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Arbiters of Decency: A Study of Legislators' Eighth Amendment Role

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THE ARBITERS OF DECENCY: A STUDY OF LEGISLATORS' EIGHTH AMENDMENT ROLE

David Niven & Aliza Plener Cover*

Abstract: Within Eighth Amendment doctrine, legislators are arbiters of contemporary values. The United States Supreme Court looks closely to state and federal death penalty legislation to determine whether a given punishment is out of keeping with “evolving standards of decency.” Those who draft, debate, and vote on death penalty laws thus participate in both ordinary and higher lawmaking. This Article investigates this dual role.

We coded and aggregated information about every floor statement made in the legislative debates preceding the recent passage of bills abolishing the death penalty in Connecticut, Illinois, and Nebraska. We categorized all statements according to their position on the death penalty, their subject matter, and any references they made to the courts and Constitution. We also collected basic facts about the legislators, including about political party, race, education, and profession. We present our quantitative and qualitative findings here.

Building upon these findings, we critically examine the Court’s use of legislation as an “objective indicator” of “evolving standards of decency.” We identify disconnects between legislative outcomes and community “standards of decency,” and we analyze legislators’ understanding of their constitutional significance and why their level of self-awareness may matter. Finally, we consider how legislative debates—rather than outcomes alone—might provide insights into contemporary values. In particular, the strong concern we observed over wrongful execution may support more robust Eighth Amendment protections for those claiming actual innocence.

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INTRODUCTION

An enduring debate among jurists and legal academics concerns the proper role of legislative history in the interpretation of statutory text.¹ This Article considers how legislative history might be used in another context in which judges analyze legislative action: the Eighth Amendment inquiry into “evolving standards of decency.” In this context, legislation matters not for its own sake but as a symbol of something greater: society’s contemporary moral standards.

In its modern death penalty jurisprudence, the United States Supreme Court looks to society’s “evolving standards of decency” in deciding whether a particular punishment practice violates the Eighth Amendment prohibition on “cruel and unusual punishment.”² To discern these “evolving standards” in the death penalty context, the Court refers to two primary “objective indicators”: state legislation and capital sentencing data.³ In doing so, the Court acknowledges in uniquely explicit terms the interaction between its constitutional pronouncements and popular will. Majoritarian decision-making by legislatures and juries impacts the trajectory of Eighth Amendment law.

1. Compare, e.g., *Digital Realty Tr., Inc. v. Somers*, 583 U.S. ___, 138 S. Ct. 767, 782–83 (2018) (Sotomayor, J., concurring) (defending the Court’s reliance on legislative history), with *id.* at 783–84 (Thomas, J., concurring in part and concurring in the judgment) (critiquing that same reliance). See also, e.g., *Bank One Chicago, N.A. v. Midwest Bank & Tr. Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in the judgment) (critiquing the resort to legislative history); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992) (defending the use of legislative history).

2. *Atkins v. Virginia*, 536 U.S. 304, 311–13 (2002).

3. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (“The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures. We have also looked to data concerning the actions of sentencing juries.” (citing cases)), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); see also *Kennedy v. Louisiana*, 554 U.S. 407, 421 (citing cases), *modified*, 554 U.S. 945 (2008).

A substantial body of legal scholarship is devoted to the Court’s “evolving standards of decency” analysis—to whether the Supreme Court is accurately deciphering society’s “standards of decency” and to whether it should be engaging in that inquiry in the first place.⁴ Scholars frequently criticize the doctrine for being too majoritarian—for failing to place a sufficient counter-majoritarian check upon harsh punishments imposed through political processes.⁵ And some scholarship has specifically critiqued the use of legislation as the primary indicator of society’s evolving standards of decency.⁶ According to these critiques, legislative outcomes are imprecise barometers of morality: they bear useful simplicity as a judicial shorthand, but that simplicity can also obscure important details and may in some cases be used to produce deceptive signals of society’s values.⁷

This Article advances these scholarly discussions by peering behind death penalty legislation to the debates that preceded them. We conducted a study analyzing the floor debates leading to three recent legislative actions abolishing the death penalty: from Connecticut in 2009 and 2012, from Illinois in 2011, and from Nebraska in 2015.⁸ We coded and then aggregated information about every floor statement made in these debates, including about the types of justifications made for and against the death penalty, and about all references made to the United States Supreme Court and to constitutional law.

4. For a sampling of such scholarship, see for example Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 FLA. ST. U. L. REV. 853, 854 (2013) [hereinafter Farrell, *Strict Scrutiny*]; Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation As Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089 (2006); Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1 (2007); Susan Raeker-Jordan, *Kennedy, Kennedy, and the Eighth Amendment: “Still in Search of A Unifying Principle”?*, 73 U. PITT. L. REV. 107 (2011); Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403 (2011); Robert J. Smith, Bidish J. Sarma & Sophie Cull, *The Way the Court Gauges Consensus (and How to Do It Better)*, 35 CARDOZO L. REV. 2397 (2014); John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1749–57 (2008).

5. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 69 (1980) (“[I]t makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority.”); Jacobi, *supra* note 4, at 1098 (“[I]t is axiomatic that the Constitution is meant to protect citizens from the whim of political majorities; as such there is a fundamental theoretical problem with interpreting a constitutional provision on the basis of whether there is a national consensus for or against it.”); Lain, *supra* note 4, at 1 n.1 and accompanying text (citing scholarship); Raeker-Jordan, *supra* note 4, at 137 (critiquing the *Gregg v. Georgia*, 428 U.S. 153 (1976), plurality for “improperly put[ting] its thumb on the scale toward majoritarian control of the Eighth Amendment and away from protection of individual rights”).

6. See, e.g., Jacobi, *supra* note 4, at 1091–93; Smith et al., *supra* note 4, at 2421.

7. See Jacobi, *supra* note 4, at 1092–93; Smith et al., *supra* note 4, at 2420–23.

8. In 2013, Maryland also repealed the death penalty. However, we did not include Maryland in this Article because legislative transcripts were not available for us to review.

In this Article, we report qualitative and quantitative findings from our study and use these findings to investigate three interrelated questions. First, scholars have argued that legislation does not reliably encapsulate public morality on the death penalty. What can legislative history teach us about the viability of legislative outcomes as “objective indicators” of “evolving standards of decency”?

Second, many have voiced concerns that the “evolving standards of decency” doctrine cedes too much control over individual rights to the whims of majoritarian legislators. But little attention has focused on how *legislators* understand the constitutional dimensions of their lawmaking in the death penalty context. What insights can legislative debates provide into the institutional dynamics between courts and majoritarian legislatures in the Eighth Amendment context?

Third, some have criticized the reliance on legislative outcomes and jury verdicts, rather than other available data points, as the “objective indicators” of contemporary values. If we understood legislative debates themselves to contain clues into “evolving standards of decency,” what lessons about societal standards might we discern?

The Article proceeds in four parts. Part I summarizes the Court’s “evolving standards of decency” doctrine, the relevance of state legislation to the Court’s constitutional analysis, and some prominent critiques of the doctrine. Part II explains the methodology of our study. Part III presents our major findings, including information we aggregated about the overall character of the debates and anecdotal information we collected about particularly illuminating statements.

Part IV connects the results of our study to Eighth Amendment doctrine. We find support for the critique that state legislation is an imperfect indicator of society’s “evolving standards of decency.” Moreover, we find that the legislators in our study demonstrated little understanding of their constitutional significance—and, indeed, of judicial processes and constitutional law more generally—an ignorance that may have both negative and positive consequences for Eighth Amendment doctrine as a whole. Finally, we observe a strong moral concern throughout the debates over executing the innocent and consider how that concern might be incorporated into Eighth Amendment doctrine.

I. LEGAL BACKGROUND

A central pillar of the Court’s Eighth Amendment jurisprudence is its assessment of society’s “evolving standards of decency.” Chief Justice Warren first introduced that phrase in his plurality opinion in *Trop v.*

Dulles,⁹ writing that the “scope” of the Eighth Amendment is not “static”; rather, “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁰ The Court later clarified that society’s “evolving standards of decency” should be gauged in reference to “objective indicators”¹¹ rather than defined according to the Court’s own subjective impressions. To date, the Court has specifically endorsed two principal sources for “objective evidence of contemporary values” in its “evolving standards of decency” analysis: “the legislation enacted by the country’s legislatures” and “data concerning the actions of sentencing juries.”¹²

Although emphasizing “evolving standards of decency,” the Court has never deferred wholly to contemporary practice, but has insisted that, in the end, its own judgment of a punishment’s constitutionality is controlling.¹³ Nevertheless, the inquiry into “objective indicators” of “evolving standards of decency” has been an essential component of the Court’s analysis. Indeed, the Court has never parted ways from the “standards of decency” it has discerned¹⁴—at least not in any death penalty case.¹⁵ And the Court has frequently relied heavily on its reading

9. 356 U.S. 86 (1958) (plurality opinion).

10. *Id.* at 101.

11. *Furman v. Georgia*, 408 U.S. 238, 277–79 (1972) (Brennan, J., concurring); *see also Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (“Proportionality review under those evolving standards should be informed by ‘objective factors to the maximum possible extent’”) (citation omitted).

12. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated on other grounds by Atkins*, 536 U.S. 304 (2002).

13. *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (“Consensus is not dispositive. Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.” (citing cases)), *modified*, 554 U.S. 945 (2008); *Atkins*, 536 U.S. at 312 (“[I]n cases involving a [national] consensus, [the Court’s] own judgment is ‘brought to bear,’ . . . by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.” (citation omitted) (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion))); *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (plurality opinion) (“As we have seen, however, the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment.”).

14. As we will discuss shortly, some scholars and jurists have read from this consistency that the Court is able to manipulate the “objective indicators” to such that they “indicate” whatever it is that the Court wishes to conclude. *See infra* notes 46–52 and accompanying text.

15. In at least one non-capital case, the Court’s decision did arguably depart from the “objective indicia” of “evolving standards of decency.” In *Miller v. Alabama*, 567 U.S. 460 (2012), a case which struck down as unconstitutional a mandatory punishment of life imprisonment without parole for a juvenile homicide offender, the Court deemed the “objective indicia” inquiry unnecessary altogether because its holding was dictated by prior precedent. *Id.* at 483 (“[O]ur decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law’s most serious

of evolving standards to justify the outcome it reaches. In *Gregg v. Georgia*,¹⁶ the Court reinstated the death penalty¹⁷ four years after striking it down as unconstitutionally administered in *Furman v. Georgia*.¹⁸ The justices were moved by strong empirical evidence in the wake of *Furman* that the nation's "standards of decency" had not evolved beyond the death penalty.¹⁹ The Court weighed heavily the post-*Furman* re-enactment of death penalty statutes by thirty-five state legislatures and by Congress, as well as the sentencing of 460 individuals to death by March of 1976.²⁰

After *Gregg*, the "evolving standards of decency" analysis retained prominence, and contemporary standards have been invoked numerous times since then to justify Eighth Amendment opinions.²¹ Most interestingly, in *Atkins v. Virginia*²² and *Roper v. Simmons*,²³ changing "objective indicators" appeared to directly alter the previously settled scope of the Eighth Amendment's protection. In *Atkins*, the Court held that the Eighth Amendment prohibited the execution of intellectually disabled²⁴ offenders,²⁵ without confessing that it had erred thirteen years

punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments."); *id.* at 484 n.11. Justice Alito in dissent sharply criticized the shift: "What today's decision shows is that our Eighth Amendment cases are no longer tied to any objective indicia of society's standards. Our Eighth Amendment case law is now entirely inward looking." *Id.* at 514 (Alito, J., dissenting).

