322. See U.S. CONST. art. V. See, e.g., Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 CHI. L. REV. 1043, 1046 n.2 (1988); Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1573 (1998).

323. See, e.g., Amar, *supra* note 322, at 1083; Chemerinsky, *supra* note 322, at 1569.

324. Mark Berman, *Nebraska and California Voters Decide to Keep the Death Penalty*, WASH. POST (Nov. 9, 2016, 5:41 PM), <https://www.washingtonpost.com/news/post-nation/wp/2016/11/09/nebraska-and-california-voters-decide-to-keep-the-death-penalty/?noredirect=on> [<https://perma.cc/56KQ-LHWW>].

325. See Andrew Novak, *It's Too Dangerous to Elect Prosecutors*, DAILY BEAST (Apr. 14, 2017, 9:50 AM), <https://www.thedailybeast.com/its-too-dangerous-to-elect-prosecutors> [<https://perma.cc/J38N-5NAF>].

326. FAIR PUNISHMENT PROJECT, *AMERICA'S TOP FIVE DEADLIEST PROSECUTORS: HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY* 4 (2016).

327. *Id.* at 3. These prosecutors are: Joe Freeman Britt of Robeson County, North Carolina; Donnie Myers of Lexington County, South Carolina; Bob Macy of Oklahoma County,

sentences—one out of every seven inmates on death row.³²⁸ Even more troubling, a number of these sentences were reversed because of error and misconduct on the part of the prosecutors.³²⁹ These individuals help create the unusual death sentences that violate their respective state constitutions.

If state courts are willing to restrict unusual punishments under state constitutions, judges could counteract the unregulated power over life that state prosecutors regularly exercise. Given the number of states engaging in unusual capital punishments (twenty-three out of thirty capital states, or 77%), it is time for state courts to give their state constitutions meaning by limiting unconstitutional death sentences.³³⁰

CONCLUSION

This Article has advanced the argument that most state capital sentences are unusual and, in many cases, in violation of the applicable provisions of the governing state constitution. Part I of this Article explained the concept of unusualness under the Eighth Amendment as developed by the U.S. Supreme Court in its cases. In Part II, this Article explored the Eighth Amendment analogues in state constitutions that similarly prohibit unusual punishments and the conjunctive and disjunctive language of the state constitutions, before demonstrating how the Eighth Amendment approach could translate to the analysis of unusualness under state constitutional law. Part III then examined the states that have unusual proscriptions in their state constitutions, and categorizes the states based on the likelihood that their use of the death penalty violates their state constitutions. Finally, in Part IV, this Article argued for an expansive application of state constitutions to bar unusual state capital punishments, exploring the policy reasons supporting this analytical move. Indeed, state constitutional law provides a ripe area for revisiting the use of the death penalty, which continues to be, as it has since *Furman*, an unusual and unconstitutional punishment.

Oklahoma; Lynne Abraham of Philadelphia County, Pennsylvania; and Johnny Holmes of Harris County, Texas. *Id.*

328. *Id.* at 18.

329. *Id.* at 5, 8–9, 11–13; see also Ed Pilkington, *America's Deadliest Prosecutors: Five Lawyers, 440 Death Sentences*, GUARDIAN (June 30, 2016, 12:01 AM), https://www.theguardian.com/us-news/2016/jun/29/us-deadliest-prosecutors-death-penalty-five-attorneys-justice-system?CMP=share_btn_fb [<https://perma.cc/SCP8-W8ZP>]; Robert J. Smith, *America's Deadliest Prosecutors*, SLATE (May 14, 2015, 3:54 AM), <https://slate.com/news-and-politics/2015/05/americas-deadliest-prosecutors-death-penalty-sentences-in-louisiana-florida-oklahoma.html> [<https://perma.cc/GJ6G-3G5Q>].

330. See discussion *supra* Part III.