Professor Ian Farrell has asserted that the sidestepping of the "objective indicia" analysis in *Miller* is a harbinger of things to come and that "the Court is likely to follow *Miller* in declining to employ Objective Indicia Analysis, and that ultimately, the methodology will be abandoned entirely." Farrell, *Strict Scrutiny*, *supra* note 4, at 903–04.

16. 428 U.S. 153 (1976) (plurality opinion).

17. *Id.* at 179–82 (plurality opinion).

18. 408 U.S. 238 (1972).

19. *Gregg*, 428 U.S. at 179–82 (plurality opinion).

20. *Id.* Note that *Furman* struck down the death penalty as administered, but a majority of the Court did not hold the death penalty per se unconstitutional. *Id.* at 168–69 (explaining the precedential effect of *Furman*). Thus, thirty-five states rewrote their death penalty statutes after *Furman* in an attempt to conform their laws to that decision's constitutional requirements. *Id.* at 179–80.

21. *See, e.g.*, *Enmund v. Florida*, 458 U.S. 782, 788–96 (1982) (conducting an "objective indicia" analysis in holding unconstitutional the death penalty for offenders who neither killed nor intended to kill); *Coker v. Georgia*, 433 U.S. 584, 593–97 (1977) (plurality opinion) (conducting an "objective indicia" analysis in holding unconstitutional the death penalty for the rape of an adult).

22. 536 U.S. 304 (2002).

23. 543 U.S. 551 (2004).

24. The Court used the term "mental retardation" in *Atkins* but has since recognized that the preferred (and synonymous) term is "intellectual disability." *Hall v. Florida*, __ U.S. __, 134 S. Ct. 1986, 1990 (2014).

25. *Atkins*, 536 U.S. at 32.

earlier when it upheld as constitutional the very same practice.²⁶ Instead, the Court explained that since *Penry v. Lynaugh*,²⁷ “[t]he practice . . . has become truly unusual, and it is fair to say that a national consensus has developed against it.”²⁸ In other words, a formerly constitutional practice was now unconstitutional because the “objective indicators” of society’s “evolving standards of decency” had changed. Similarly, when the Court barred the execution of juveniles in *Roper*,²⁹ it departed from the opposite conclusion it had reached in *Stanford v. Kentucky*³⁰ by reanalyzing the “objective indicia” of “evolving standards of decency” and deeming them sufficiently changed.³¹

As mentioned earlier, when evaluating society’s “standards of decency,” the Court has focused on objective information “as expressed in legislative enactments and state practice with respect to executions.”³² Other evidence of society’s contemporary morality, including international and foreign law,³³ viewpoints of professional organizations,³⁴ and public opinion polls,³⁵ have appeared in some of the Supreme Court’s Eighth Amendment cases and arguably influenced the Court’s analysis, but they have been discussed only tentatively and without any binding reliance or endorsement.³⁶ The Court has never

26. See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989), *abrogated on other grounds by*, *Atkins*, 536 U.S. 304.

27. 492 U.S. 302 (1989), *abrogated on other grounds by*, *Atkins*, 536 U.S. 304.

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

29. 543 U.S. 551, 578 (2004).

30. 492 U.S. 361 (1989).

31. *Roper*, 543 U.S. at 564–67. See also Stinneford, *supra* note 4, at 1741 (“In *Atkins v. Virginia* and *Roper v. Simmons*, the Supreme Court appeared to agree that the imposition of the death penalty on the mentally retarded and on seventeen-year-olds respectively was *not* cruel and unusual punishment in 1989, when *Penry v. Lynaugh* and *Stanford v. Kentucky* were decided. Nonetheless, the Court held that such punishments *are* cruel and unusual today. As Justice Scalia stated in his *Roper* dissent, the decisions in *Atkins* and *Roper* are based on the proposition ‘that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court’s decision 15 years ago was *wrong*, but that the Constitution *has changed*.’” (citations omitted)).

32. *Kennedy v. Louisiana*, 554 U.S. 407, 421 (quoting *Roper*, 543 U.S. at 563), *modified* 554 U.S. 945 (2008).

33. See, e.g., *Roper*, 543 U.S. at 575–78; Stinneford, *supra* note 4, at 1751–52 (citing *Roper*, 543 U.S. at 575–78; *Atkins*, 536 U.S. at 316 n.21).

34. See *Hall v. Florida*, 574 U.S. ___, 134 S. Ct. 1986, 1993–97 (2014).

35. *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (“The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely.”), *abrogated on other grounds by* *Atkins*, 536 U.S. 304 (2002); *Gregg v. Georgia*, 428 U.S. 153, 181 n.25 (1976) (plurality opinion) (citing public opinion polls).

36. See, e.g., *Atkins*, 536 U.S. at 324 (Rehnquist, C.J., dissenting) (“In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole

provided a precise formula for assessing the constitutional significance of legislation and sentencing data. With respect to legislation, the Court has considered both the absolute number of states that permit or reject a particular practice and the direction and consistency of the legislative trend.³⁷ Although the Court does sometimes seek to decipher the impetus behind a particular piece of legislation³⁸ and has noted whether the legislation passed by a large or narrow margin,³⁹ the Court rarely looks to legislative history to answer questions about the significance of the legislation or to deepen its understanding of social norms. One exception of note was *Kennedy v. Louisiana*,⁴⁰ when the Court struck down as unconstitutional the death penalty for child rape.⁴¹ The majority and dissent disputed whether the Court's decision in *Coker v. Georgia*,⁴² which prohibited the death penalty for the rape of an adult,⁴³ had deterred state legislators from enacting legislation to punish the rape of a child.⁴⁴

indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.”)

37. See, e.g., *Kennedy*, 554 U.S. at 426 (“Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind.”); *Atkins*, 536 U.S. at 315 (“It is not so much the number of these States that is significant, but the consistency of the direction of change.”); Smith et al., *supra* note 4, at 2406–11 (providing a helpful summary and explanation of the Court's use of state legislative data in its consensus analysis).

38. See, e.g., *Atkins*, 536 U.S. at 314 (“Responding to the national attention received by the Bowden execution and our decision in *Penry*, state legislatures across the country began to address the issue.”); *Woodson v. North Carolina*, 428 U.S. 280, 298–99 (1976) (plurality opinion) (“The fact that some States have adopted mandatory measures following *Furman* while others have legislated standards to guide jury discretion appears attributable to diverse readings of this Court's multi-opinioned decision in that case.”).

39. *Atkins*, 536 U.S. at 316 (“The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.”).

40. 554 U.S. 407, *modified*, 554 U.S. 945 (2008).

41. *Id.* at 413.

42. 433 U.S. 584 (1977) (plurality opinion).

43. *Id.* at 592 (plurality opinion).

44. *Kennedy*, 554 U.S. at 429 (“Still, respondent contends, it is possible that state legislatures have understood *Coker* to state a broad rule that covers the situation of the minor victim as well. We see little evidence of this. Respondent cites no reliable data to indicate that state legislatures have read *Coker* to bar capital punishment for child rape and, for this reason, have been deterred from passing applicable death penalty legislation. In the absence of evidence from those States where legislation has been proposed but not enacted we refuse to speculate about the motivations and concerns of particular state legislators.”); *id.* at 448 (Alito, J., dissenting) (“In assessing current norms, the Court relies primarily on the fact that only 6 of the 50 States now have statutes that permit the death penalty

The “evolving standards of decency” doctrine, with its outward-facing and dynamic stance, can be both admired and maligned. To its credit, the doctrine has made the Eighth Amendment a tool for progressive protections in modern times, rather than a stagnant barrier against eighteenth century notions of barbarity.⁴⁵ And through its reliance on “*objective* indicators” of contemporary values, the Court arguably has been able to bolster the legitimacy of some its more controversial decisions against charges of judicial overreaching, moral subjectivity, and arbitrariness.

Yet the doctrine has also received substantial criticism from judges and legal academics, including some who would seem to agree with the outcome reached in several of the Court’s major cases employing it. Commentators have advanced two primary big-picture critiques of the Court’s reliance on “evolving standards of decency” test.

The first critique is that the test is too majoritarian.⁴⁶ Critics argue that by looking to majoritarian legislatures in defining the contours of an individual right, the Court abdicates its counter-majoritarian role and fails to meaningfully constrain cruel yet commonly accepted punishments.⁴⁷ Moreover, from a states’ rights perspective, a majoritarian Eighth Amendment undermines the states’ traditional freedom to serve as laboratories of experimentation and upsets the federalism balance by imposing some states’ views upon sister states that disagree with them.⁴⁸

The other primary critique of the Court’s “evolving standards of decency” jurisprudence is that it is merely a charade that provides cover for the Court to reach its own desired outcome.⁴⁹ According to this

for this offense. But this statistic is a highly unreliable indicator of the views of state lawmakers and their constituents . . . [D]icta in this Court’s decision in *Coker v. Georgia* has stunted legislative consideration of the question whether the death penalty for the targeted offense of raping a young child is consistent with prevailing standards of decency. The *Coker* dicta gave state legislators and others good reason to fear that any law permitting the imposition of the death penalty for this crime would meet precisely the fate that has now befallen the Louisiana statute that is currently before us, and this threat strongly discouraged state legislators—regardless of their own values and those of their constituents—from supporting the enactment of such legislation.”); *see also id.* at 452–54 (Alito, J., dissenting) (explaining how misinterpretation of *Coker* may have influenced state legislatures’ choice not to enact the death penalty for child rape).

45. As Justice Stevens put it, “[a] claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail.” *Atkins*, 536 U.S. at 311.

46. *See supra* note 5 (collecting scholarship).

47. *See supra* note 5.

48. Jacobi, *supra* note 4, at 1105–23.

49. *See, e.g.*, *Glossip v. Gross*, 576 U.S. ___, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring); *Atkins*, 536 U.S. at 348–49 (Scalia, J., dissenting); Ian P. Farrell, *Abandoning Objective Indicia*, 122

critique, the problem of “evolving standards of decency” doctrine is that it creates the veneer, rather than the reality, of a majoritarian constraint.⁵⁰ The Eighth Amendment inquiry is not too majoritarian; it is, rather, too susceptible to the personal predilections of nine men and women in black robes. “Evolving standards of decency” are inherently malleable. Some attribute this malleability to ends-oriented machinations by members of the Court⁵¹; others to the inherent ambiguity of the supposed “objective indicators,”⁵² as legislative action and jury verdicts are fuzzy signals subject to competing interpretations. Critics have also argued that the Court’s professed reliance on these “objective indicators” creates doctrinal instability⁵³: the Court is simply making up Eighth Amendment doctrine as it goes and interpreting the “indicators” in inconsistent ways so as to match the conclusions it wishes to reach.⁵⁴ To these critics, it is no coincidence that when the Court goes on to exercise its “own judgment,”⁵⁵ its judgment always coincides with the results identified from the objective indicators.⁵⁶

Beyond these two primary conceptual critiques, other scholars have critiqued the Court’s current *means* of evaluating “evolving standards of decency,” even if we were to accept that ultimate goal. Most significantly for the purposes of this Article, scholars have questioned the wisdom of relying on state legislation as an “objective indicator” of contemporary values.⁵⁷

YALE L.J. ONLINE 303, 312–13 (2013); Jacobi, *supra* note 4, at 1094; Lain, *supra* note 4, at 83 (citing scholarship making this critique).

50. See Jacobi, *supra* note 4, at 1094.

51. See, e.g., *Atkins*, 536 U.S. at 348–49 (Scalia, J., dissenting).

52. Sigler, *supra* note 4, at 410–11.

53. Jacobi, *supra* note 4, at 1150.

54. Corinna Barrett Lain argues with nuance for a third alternative: that the “evolving standards of decency” inquiry is both majoritarian as a doctrine and a charade, but that the Eighth Amendment jurisprudence is nonetheless tethered to majoritarian preferences through non-doctrinal means. The real majoritarian influence on the Court comes from extrajudicial majoritarian forces that pervade its decision-making not only in the death penalty and Eighth Amendment contexts, but throughout its constitutional jurisprudence. Lain, *supra* note 4, at 5–7.

55. *Atkins*, 536 U.S. at 313; *id.* at 348–49 (Scalia, J., dissenting).

56. *But see supra* note 15 and accompanying text (describing the Court’s decision not to engage in the evolving standards of decency analysis in *Miller*, when consensus evidence was weak); Farrell, *Abandoning Objective Indicia*, *supra* note 49, at 304 (“The real significance of *Miller* lies less in the result and more in the method employed—or, more precisely, the method *not* employed Justice Kagan, writing for the *Miller* Court, declined to apply objective indicia analysis.”).

57. There are also substantial critiques of the manner in which the Court relies on jury verdicts as evidence of “evolving standards of decency.” See, e.g., Aliza Plener Cover, *The Eighth Amendment’s Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113 (2016) (arguing that the Court’s failure to consider the effects of death qualification on capital jury verdicts

First, some have asserted that state legislation on the death penalty does not accurately represent community sentiment on that issue and thus is misleading as an “objective indicator” of “evolving standards of decency.”⁵⁸ There are a number of reasons for a potential disconnect. Elections are not single-issue referenda on the death penalty, and representatives elected for their stance on, say, fiscal policy or the economy may well depart from the constituents who voted for them on the question of the death penalty.⁵⁹ Moreover, breakdowns in the democratic bona fides of our electoral system—such as partisan gerrymandering—undermine the representativeness of legislatures and create a gap between the people and their lawmakers.⁶⁰ Additionally, due to political pressures that lead toward the proliferation of harsh criminal laws, criminal justice legislation in particular may not accurately reflect community sentiment on these same issues.⁶¹ Furthermore, legislators have been shown to be motivated by a multitude of forces beyond simple public opinion when deciding which bills to support,⁶² and even when they do take public opinion into account, they may miscalculate what that

skews its Eighth Amendment analysis). We do not focus on these critiques here, as our study relates to the legislative process.

58. Edmund F. McGarrell & Marla Sandys, *The Misperception of Public Opinion Toward Capital Punishment: Examining the Spuriousness Explanation of Death Penalty Support*, 39 AM. BEHAV. SCI. 500, 500–13 (1996).

59. Smith et al., *supra* note 4, at 2422.

60. *See generally, e.g.*, LAURA ROYDEN & MICHAEL LI, BRENNAN CTR. FOR JUSTICE, EXTREME MAPS (2017), https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16_0.pdf [<https://perma.cc/JY7T-8WQH>] (detailing distorting effect of gerrymandering upon congressional elections).

61. *See, e.g.*, William J. Bowers et al., *Too Young for the Death Penalty: An Empirical Examination of Community Conscience and the Juvenile Death Penalty from the Perspective of Capital Jurors*, 84 B.U. L. REV. 609, 619–20 (2004) (citing Craig Haney, *Commonsense Justice and Capital Punishment: Problematising the “Will of the People”*, 3 PSYCHOL. PUB. POL’Y & L. 303, 332–33 (1997)) (explaining how legislators may “whip up”—rather than act in response to—public support for harsh punishment); Pamela S. Karlan, *“Pricking the Lines”: The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 890–91 (2004) (“There are good reasons to think that the legislative process may produce statutes that systematically exaggerate a crime’s seriousness. Legislators face powerful political pressures that lead them to ratchet up sentences. Even a legislator who thinks a particular sentence is unwarranted or believes that her constituents, on reflection, would view a sentence as unduly harsh (either categorically or with respect to some of the acts that fall within its scope) may fear being tarred as soft on crime if she votes against a crime bill.” (citations omitted)).

62. Farrell, *Abandoning Objective Indicia*, *supra* note 49, at 313.

public opinion is.⁶³ Legislation may also lag behind public opinion, with outdated and under-enforced laws remaining on the books.⁶⁴

Another concern with the use of state legislation as an indicator of community sentiment on the death penalty lies with the abstract and non-individualized nature and quality of legislative decision-making. Legislation sets generalized policy that can be disconnected from the human consequences of individual cases:

Unlike a jury which must see the accused in the flesh and listen to the details of his character and background, the information that filters into legislative debates over capital punishment is largely abstract considerations. Deciding to impose a death sentence after listening to the character and background of the defendant is something altogether different. The latter is a “reasoned moral response” based on more complete information about the crime and the person who committed it. Whether or not legislative judgments reflect the abstract policy preferences of the public, legislative enactments do not tell us about how the public feels about the punishment when it is applied to real, individual people. The legislative process is not generally geared towards the reality that those who commit crimes are people, too.⁶⁵

If we understand our society’s “standards of decency” about punishment to be the standards we adhere to when exposed to the facts and consequences of individual cases, legislative decision-making may be too theoretical to serve as an “objective indicator.”⁶⁶ Similarly, Justice Marshall, in his concurring opinion in *Furman* and in his dissenting opinion in *Gregg*, asserted that the death penalty is unconstitutional in part because of his belief that “the American people, fully informed as to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable.”⁶⁷ Marshall insisted upon a heightened (and hypothetical) standard of the people’s informed opinion, rather than their

63. McGarrell & Sandys, *supra* note 58, at 500–13; John T. Whitehead, Michael Blankenship & John Paul Wright, *Elite Versus Citizen Attitudes on Capital Punishment: Incongruity Between the Public and Policymakers*, 27 J. OF CRIM. JUST. 249–58 (1999).

64. Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 23 (2007) (“As is often the case with penal prohibitions, support for officially discarding death penalty statutes tended not to materialize until well after those statutes already had been discarded in practice.”).

65. Smith et al., *supra* note 4, at 2421 (footnotes omitted).

66. The outcomes of popular referenda might be even less considered than legislative outcomes; thus, along this measure, we might be even more wary of ballot initiatives than legislation as “evolving standards of decency.”

67. *Gregg v. Georgia*, 428 U.S. 227, 232 (1976) (Marshall, J., dissenting).

abstract and uneducated impressions, to govern the constitutional analysis.⁶⁸

A third concern about using state legislation as the primary “objective indicator” of “evolving standards of decency” is the inherent difficulty in ascribing underlying causal motivations to the legislators who supported any particular piece of legislation. A legislator who votes in favor of a death penalty abolition bill, for example, may be motivated by moral objections to the death penalty, but she may instead be motivated by administrative, fiscal, or any number of other concerns.⁶⁹ Deciphering which precise “standard of decency” any particular piece of legislation “indicates” is a fraught enterprise. This challenge is even greater when the Court seeks to interpret how abolitionist states have legislated with respect to more narrow issues within capital punishment, such as the availability of the death penalty to punish categories of offenders or types of offenses.⁷⁰

II. METHOD OF STUDY

With an eye toward establishing the standards state legislators apply as they articulate their positions on the death penalty, we analyzed the entirety of floor debate on the issue from the Connecticut legislature in 2009 and 2012, the Illinois legislature in 2011, and the Nebraska state Senate in 2015.⁷¹ These are the three states with the most recent legislative repeals of the death penalty for which complete transcripts of the floor debates were available.⁷² These states are distinct in political culture⁷³ as well as in legislative structure, as Nebraska features the nation’s only

68. *Id.* (“[I]f the constitutionality of the death penalty turns, as I have urged, on the opinion of an informed citizenry, then even the enactment of new death statutes cannot be viewed as conclusive. In *Furman*, I observed that the American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and concluded that if they were better informed they would consider it shocking, unjust, and unacceptable. A recent study, conducted after the enactment of the post-*Furman* statutes, has confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty.” (emphasis added) (citations omitted)).

69. Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL’Y 17, 20–21 (2009).

70. Sigler, *supra* note 4, at 410–11.

71. We focused on legislative debate rather than testimony given by witnesses at legislative hearings for two primary reasons. First, and from a practical perspective, transcripts of the legislative debates were more readily available. Second, and more importantly, our focus was on understanding the legislators themselves, and the arguments *they* chose to bring to the legislative floor, as it is the legislators who ultimately determine the direction of state law.

72. Maryland repealed the death penalty in 2013, but we were unable to obtain transcripts of the debates preceding the repeal. MD. CODE ANN., Death Penalty § 71–79 (West 2018) (repealed 2013).

73. DANIEL ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 9, 18 (1966).

unicameral legislature while Connecticut and Illinois have a traditional bicameral House of Representatives and Senate.

A. An Overview of Legislative Action

In Connecticut, a serious legislative effort to repeal the death penalty was launched in 2005. In 2007, two men perpetrated a horrific home invasion, sexually assaulting and murdering a mother and her two daughters in Cheshire, Connecticut. The case drew national and international media attention and was, not surprisingly, a frequently discussed topic when the repeal effort was renewed in 2009.⁷⁴ While the State House of Representatives (90-56) and State Senate (19-17) did vote to repeal the death penalty, Connecticut Governor Jodi Rell (Republican) vetoed the repeal, and the Senate lacked the votes to override the veto.⁷⁵

In 2012, a repeal bill was again heard in the legislature and again passed both the House (86-62) and Senate (20-16). Connecticut Governor Daniel Malloy (Democrat) signed the bill into law.⁷⁶ The Cheshire case was again a significant factor in the legislative debate, with some legislators moved to oppose the bill based on the depravity of the crime, and others satisfied by a provision in the repeal bill that maintained the death sentences for the two men convicted in the Cheshire case and for nine others on death row. That provision was later overturned by the Connecticut Supreme Court, resulting in life without parole sentences for the eleven men who had been on death row.⁷⁷ At the time of the 2012 repeal, a Quinnipiac University poll found 62% of Connecticut voters opposed abolishing the death penalty.⁷⁸

In Nebraska, the state Senate passed a bill to repeal the death penalty in 1979.⁷⁹ The bill was vetoed by Governor Charley Thone

74. See, e.g., RYAN D'AGOSTINO, *THE RISING: MURDER, HEARTBREAK, AND THE POWER OF HUMAN RESILIENCE IN AN AMERICAN TOWN* 190 (2015) (documenting the media swarm that descended on the town and the victims' family).

75. Chris Keating, *Rell Vetoes Bill to Abolish Death Penalty*, HARTFORD COURANT (Jun. 6, 2009), http://articles.courant.com/2009-06-06/news/death-penalty-veto-0605.art_1_death-penalty-ultimate-penalty-abolition [<https://perma.cc/CU6K-XW4H>].

76. Susan Campbell, *What's Next for Death Penalty Abolition Group?*, HARTFORD COURANT (Apr. 17, 2012), http://articles.courant.com/2012-04-17/news/hc-campbell-cnadp-0417-20120417_1_repeal-organization-regroups-death-row [<https://perma.cc/9SS9-QLJX>].

77. See *State v. Peeler*, 140 A.3d 811, 811 (Conn. 2016).

78. *Connecticut Voters Split on Death or Life Without Parole, Quinnipiac University Poll Finds; But Voters Say Abolishing Death Penalty Is Bad Idea*, QUINNIPIAC UNIV. (Apr. 25, 2012), <https://poll.qu.edu/connecticut/release-detail?ReleaseID=1739> [<https://perma.cc/4FKT-LRBG>].

79. LARRY W. KOCH, COLIN WARK & JOHN F. GALLIHER, *THE DEATH OF THE DEATH PENALTY: STATES STILL LEADING THE WAY* 107-09 (2012).

(Republican).⁸⁰ The issue came up repeatedly in the following years, including a 1999 bill passed to create a moratorium on executions, and a 2007 repeal bill that came within one vote of passage.⁸¹ In 2015, the state Senate again passed a repeal bill, and after Governor Pete Ricketts (Republican) vetoed the bill, the legislature overrode his veto by a vote of thirty to nineteen.⁸²

That law was challenged by a voter referendum, which placed the death penalty question on the ballot in 2016.⁸³ More than 60% of Nebraska voters cast a vote in favor of keeping the death penalty in place, effectively undoing the legislature's action.⁸⁴

By the year 2000, Illinois had exonerated more men from death row (thirteen) than it had executed (twelve).⁸⁵ Responding to what he considered to be a crisis of injustice, Governor George Ryan (Republican) established a moratorium on executions in 2000.⁸⁶ Three years later, in the waning days of his second term, Ryan commuted the sentences of all 167 men and women on death row.⁸⁷ After a state commission offered dozens of recommendations for reforming the death penalty in Illinois, the legislature ultimately took up the question of repeal. In 2011 the House (60-54) and Senate (32-25) passed a death penalty repeal bill that was signed into law by Governor Pat Quinn (Democrat).⁸⁸ While the

80. Irene North, *History Shows Nebraska Unlikely to Uphold Death Penalty Repeal*, SCOTTSBLUFF STAR HERALD (Sep. 18, 2016), https://www.starherald.com/news/local_news/history-shows-nebraska-unlikely-to-uphold-death-penalty-repeal/article_05e412ce-7d4d-11e6-96f8-97234d3fe513.html [https://perma.cc/82VZ-FV4U].

81. KOCH ET AL., *supra* note 79, at 110–113.

82. Mark Berman, *Nebraska Lawmakers Abolish the Death Penalty, Narrowly Overriding Governor's Veto*, WASH. POST (May 27, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/05/27/nebraska-lawmakers-officially-abolish-the-death-penalty/?noredirect=on&utm_term=.084d63036c6d [https://perma.cc/6Z7E-94UM].

83. 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/6SGD-55HU].

84. Shelly Kulhanek, *History of the Death Penalty in Nebraska*, LINCOLN J. STAR (Aug. 11, 2018), https://journalstar.com/news/state-and-regional/govt-and-politics/history-of-the-death-penalty-in-nebraska/article_54fb4bff-7ef4-5641-abec-6f3f8a4b35c8.html (last visited Sept. 1, 2018).

85. Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty*, CHI. TRIB. (Jan. 31, 2000), http://articles.chicagotribune.com/2000-01-31/news/0002010058_1_delay-execution-illinois-death-row-illinois-reinstated-capital-punishment [https://perma.cc/5UV3-49FU].

86. *Id.*

87. Jodi Wilgoren, *Citing Issues of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES (Jan. 12, 2003), <https://www.nytimes.com/2003/01/12/us/citing-issue-of-fairness-governor-clears-out-death-row-in-illinois.html> (last visited Aug. 20, 2018).

88. Patrick Thomas, *Death Penalty Debate Takes New Turn with Bill*, BEVERLY REV. (Jan. 26,

legislation was not retroactive to the fifteen men then on death row, Governor Quinn commuted their sentences to life in prison without parole.⁸⁹

Not long before legislators passed the repeal bill, a Southern Illinois University poll found 56% of respondents in the state favored an end to the death penalty moratorium and continued pursuit of death sentences.⁹⁰

B. *Study Procedures*

Across the three states, legislators gave 360 floor speeches on the death penalty in the years under study, amounting to 284,064 total words. With the help of trained student research assistants, we analyzed the entirety of every speech to categorize it for the arguments made in favor or against the death penalty and to take note of if and how legislators referenced United States Supreme Court decisions and the Constitution.

First, we read the speech to determine its overall direction on the issue—either in favor of the death penalty, opposed to the death penalty, or neutral. (There were, in fact, a handful of legislators who rose to announce to their colleagues that they were not sure what to do about the issue.)

After a pilot effort to review approximately 10% of the available speeches, recurring categories of arguments for and against the death penalty found in those remarks were identified. Research assistants were then given a definition and example of each category and proceeded to analyze the universe of available speeches.⁹¹

We categorized speeches in favor of the death penalty for the following topics: *deterrence* (the death penalty prevents or discourages crime), *retribution* (a terrible penalty is required for a terrible crime), *victim and family* (statements focused on the suffering of victims and/or their family), *removing dangerous person* (the need to protect society from this dangerous person), *religion* (an appeal to the Bible or other religious precept to support the death penalty), *public support* (a reference to public opinion or other indicator of popular support for the death penalty),

2011), http://www.beverlyreview.net/news/featured_news/article_53d60124-e22a-59d6-a1abc03f9dd50d24.html [https://perma.cc/3JEA-ZDC9].

89. *Id.*

90. Press Release, Paul Simon Pub. Policy Inst., Illinois Voters Divide on Abortion, Death Penalty, Gambling, and Gay Marriage; Favor Open Gay Military Service (Oct. 16, 2010), https://paulsimoninstitute.siu.edu/_common/documents/opinion-polling/simon-institute-poll/2010/2010_third_release.pdf [https://perma.cc/3G5R-8JKN].

91. As a test of intercoder reliability, multiple readers analyzed fifty speeches. There were no disagreements on the direction of the speeches, and the topic categorization measures all achieved recognized standards of reliability (Krippendorff's alpha >0.67).

prosecution tool (the death penalty is needed to help prosecutors do their job and/or achieve favorable plea agreements), *longstanding practice/tradition* (focus on long use of the death penalty in the state or nation), and *Court/Constitution* (an argument built on supportive aspects of United States Supreme Court decisions or the Constitution).

We categorized speeches against the death penalty on the following topics, some of which represent a direct counterpoint to advocates' positions: *not a deterrent* (the death penalty does not discourage crime or lower murder rates), *arbitrary* (who is subjected to the sentence is arbitrary, unfair, or not based on the severity of the crime), *racial disparity* (the process is based on the race of the defendant or victim, or racism in society at large), *cost* (a focus on the resources necessary to pursue death penalty cases), *futility of eye for an eye* (questions proportionality of the sentence relative to the way other crimes are punished), *innocence* (mentions examples of exonerations from death row or the possibility of making mistakes), *cruelty* (mentions the pain of the procedure or of the process to the defendant), *lack of closure* (the victim's family does not benefit from the process), *alternative sentences* (the value of life without parole and other harsh sentences), *prosecution power* (prosecutors are too powerful, have too much discretion, or are prone to misconduct), *religion* (an appeal to the Bible or other religious precept to oppose the death penalty), *public support* (a reference to public opinion or other indicator of popular rejection of the death penalty), *Court/Constitution* (an argument built on aspects of United State Supreme Court decisions or the Constitution that limit or reject the death penalty), and *redemption* (assertion that convicted individuals can change for the better).⁹²

Beyond the direction and the arguments made in each speech, we took note of the overall word count of the speech, the word count pertaining to the courts and Constitution, and basic facts concerning the legislators themselves (including their party, race, and education).

92. As an example of the coding process, this is how the central arguments made in a speech by Nebraska State Senator Kate Bolz were categorized: (A) “[I] rise in support of this piece of legislation” (coded as an anti-death penalty speech as the bill would repeal the death penalty). (B) “Over the last decade the murder rate in the nondeath penalty states has remained consistently lower than the rate in states with the death penalty” (coded: not a deterrent). (C) “I am a person of faith and I don’t speak of that on this floor very often. But as a representative of the people and as someone who campaigned as a person of faith, I do feel compelled to say that I feel as though I am representing the people of Nebraska when I represent compassion” (coded: religion and public support). (D) “If we are a people of faith, we can’t only believe in the pieces about giving ourselves up to God, or about what it means to obey the Ten Commandments, we also have to give ourselves up to the idea that redemption is possible” (coded: religion and redemption). Transcript of Floor Deb. on Legis. B. 268, 104th Leg., 1st Reg. Sess. 5 (Neb. May 20, 2015) [hereinafter Transcript of Floor Deb. on Legis. B. 268 (Neb. May 20, 2015)] (statement of Sen. Bolz).

The data we collected and the methodology we employed in collecting it serve two significant objectives. First, we provide a fuller picture of what happened during these legislative debates—information that is important for its own sake. We see value in aggregating and categorizing the discussions that occurred in these legislative halls on matters of such great significance and in sharing that information with the public.

Second, we use the contents of these debates to enrich our understanding of how state laws—and the legislators who enact them—relate to community “standards of decency.” These debates provide an important window into how legislators perceive their relationship to their constituents, which issues matter to legislators, and how legislators understand their relationship to the Court and the Constitution. Given the Court’s heavy emphasis upon legislative action in determining the constitutionality of the death penalty, it is particularly important to understand what may animate legislators who are called upon to vote on death penalty legislation and how well these motivations align with community “standards of decency.”⁹³

III. LEGISLATORS ON THE DEATH PENALTY

Having read and analyzed every death penalty speech given by legislators in the three states, we now report on the legislators’ positions and arguments, as well as the references to United States Supreme Court decisions in these proceedings. Consistent with the eventual outcome of the votes, across the three states 51.7% of the speeches given were anti-death penalty, 45.3% favored the death penalty, and 3.1% were neutral. Table 1 breaks down the direction of the speeches by party and profession.

The disparity between the political parties was vast, with over 80% of Democratic speeches expressing opposition to the death penalty and more than 71% of Republican speeches expressing support.

There was also a considerable difference between speakers with a law degree and those without. Among non-lawyers, just over half (52.4%) of the speeches were in support of the death penalty. Among lawyers, two-thirds (67.3%) of the speeches were in opposition to the death penalty.

93. We recognize, of course, that while we collected data from three politically distinct states, the results we found may not be replicated if we were to study the debates leading up to death penalty legislation in other states. Ours is a case study, rather than a statistical sampling of the legislative history behind every piece of death penalty legislation; our results are descriptive of these debates rather than predictive of debates in all other jurisdictions. Moreover, we recognize that there may be a disconnect between what legislators say in the floor debates and what truly animates their behavior. Legislators may use legislative debates to manipulate the historical record rather than to genuinely voice their opinions. Precisely this concern has animated many opponents to the use of legislative history in interpreting statutes.

Table 1:
Direction of Death Penalty Speeches in
Connecticut, Illinois, and Nebraska Legislatures

A. Overall Direction of Speeches

	All Speakers
Pro	45.3%
Anti	51.7%
Undecided	3.1%

B. Direction by Party

	Democrats	Republicans
Pro	16.6%	71.9%
Anti	80.7%	24.5%
Undecided	2.8%	3.6%

C. Direction by Profession

	Lawyers	Non-Lawyers
Pro	29.1%	52.4%
Anti	67.3%	44.8%
Undecided	3.6%	2.8%

D. Direction by Education

	No College Degree	College Degree	Advanced Degree (Non-Law)	Law Degree
Pro	56%	67.2%	29.3%	29.1%
Anti	40%	32.1%	64.6%	67.3%
Undecided	4%	0.7%	6.1%	3.6%

A similar divide occurs when the results are further broken down by education. Among those without a college degree and among those with a bachelor's degree, a majority of the speeches were in favor of the death penalty. Among those with a law degree and those with advanced degrees in other subjects, a majority of speeches were in opposition to the death penalty.

There is clearly an additive effect between party and education such that Democrats with more education were least likely to speak in favor of the death penalty and Republicans with less education were most likely to

speak in favor of capital punishment. To wit, 90.9% of the speeches from Republicans without a college degree were supportive of the death penalty while 90.2% of speeches from Democratic lawyers were in opposition to the death penalty.

Table 2:
Length of Death Penalty Speeches in
Connecticut, Illinois, and Nebraska Legislatures

Position	Word Count (mean)
All speakers	789.1
Pro-Death Penalty	912.1
Anti-Death Penalty	688.7
Neutral	663.9

The average speech on the subject was 789 words long, which amounts to approximately six minutes in length for the typical speaker. As shown in Table 2, proponents of the death penalty, who were ultimately on the losing end of the vote in all three states, had considerably more to say, averaging 912 words in their remarks, while opponents and undecided legislators both used an average of less than 700 words. This pattern is regularly seen in legislative debates. Those who find themselves outnumbered tend to use more time in a last-ditch effort to convince their colleagues to change their minds.⁹⁴

A. How Legislators Speak about the Courts and the Constitution

By and large, state legislators do not focus their attention on the Constitution or United States Supreme Court rulings when they discuss the death penalty. In fact, among legislators speaking in favor and against the death penalty, 90% fail to mention any aspect of the Court's rulings or the Constitution in support of their position. As a proportion of their entire remarks, the figures are even more pronounced. While the mean length of legislators' remarks on the death penalty is 789 words, their speeches contain an average of only twenty-five words focused on the Court or the Constitution. That equates to dedicating roughly 3% of their words to matters of the Court and Constitution. While proponents of the

94. Also, as a matter of simple math, time for legislative debate is often split equally among proponents and opponents. Whichever side is larger, therefore, must necessarily split their time among more members, thus producing shorter speeches. *See, e.g.,* Sven-Oliver Proksch & Jonathan B. Slapin, *Institutional Foundations of Legislative Speech*, 56 AM. J. POL. SCI. 3, 520 (2012) (theorizing that in some legislative systems, individual legislators will have less time to debate as their party size increases).

death penalty have more to say than opponents on the Courts and Constitution, the difference is slight.

Table 3:
Mentions of the Courts and the Constitution in Death Penalty Speeches in Connecticut, Illinois, and Nebraska Legislatures

	All	Pro-Death Penalty	Anti-Death Penalty
Court/Constitution Word Count (mean)	25	27.2	24
Court/Constitution Mentioned (%)	8.2	10	7

Legislators often challenge their opponents' understanding of the law surrounding the death penalty. Nebraska State Senator Ernie Chambers chastised his colleagues' lack of knowledge or even interest in seminal Court rulings:

Because you don't study. You don't pay attention . . . [The courts] started returning a lot of these cases by saying, "we uphold the conviction but we overturn the death sentence." And then they will give examples of where lawyers slept during the trial, where they came to court intoxicated. You all won't read decisions by U.S. Supreme Court judges to find out why they make the decisions that they do. They have built in overlays of safeguards to protect these people who, at the local level, are subjected to what would be legalized lynchings.⁹⁵

By contrast, Chambers' fellow senator Beau McCoy portrayed their chamber as being replete with constitutional scholars, noting that his fellow senators have "a full length and breadth of an understanding and knowledge of the Supreme Court cases regarding the death penalty."⁹⁶

Nevertheless, the relatively minimal discussion of the courts and the Constitution seems in part a function of the difficulty understanding and expressing the foundational legal issues at hand. Some members openly

95. Transcript of Floor Deb. on Legis. B. 268, 104th Leg., 1st Reg. Sess. 128 (Neb. May 27, 2015) [hereinafter Transcript of Floor Deb. on Legis. B. 268 (Neb. May 27, 2015)] (statement of Sen. Chambers) (quotation marks added).

96. Transcript of Floor Deb. on Legis. B. 268, 104th Leg., 1st Reg. Sess. 33 (Neb. Apr. 16, 2015) [hereinafter Transcript of Floor Deb. on Legis. B. 268 (Neb. Apr. 16, 2015)] (statement of Sen. McCoy).

admit they do not want to expend the time and energy necessary to better understand the pertinent legal questions. Connecticut State Senator Scott Frantz prefaced his remarks on the death penalty by saying, “[n]ot being a lawyer and, hopefully, not having to learn too much more about the judicial system”⁹⁷ Others lament their discomfort with the details and language of the issue. “Many of you are attorneys. You understand the legal aspects,” said Frantz’s colleague State Senator Steve Cassano.⁹⁸ Cassano then noted how hard it is simply to read bills on the death penalty and other subjects, admitting, “I couldn’t understand most of them because they [sic] written in a language I never saw before. ‘Legalese’ I call it. I’m a sociologist.”⁹⁹

Legislators’ discomfort and unfamiliarity with the legal terrain is apparent as they struggle against ubiquitous Latin terms and other phrases. Connecticut State Senator John Kissel refers to “the habeuses.”¹⁰⁰ Nebraska State Senator Bill Kintner pauses in a speech to ask for help with pronunciation (“Petition for writ of—and I’ll ask the ‘Professor’ over here, Senator Schumacher, how to say it—certiorari to the Supreme Court of the United States. And I’m sure Senator Schumacher can help with how to pronounce that.”¹⁰¹) Nebraska State Senator Beau McCoy employs the words “majority” and “plurality” interchangeably:

In 1976, *Gregg v. Georgia*, in a landmark Supreme Court decision, a plurality, a majority of the Court found that the death penalty was not a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment. And I’m going to read a quote from the court from the majority opinion on that case that has guided this issue ever since across the country. The plurality, therefore, concluded that, quote, the infliction of death as a punishment for murder is not without justification¹⁰²

Other times legislators’ mentions of constitutional rights devolve into little more than an opportunity to inject politically-charged language. In the speeches of several legislators rejecting the possibility that death

97. S. Transcript of Floor Deb. on H.B. 6578, 2009, Reg. Sess. 178 (Conn. May 21, 2009) [hereinafter S. Transcript of Floor Deb. on H.B. 6578 (Conn. May 21, 2009)] (statement of Sen. Frantz).

98. S. Transcript of Floor Deb. on S.B. 280, 2012, Reg. Sess. 260 (Conn. Apr. 4, 2012) [hereinafter S. Transcript of Floor Deb. on S.B. 280 (Conn. Apr. 4, 2012)] (statement of Sen. Cassano).

99. *Id.*

100. S. Transcript of Floor Deb. on H.B. 6578 (Conn. May 21, 2009), *supra* note 97, at 130 (statement of Sen. Kissel).

101. Transcript of Floor Deb. on Legis. B. 268 (Neb. Apr. 16, 2015), *supra* note 96, at 16 (statement of Sen. Kintner).

102. *Id.* at 33 (statement of Sen. McCoy) (emphasis added).

sentences could be imposed arbitrarily or based upon insufficient evidence, the Fifth Amendment’s guarantee of due process is referred to as “super due process,”¹⁰³ “super process,”¹⁰⁴ or “maximum due process.”¹⁰⁵

Table 4:
Mentions of Religion Outnumber Court/Constitution in Death Penalty Speeches in Connecticut, Illinois, and Nebraska Legislatures

	All	Pro-Death Penalty	Anti-Death Penalty
Religion Mentioned (%)	13.6	13	14
Court/Constitution Mentioned (%)	8.2	10	7

Relying on the Constitution and court decisions is likely not the easiest way to articulate a position on an issue that is for many legislators a cut and dried moral question. Indeed, more frequently cited in legislator remarks than the courts and the Constitution are religious beliefs and the Bible. Table 4 shows that both pro-death penalty speakers and anti-death penalty speakers invoke a religious justification for their position more frequently than they cite a United States Supreme Court decision or the Constitution. Also, in contrast to the shaky footing legislators seem to have when discussing the courts, when they speak of religion legislators tend to do so with unrestrained authority. As Nebraska State Senator Bill Kintner put it, “We’re doing exactly as God has asked us to do in this. And I would submit to you that we’re the only western country that still executes people because we’re the only country that still has vestiges left of Christianity. Europe has pretty much moved from God.”¹⁰⁶

When legislators do engage with the Court and constitutional questions it is typically to extract broad justification for the thrust of their position. Which is to say, *Furman* and *Gregg* were the most frequently cited cases and were referenced in service of making a point on the general

103. *Id.* at 30.

104. H.R. Transcript of Floor Deb. on S.B. 3539, 96th Leg., Reg. Sess. 104 (Ill. Jan. 6, 2011) [hereinafter H.R. Transcript of Floor Deb. on S.B. 3539 (Ill. Jan. 6, 2011)] (statement of Rep. Durkin).

105. S. Transcript of Floor Deb. on H.B. 6578 (Conn. May 21, 2009), *supra* note 97, at 456 (statement of Sen. Williams).

106. Transcript of Floor Deb. on Legis. B. 268 (Neb. Apr. 16, 2015), *supra* note 96, at 45 (statement of Sen. Kintner).

acceptability of the death penalty. Indeed, these cases were practically depicted as the last word on the subject. Citing *Gregg*, Nebraska State Senator Beau McCoy said the Court had spoken on the death penalty “most notably” in this case, labeling it a “landmark Supreme Court decision.”¹⁰⁷ McCoy did not mention any other Court decision on the issue, nor even hint at any evolution in Court thinking evinced in four decades of subsequent decisions. In contrast to *Furman* and *Gregg*, totally unmentioned by legislators are more contemporary cases such as *Atkins* and *Roper*, which not only place direct constraints on the pursuit of capital sentences but also continue to affirm the centrality of state legislative action in the Court’s practical application of the Eighth Amendment.

B. Legislators and Contemporary Standards of Decency

In fact, rather than accurately depicting the interactive relationship between state legislatures and the courts on the death penalty, legislators almost unanimously depict their work as wholly dependent on court decisions. “We have to be consistent and I think we are consistent. We are as consistent as the courts will allow us to be,” Nebraska State Senator Jim Scheer said,¹⁰⁸ offering a variation on the commonly held sentiment that legislators are constrained by the courts in ways that are neither welcome nor necessarily logical.

In stark contrast with the way the Court operationalizes the Eighth Amendment, legislators repeatedly suggest that they lack even the potential power to influence the Court. Connecticut State Representative Mike Lawlor’s comments were typical of legislative sentiment when he said that to alter the Court’s disposition toward the death penalty “you’re going to have to amend the [C]onstitution or change the makeup of the United States Supreme Court.”¹⁰⁹

The Court’s dramatic turn on the question of whether intellectually disabled defendants can be subject to the death penalty, however, is just one contemporary example of a Court transformation based neither on amendment nor personnel change, but rather because of state legislative behavior. In 1989, Justice O’Connor wrote the plurality opinion in *Penry* in which the Court found subjecting the intellectually disabled to the death

107. *Id.* at 33 (statement of Sen. McCoy).

108. Transcript of Floor Deb. on Legis. B. 268, 104th Leg., 1st Reg. Sess. 31 (Neb. May 15, 2015) [hereinafter Transcript of Floor Deb. on Legis. B. 268 (Neb. May 15, 2015)] (statement of Sen. Scheer).

109. H.R. Transcript of Floor Deb. on H.B. 6578, 2009, Reg. Sess. 131 (Conn. May 13, 2009) [hereinafter H.R. Transcript of Floor Deb. on H.B. 6578 (Conn. May 13, 2009)] (statement of Rep. Lawlor).

penalty was not in conflict with the Eighth Amendment.¹¹⁰ Justice O’Connor was then part of a Court majority overturning the *Penry* decision “in light of the dramatic shift in the state legislative landscape that has occurred in the past 13 years.”¹¹¹ When *Penry* was heard, only two states specifically barred the use of the death penalty for intellectually disabled defendants. When *Atkins* was heard, eighteen states had exempted intellectually disabled defendants from capital sentences, prompting the Court in *Atkins* to note “the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.”¹¹²

Even more striking are the legislators who not only fail to acknowledge that decisions of state legislatures inform the Court’s view of the Eighth Amendment but who directly contradict the premise of the Court’s objective indicators of community standards doctrine. Nebraska State Senator Paul Schumacher told his colleagues, “Our courts have repeatedly said that it is impossible to divine the intent of the electorate. And, therefore, this gives us no guidance at all.”¹¹³ In actuality, as the plurality in *Penry* noted, the Court values state legislative action as “the clearest and most reliable objective evidence of contemporary values.”¹¹⁴ Which is to say, the Court literally does rely on legislatures to divine the intent of the electorate. Consistent with most legislative references to the Court, Schumacher does not mention any case or otherwise explain the origins of an assertion that defies the objective indicators concept in use for more than four decades.

Table 5:
Mentions of Public Sentiment in Death Penalty Speeches in Connecticut, Illinois, and Nebraska Legislatures

	All	Pro-Death Penalty	Anti-Death Penalty
Public Support Mentioned (%)	24.4	35	15

110. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989), *abrogated on other grounds by Atkins*, 536 U.S. 304 (2002).

111. *Atkins v. Virginia*, 536 U.S. 304, 310 (2002).

112. *Id.* at 315–16.

113. Transcript of Floor Deb. on Legis. B. 268 (Neb. May 15, 2015), *supra* note 108, at 77 (statement of Sen. Schumacher).

114. *Penry*, 492 U.S. at 331.

Even as the Court assumes in state legislators the ability to divine, or at minimum represent, the opinion of their constituents, in most of their speeches legislators do not claim to be speaking on behalf of community sentiment (Table 5). Among pro-death penalty speeches, only 35% include a mention of public sentiment, while among anti-death penalty speeches just 15% do. Thus, most legislator speeches do not claim a public mandate, and even among those that do, such speeches collectively assert contradictory notions of both the direction and relevance of public opinion.

When legislators do speak of public opinion it is commonly presented in a way that is anecdotal (Connecticut State Senator Rob Kane mentioned he had heard concerns about death penalty repeal efforts while “I was pounding the proverbial pavement, if you will, knocking on doors, meeting with diners at coffee shops and at the local supermarkets”¹¹⁵) or purely impressionistic (Nebraska State Senator Kate Bolz: “I do feel compelled to say that I feel as though I am representing the people of Nebraska when I represent compassion”¹¹⁶). It is fair to say that legislators are not regularly employing scientific polling data to gauge public sentiment back home.

Other legislators admit they are acting against what they perceive to be the public’s beliefs. “Many of our constituents have pointed out . . . that if I vote to repeal the death penalty that I could be voting against a majority of my own constituents, and I acknowledge that that may be true,” Connecticut State Representative Patricia Miller said.¹¹⁷ She added that her colleagues will be casting “a courageous vote because they will risk alienating their own constituents who feel strongly as they do.”¹¹⁸ Miller’s colleague State Representative Tim Legeyt admitted that he planned to cast his vote “irrespective of the leanings of my constituents.”¹¹⁹

Several legislators went to the opposite extreme, calling for complete deference to public opinion by holding a binding voter referendum on the death penalty. Illinois State Senator Linda Holmes told her colleagues, “I

115. S. Transcript of Floor Deb. on H.B. 6578 (Conn. May 21, 2009), *supra* note 97, at 245 (statement of Sen. Kane).

116. Transcript of Floor Deb. on Legis. B. 268 (Neb. May 20, 2015), *supra* note 92, at 5 (statement of Sen. Bolz).

117. H.R. Transcript of Floor Deb. on S.B. 280, 2012, Reg. Sess. 197 (Conn. Apr. 11, 2012) [hereinafter H.R. Transcript of Floor Deb. on S.B. 280 (Conn. Apr. 11, 2012)] (statement of Rep. Miller).

118. *Id.* at 197–98.

119. *Id.* at 119 (statement of Rep. Legeyt).

don't think we as a Body should be making this decision for the people of Illinois. I would like to give the people of Illinois the opportunity to make this decision themselves. Let's have them weigh in on this. This could be put to referendum."¹²⁰

Connecticut State Representative Arthur O'Neill took the same position, introducing an amendment to the death penalty repeal bill to require a public vote on the issue. O'Neill said "people voting in a referendum" is "the ultimate law that we have to answer to. That's the organic law of the state."¹²¹ Representative Miller, in the same speech in which she acknowledged a willingness to vote against her constituent's beliefs, railed against O'Neill's proposal: "It's been suggested to me that we should . . . take a controversial issue like this . . . and put that to a popular vote. But I can't help but think that our founding fathers were a little more prescient than that and that's why they designed representation so that we would not have a mob rule."¹²²

As noted, after opponents gathered the necessary petition signatures to place the question on the ballot, the contentious work of the Nebraska State Senate that resulted in a death penalty repeal was ultimately subject to a statewide referendum and overturned when more than 60% of the vote favored reinstating the death penalty.

In short, despite their Court-ascribed status as a window of contemporary values, legislators disagree about what those values are, disagree about whether they are any kind of window on them, disagree about whether the community's values are even relevant to the matter at hand, and provide no evidence that they would vest in themselves the interpretive power the Court ascribes to them. Poll results in Connecticut and Illinois and the referendum outcome in Nebraska all favored the death penalty as legislators voted to abolish it, suggesting that legislative behavior is a rather unreliable interpreter of public sentiment.

Connecticut State Senator John McKinney likely comes closest to articulating the concept that the Court does concern itself with the prevalence of death penalty practices across the fifty states. The direction of McKinney's explanation ("[O]ne of the standards used to determine whether something is constitutional under the [Eighth] [A]mendment is evolving standards of decency. And if we're doing something that is harsher with respect to confinement than any other state is doing, that

120. S. Transcript of Floor Deb. on S.B. 3539, 96th Leg., Reg. Sess. 50 (Ill. Jan. 11, 2011) [hereinafter S. Transcript of Floor Deb. on S.B. 3539 (Ill. Jan. 11, 2011)] (statement of Sen. Holmes).

121. H.R. Transcript of Floor Deb. on S.B. 280 (Conn. Apr. 11, 2012), *supra* note 117, at 407 (statement of Rep. O'Neill).

122. *Id.* at 386–87 (statement of Rep. Miller).

might be stricken down as well.”¹²³) nonetheless implies that the Court is the constraint on state legislative behavior rather than acknowledging that the decisions of the other forty-nine states would effectively set the standard here. In other words, the implication of McKinney’s comments is that the state must follow the Court, without acknowledgment that the Court is following the behavior of the states.

C. Uncertain Guidance from the Court

Beyond misunderstanding the legislature’s role in influencing the Court’s interpretation of the Eighth Amendment, legislators commonly misconstrue United States Supreme Court guidance along other dimensions. While multiple Court decisions permit the use of capital punishment in only narrowly defined circumstances, and only upon individualized consideration of aggravating and mitigating circumstances,¹²⁴ Connecticut State Representative Gary Holder-Winfield suggests something close to the opposite when he asserts that states must frequently impose the death penalty if they are to use it at all: “[W]hen we want to talk about doing this rarely, we’re on troubled ground[;]” Holder-Winfield said, “Because the Supreme Court said that when the death penalty statute applies, it should be used.”¹²⁵ Meanwhile, Nebraska State Senator Colby Coash referred elliptically to a Court case that categorically bars the imposition of life without parole sentences:

There was a Supreme Court case, and I am going to find [it] . . . It’s going to take me a little longer to find that, but there

123. S. Transcript of Floor Deb. on S.B. 280 (Conn. Apr. 4, 2012), *supra* note 98, at 304 (statement of Sen. McKinney).

124. *Roper v. Simmons*, 543 U.S. 551, 568–69 (2005) (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’ This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. In any capital case a defendant has wide latitude to raise as a mitigating factor ‘any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.’ There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.” (citations omitted)).

125. H.R. Transcript of Floor Deb. on H.B. 6578 (Conn. May 13, 2009), *supra* note 109, at 147 (statement of Rep. Holder-Winfield). Though it is not clear what decision Holder-Winfield believes established this premise, the implication that states must regularly, essentially reflexively, impose death sentences conflicts with the Court’s demand that death sentences only be imposed after “individualized consideration.” *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

was a Supreme Court case that said if you put in life without the possibility of parole, you usurp the governor's and the pardons board's ability to commute a sentence. Therefore, you are violating the separation of powers.¹²⁶

Senator Coash did not ultimately provide the name of the case he believes establishes a ban on life without parole sentences (a practice then in use in forty-nine states including Nebraska) nor did Representative Holder-Winfield explain the origins of his belief that the death penalty must be used frequently to be used at all.

When Nebraska State Senator Mike Groene repurposed the famous Potter Stewart quote (“I know it when I see it”¹²⁷) to explain how the Court goes about seeking justice in death penalty cases, he was expressing a skepticism about the Court common among legislators. As a whole, they cannot identify meaningful foundations under the Court's rulings on the death penalty, and when they do, they frequently misunderstand the core point.

Perhaps the most frequent focus when the Court and the Constitution were invoked was speculation about how specific legislation or a provision within that legislation would stand up to scrutiny. In Connecticut, for example, embedded in the bill that would abolish the death penalty for future trials was a provision that would maintain the death penalty for the eleven men already on Connecticut death row.

Legislators took to the floor to assert their views on the Constitution and on the Court's most likely response, or simply to worry that the resolution of the question was essentially unknowable. “The State could not and would not—could not constitutionally and would not, as a matter of public policy—seek to execute someone for a crime they committed today when they could not be executed for committing that same crime tomorrow,” said Connecticut State Representative Arthur O'Neill.¹²⁸ O'Neill added, “I don't think that would stand up as a matter of constitutional law. I don't think the courts would permit it and I'm sure this legislature would not want us to be doing it.”¹²⁹ Similarly, State Senator Len Fasano concluded, “[I]n my view it is unconstitutional. You

126. Transcript of Floor Deb. on Legis. B. 268 (Neb. Apr. 16, 2015), *supra* note 96, at 55 (statement of Sen. Coash).

127. Transcript of Floor Deb. on Legis. B. 268 (Neb. May 20, 2015), *supra* note 92, at 41 (statement of Sen. Groene).

128. H.R. Transcript of Floor Deb. on H.B. 6578 (Conn. May 13, 2009), *supra* note 109, at 240 (statement of Rep. O'Neill).

129. *Id.*

cannot treat similarly situated people differently under the context of the law.”¹³⁰

By contrast, Connecticut State Representative Lawrence Cafero lamented what he considered the false confidence of those who believed the state could both end (future) death sentences and maintain (existing) death sentences. “The bill that we have before us has yet to be determined whether or not it’s constitutional,” he said. “But you see here is the rub. Many people are making their decision on whether or not to vote for this because they are trusting that even if . . . it passes, those 11 animals on death row will die.”¹³¹

While legislators could reasonably disagree about how an oft-divided Court might respond to the particulars of their bill, some of their colleagues made it clear that considerations of the Constitution were secondary. “I agree that this bill is imperfect,” Connecticut State Representative Terry Backer said, “I might question some of its constitutionality. We have processes to challenge constitutionality, so I will be supporting here today the bill.”¹³² That is, Representative Backer expresses a willingness to support something he believes is unconstitutional because someone else could fight it another day, in another venue. This willingness to defy one’s own understanding of the Constitution—to defy the oath Connecticut legislators take to “support the Constitution of the United States”¹³³—seems to invite skepticism and scrutiny rather than deference to legislative intent when the Court encounters the work product of these lawmakers.

D. The Moral Dimension of the Death Penalty

More than any aspect of Constitutional law, legislators tend to focus their remarks on the moral dimensions of the death penalty in their remarks on the subject. Tables 6 and 7 list, in order of frequency, the prevalence of each argument topic employed by pro-death penalty and anti-death penalty speakers.

130. S. Transcript of Floor Deb. on S.B. 280 (Conn. Apr. 4, 2012), *supra* note 98, at 292 (statement of Sen. Fasano).

131. H.R. Transcript of Floor Deb. on S.B. 280 (Conn. Apr. 11, 2012), *supra* note 117, at 87 (statement of Rep. Cafero).

132. *Id.* at 93–95 (statement of Rep. Backer).

133. CONN. GEN. STAT. ANN. § 1-25 (West 2017), https://www.cga.ct.gov/2015/pub/chap_004.htm [<https://perma.cc/MK9M-DV33>].

Table 6:
Topics of Pro-Death Penalty Speeches in
Connecticut, Illinois, and Nebraska Legislatures

	Connecticut*	Illinois*	Nebraska*	Total*
Retribution	60	42	53	55
Victim/Family	47	50	25	37
Public Opinion	31	17	42	35
Removing Dangerous Person	38	42	28	33
Deterrent	40	42	15	28
Prosecution Tool	24	58	8	18
Longstanding Practice/Tradition	13	100	18	14
Religion	1	100	27	13
Court/Constitution	14	8	6	10

* % using argument (speakers may use more than one).

Table 7:
Topics of Anti-Death Penalty Speeches in
Connecticut, Illinois, and Nebraska Legislatures

	Connecticut*	Illinois*	Nebraska*	Total*
Innocence	42	67	33	40
Arbitrary	31	38	32	32
Lack of Closure	36	19	25	28
Alternative Sentences	36	38	21	28
Financial Cost of Process	25	33	21	24
Not a Deterrent	33	33	18	25
Racial Disparity	24	24	9	16
Eye for an Eye Futility	22	19	9	15
Public Opinion	10	5	19	15
Religious Objection	6	5	21	14
Prosecution Power	12	19	10	12
Cruelty	2	24	14	11
Court/Constitution	13	0	4	7
Capacity for Redemption of Inmate	2	0	6	4

* % using argument (speakers may use more than one).

Supporters of the death penalty are more likely to discuss retribution than any other aspect of the issue, with 55% of all pro-death penalty speeches discussing the topic. They speak of the need for a fitting punishment for a terrible crime. They speak of depraved people who deserve to die. In their words, death row is populated by “murderous savages”¹³⁴ who are “pure evil.”¹³⁵ They speak of the need for “old west justice”¹³⁶ and boast of being personally “pro-death.”¹³⁷ Notable crimes and victims are a recurring point of emphasis. The notorious 2007 home invasion in Cheshire, Connecticut was a frequent subject of commentary in the Connecticut legislature. State Senator Michael McLachlan, for example, quoted at length from a surviving member of the family,

Dr. Petit . . . he made an incredible impression on my feeling about this issue “If you allow murderers to live, you are giving them more regard, more value than three women who never hurt a soul and played by all of society’s rules for all of their short lives. My family got the death penalty and you want to give murderers life. That is not justice. Any penalty less than death for murder is unjust and trivializes the victim and the victim’s family. It is immoral and unjust to all of us in our society.”¹³⁸

The moral dimension that animated death penalty opponents, and the topic discussed more frequently than any other in their speeches, was the prospect of punishing the innocent. Forty percent of all speeches against the death penalty include a discussion of those exonerated from death row or the danger of carrying out a death sentence against an innocent person. Though it is certainly also a legal issue, these legislators focus on what they see as the indefensible moral aspect. For example, after quoting an expert who testified that innocent people have been executed, Connecticut State Senator Gayle Slossberg said, “Is that the society we want where we execute innocent people? And if our society executes an innocent person, there’s no possibility of fixing that error. There is no turning back. Haven’t we then become the evil we are trying to eliminate?”¹³⁹

134. Transcript of Floor Deb. on Legis. B. 268 (Neb. Apr. 16, 2015), *supra* note 96, at 12 (statement of Sen. Schnoor).

135. *Id.* at 28 (statement of Sen. Riepe).

136. Transcript of Floor Deb. on Legis. B. 268 (Neb. May 27, 2015), *supra* note 95, at 104 (statement of Sen. Bloomfield).

137. Transcript of Floor Deb. on Legis. B. 268 (Neb. Apr. 16, 2015), *supra* note 96, at 28 (statement of Sen. Riepe).

138. S. Transcript of Floor Deb. on H.B. 6578 (Conn. May 21, 2009), *supra* note 97, at 366 (statement of Sen. McLachlan).

139. S. Transcript of Floor Deb. on S.B. 280 (Conn. Apr. 4, 2012), *supra* note 98, at 280 (statement of Sen. Slossberg).

These dueling portrayals of evil underscore the difficulty proponents and opponents have in reaching each other. To each side, the perpetration of evil is indefensible and must be opposed with unrestrained vigor. But these legislators look for and see evil in different places.

It is perhaps not surprising given the opposing moral visions on display here that debate on the death penalty is often deeply and openly personal. Nebraska State Senator Lydia Brasch challenged her colleague Ernie Chambers, the prime sponsor of the bill, to repeal the death penalty: “We have heard Senator Chambers tell us several times . . . that he does not believe in God. So I don’t understand why repeal here is a priority to him.”¹⁴⁰ There is, at times, a near mocking quality as those on one side distinguish themselves from those with whom they disagree. As Nebraska State Senator Groene put it, some people “in our lily-white society, who live their perfect middle-class lives, say we can’t pull the lever, well, God made people who can.”¹⁴¹

Rather than focus on his colleagues, Nebraska State Senator Colby Coash trained his attention on the behavior of some death penalty supporters. Coash described his personal journey on the issue that began with a road trip during college to witness the atmosphere of an execution:

I made a trip down to the state penitentiary because I thought that would be something to see, to be part of justice, to be part of an execution. And when I went down there, there were two sides of people that were there to witness. And there was a side there that thought it was a party, and they had a barbeque. And they had a countdown like it was New Year’s Eve. They had a band. Can you imagine that, colleagues? A band at an execution. And on the other side of that parking lot were people who were quietly praying, trying to be a witness to life And I was on the wrong side of that debate that night, and I never forgot it.¹⁴²

Accounts like these underscore that for many legislators this is an issue that is intensely felt if not always intensively studied.

Several disparities between the states were no doubt informed both by political culture and the particular circumstances of the death penalty’s implementation. In Illinois, with exonerations having outnumbered executions, anti-death penalty legislators were more likely to focus on innocence than their peers in Connecticut and Nebraska. Meanwhile,

140. Transcript of Floor Deb. on Legis. B. 268 (Neb. May 27, 2015), *supra* note 95, at 22 (statement of Sen. Brasch).

141. Transcript of Floor Deb. on Legis. B. 268 (Neb. May 20, 2015), *supra* note 92, at 41 (statement of Sen. Groene).

142. Transcript of Floor Deb. on Legis. B. 268 (Neb. Apr. 16, 2015), *supra* note 96, at 7 (statement of Sen. Coash).

advocates for the death penalty were united in their efforts to place the death penalty in the context of a time-honored and spiritually appropriate response to crime. Several distinct patterns in argument types are employed when the data are broken down by race and party. Among those in opposition to the death penalty, African American legislators (29.2%) are almost three times as likely as white legislators (10.7%) to cite racial disparities in the process. Among both those advocates and opponents, Republicans are vastly more likely to cite religion as a reason to support (among proponents, 15.9% of Republicans and 0% of Democrats cited religion) or oppose the death penalty (among opponents, 29.8% of Republicans and 8.5% of Democrats cited religion).

In total, the legislative battle on the death penalty takes place some distance from that of a dry constitutional debate. It is about God and evil and lynchings and “old west justice.” It is about parties held at executions and depraved acts of violence and only seldom focused on interpreting the Eighth Amendment or applying Court precedents.

E. When Lawyers Speak on the Death Penalty

Among the subset of legislators who are also attorneys, the contours of the debate are noticeably different. It will surprise few that lawyer-legislators have even more to say than their colleagues, with an average non-lawyer speaking for 662 words while lawyer-legislators use an average of 1078. More to the point, lawyers’ discussion of the death penalty is much more likely to be presented in ways the Court would recognize.

Compared to non-lawyer legislators who support the death penalty, supportive lawyers speak almost twice as often on deterrence, one of the main pillars upon which the Court’s embrace of the death penalty rests. Lawyers more frequently discuss the value of removing a dangerous person from society and the importance of the death penalty as a tool for prosecutors. Lawyers are more likely to speak of the Court itself and the Constitution and less likely to speak of religion. Each of these differences reached statistical significance, meaning they were unlikely to occur due to chance alone.¹⁴³

143. Statistical significance was calculated to determine the likelihood that the difference between the topics mentioned by lawyers and non-lawyers could be due to chance alone. Highlighted measures in Table 8 and 9 reached statistical significance at the 95% level, meaning there is a 95% likelihood that the difference observed is based on real differences between the groups and not due to chance alone.

Table 8:
Topics of Pro-Death Penalty Speeches in
Connecticut, Illinois, and Nebraska Legislatures by Profession

	Lawyers	Non-Lawyers
Deterrent	47	24*
Retribution	50	56
Victim/Family	41	36
Removing Dangerous Person	47	30*
Religion/Biblical	0	17*
Public Opinion	19	39*
Tool for Prosecutors	38	14*
Longstanding Practice/Tradition	13	15
Court/Constitution	25	06*

*difference is statistically significant (T-test, $p < .05$)

Table 9:
Topics of Anti-Death Penalty Speeches in
Connecticut, Illinois, and Nebraska Legislatures by Profession

	Lawyers	Non-Lawyers
Not a Deterrent	31	21*
Arbitrary	36	29
Racial Bias	20	13*
Financial Cost of Process	27	22
Eye for an Eye Danger	12	17
Innocence/Mistakes	45	37
Cruelty	09	12
Lack of Closure for Families	31	26
Alternative Sentences/LWOP	27	29
Prosecutors Too Powerful	22	05*
Religious Objection	08	18*
Court/Constitution	09	05*
Capacity for Redemption of Inmate	07	02*
Public Opinion	18	13

*difference is statistically significant (T-test, $p < .05$)

Lawyer-legislators who oppose the death penalty are also more likely to focus their attention on the legal underpinnings of the death penalty. Compared to their non-lawyer colleagues, they are more likely to cast doubt on the death penalty as a deterrent and depict the process as rife with racial bias. Anti-death penalty lawyers also are far more likely to warn that such laws make prosecutors too powerful. These differences reach statistical significance. Though not statistically significant, lawyer legislators were also more likely to speak of the death penalty as arbitrarily imposed and potentially punishing the innocent. Like lawyers who support the death penalty, anti-death penalty lawyers are less likely to mention religion in speeches.

Beyond shaping how they express their thoughts on the subject, some lawyer-legislators point to law school as an experience that shaped what they think on the subject. As Connecticut State Senator Edward Meyer explained, his law school studies left him in doubt of any death penalty deterrence effect and repulsed by the idea that the death penalty was merely a tool for vengeance:

I went to law school and motivated by a criminal law professor, studied for the first time the issue of capital punishment as we called it. And I probably was pro capital punishment but I decided to do my third year thesis on capital punishment. And somewhat to my surprise, I discovered . . . that the death penalty does not have a deterrent effect. And if it doesn't have a deterrent effect, what are we doing with it except—except in effect being vindictive?¹⁴⁴

After considering more than 280,000 words of legislative speeches on the death penalty, several significant patterns emerge. Despite being viewed by the Court as an objective indicator of community standards of decency, legislators themselves dispute just what the community thinks and how relevant that should be to their work. Their understanding of Court precedents is generally limited or even fallacious. Instead, they express their beliefs on the death penalty in frequently personal and moral language. To be sure, positions and points of emphasis on this issue vary by party, profession, and race, but little in the sum of legislative debate suggests legislators are equipped or inclined to fill the role the Court has given them on this issue.

144. S. Transcript of Floor Deb. on H.B. 6578 (Conn. May 21, 2009), *supra* note 97, at 254 (statement of Sen. Meyer).

IV. EIGHTH AMENDMENT IMPLICATIONS

In this section, we highlight three major implications for the Court's Eighth Amendment doctrine from the findings discussed above. First, we explain how our findings cast doubt on the accuracy of legislative outcomes as indicators of “evolving standards of decency,” and we caution against over-reliance on legislative outcomes in the Eighth Amendment analysis. Second, we explore the implications of legislators' ignorance of their institutional role in the development of constitutional law. Finally, we discuss the possibility that legislative debates themselves may provide insights into society's “evolving standards.” In particular, we observe that legislators in these debates frequently cited the risk of wrongful execution as a motivation for their opposition to the death penalty—evidence that the Court's equivocal stance on the constitutionality of executing the innocent may be out of step with “evolving standards of decency.”

A. *The Viability of Legislation as “Objective Indicia” of “Evolving Standards of Decency”*

The data we collected and the findings reported above suggest that state legislation is an imperfect indicator of “evolving standards of decency.” Our study lends support for all the critiques of state legislation mentioned in Part I: that legislation is an imperfect gauge of public opinion; that the quality of legislative decision-making is often abstract and sometimes ill-informed; and that it is difficult to decipher a clear signal about a single rationale behind death penalty legislation.

First, the data support the critique that legislation may not accurately reflect community sentiment.¹⁴⁵ Although we cannot and do not attempt to generalize from our case study to all state legislation, the debates we studied did suggest a possible mismatch between public opinion and legislative action. As discussed above, the vast majority of the legislative

145. Notably, our data set consist only of legislative debates in states that were actively considering abolishing the death penalty. We did not collect any data about how accurately older legislation either abolishing or permitting the death penalty reflects current community consensus. We can hypothesize, however, that older legislation is further disconnected to contemporary community opinion. See, e.g., David Niven et al., *A “Feeble Effort to Fabricate National Consensus”: The Supreme Court's Measurement of Current Social Attitudes Regarding the Death Penalty*, 33 N. KY. L. REV. 83, 102–03 (2006) (describing disconnects between public opinion and state legislation, including that “state policies will lag current public opinion, and in some cases, be more reflective of the political culture of another era than of today” (footnote omitted)); Smith et al., *supra* note 4, at 2423 (noting that changes in the usage of the death penalty are more likely to keep in step with public opinion than legislation, which lags behind with the force of inertia).

debate was focused on other considerations besides public opinion about the death penalty. Only 35% of death penalty proponents and 15% of death penalty opponents mentioned public opinion in some form,¹⁴⁶ and those who did invoke public sentiment were often anecdotal or impressionistic.¹⁴⁷ There is little evidence from the floor debates that legislators were attempting to voice their constituents' sentiments on the issue, let alone doing so successfully. Of course, we acknowledge that legislators who share the same general world view as their constituents may share their beliefs on capital punishment as well; even if legislators do not explicitly invoke their constituents' opinions, they may be consciously or unconsciously aligned with them. Yet the limited discussion of public opinion does suggest that the legislators were not acting as the mouthpiece of the community and did not see themselves as such, and it lends support to the critique that legislation does not always echo contemporary sentiment.

Nebraska presents a particularly interesting example of the imperfect relationship between state legislation and the public's "standards of decency." After the legislature passed a bill repealing the death penalty, Governor Ricketts vetoed the bill, and the bill was then passed through a legislative override. The citizens of Nebraska then reinstated the death penalty through a popular referendum—significant (though not conclusive) evidence that the legislative action was inconsistent with popular opinion.¹⁴⁸

A question worthy of greater study is whether and to what extent the existence of a referendum mechanism changes the legislators' sense of obligation to implement the will of the people. Does it free them to do what they believe is right, since they know that the people have the power overturn their action directly if they disagree? Does it—like the threat of reversal by an appellate court—channel their discretion to comport with public opinion? Or does it encourage them to retreat from the question altogether? For example, Illinois State Senator Linda Holmes asserted, "I don't think we as a body should be making this decision for the people of

146. See *supra* section III.B tbl.5.

147. See *supra* text accompanying notes 115–116; S. Transcript of Floor Deb. on H.B. 6578 (Conn. May 21, 2009), *supra* note 97, at 245 (statement of Sen. Kane); Transcript of Floor Deb. on Legis. B. 268 (Neb. May 20, 2015), *supra* note 92, at 5 (statement of Sen. Bolz).

148. Just as legislation may not truly reflect community sentiment, popular referenda may not either. Problems of ballot access, disenfranchisement, low voter turnout infect the representative bona fides of popular referenda in addition to elections, as discussed earlier. And the problems of abstract and non-individualized thinking about matters of great moral complexity may well be more serious in the context of a ballot initiative, where a voter may check "yes" or "no" without having given the matter any serious thought at all, than in the context of a legislative debate.

Illinois.”¹⁴⁹ We did not observe any clear indication that the possibility of a referendum shaped the relationship between the legislative outcome and public opinion. Nebraska and Illinois have referendum mechanisms while Connecticut does not. Public opinion was mentioned most often in Nebraska and least often in Illinois, with Connecticut in between.

**Table 10:
Public Opinion Mentions by State**

Among Pro-DP Legislators	Among Anti-DP Legislators
CT 31%	CT 10%
IL 17%	IL 5%
NE 42%	NE 19%

Second, the data provide support for the critique that legislative decision-making is more abstract and absolutist than the individualized consideration one might find in actual cases. Much of the language used to describe capital defendants in the debates was general, colorful, and dehumanizing; those convicted of capital crimes were termed “murderous savages,”¹⁵⁰ “pure evil,”¹⁵¹ and so forth. To be sure, such language is frequently used by prosecutors in individual cases, as well.¹⁵² Yet there was virtually no nuance in the debates about the lives and individual characteristics of the capital defendants—from either the pro-death penalty legislators or, just as notably, from the anti-death penalty legislators. While legislators considered the possibility that *innocent* people could be convicted and sentenced to death, *guilty* defendants were not discussed in any kind of humanizing or individuating way. Moreover, the legislators demonstrated little specific knowledge about the legal system or how capital trials work, making it doubtful that they fully understood or had thought about the human consequences in individual cases.

The primary mechanism by which the legislative debates narrowed from the abstract to the individualized was in reference to specific

149. S. Transcript of Floor Deb. on S.B. 3539 (Ill. Jan. 11, 2011), *supra* note 120, at 52 (statement of Sen. Holmes).

150. Transcript of Floor Deb. on Legis. B. 268 (Neb. Apr. 16, 2015), *supra* note 96, at 12 (statement of Sen. Schnoor).

151. *Id.* at 28 (statement of Sen. Riepe).

152. *See, e.g.*, Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 LAW & SOC’Y REV. 19 (1993) (analyzing the language of violence in the capital trial of an African-American man tried for the murder of a young white woman).

infamous crimes—most prominently, the horrific 2007 home invasion and triple murder of the Petit family in Cheshire, Connecticut. The crime was described in gruesome detail by several legislators¹⁵³ who said it was so heinous that jurors “vomited” from the evidence.¹⁵⁴ One senator mentioned the Petit family twelve times in his speech and said his entire vote was based on them (“[O]ut of my real respect for the Petit family, and Dr. Petit in particular[—]in my opinion, that man is a hero[—]I can’t support this legislation.”).¹⁵⁵ Others echoed that sentiment,¹⁵⁶ calling Dr. William Petit “the one we most owe.”¹⁵⁷

These discussions amplified the brutality of murder and the savagery of those who commit it. They in no way amplified or individualized the humanity of those who would be put to death.¹⁵⁸

We are not surprised by the abstract and vilifying tenor of the legislative debates, even in these debates resulting in the abolition of the death penalty. Indeed, that tenor seems entirely expected given the generalized role that legislators play and the far more painstaking task of seeing humanity in killers than in victims. The abstraction of the debates was conceptually significant; however, because it made salient how the two primary “objective indicators” of “evolving standards of decency”—legislation and jury verdicts—involve fundamentally different types of moral reasoning.

In the context of capital sentencing, rather than capital legislation, the Court has strongly emphasized the importance of deliberative, individualized decision-making—and indeed has structured its Eighth Amendment jurisprudence to facilitate it. Under the Eighth Amendment, the factfinder must be given an opportunity for “the particularized

153. For example, one legislator asked his colleagues to put themselves in the place of surviving family member Dr. William Petit. S. Transcript of Floor Deb. on S.B. 280 (Conn. Apr. 4, 2012), *supra* note 98, at 295 (statement of Sen. Fasano) (“[T]hey strangled and raped your wife, they tied your kids to the bed, they poured gasoline over them, they did unspeakable things to them . . .”).

154. H.R. Transcript of Floor Deb. on S.B. 280 (Conn. Apr. 11, 2012), *supra* note 117, at 45 (statement of Rep. Cafero).

155. S. Transcript of Floor Deb. on S.B. 280 (Conn. Apr. 4, 2012), *supra* note 98, at 247 (statement of Sen. Suzio).

156. *Id.* at 295 (statement of Sen. Fasano) (“[B]efore the Cheshire murders I really was in between on whether I’d vote against the death penalty or not. I really, really was.”).

157. *Id.*

158. One interesting exception to the overall abstraction was the deeply personal story by Nebraska State Senator Colby Coash about a road trip he took during college to witness the atmosphere of an execution. See *supra* text accompanying note 142; Transcript of Floor Deb. on Legis. B. 268 (Neb. Apr. 16, 2015), *supra* note 96, at 7 (statement of Sen. Coash). Although this anecdote does not humanize the killer, it does reflect in a personal and individualized way the seriousness of taking a life—even the life of a murderer.

consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.”¹⁵⁹ The plurality in *Woodson v. North Carolina*¹⁶⁰ explained:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death . . . [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.¹⁶¹

Capital jury trials are thus constrained by constitutional requirements that are designed to give the defendant an opportunity to present mitigating, humanizing information to make a case for life.¹⁶²

The capital jury verdicts that result from this evidentiary process serve a dual function. Their most direct impact is to decide the fate of an individual defendant. But they are also relied upon to decipher a collective constitutional narrative; they are data points about “evolving standards of decency.” As “objective indicators,” they point to whether society is morally willing to impose the death penalty *when also confronted with evidence of the offender’s humanity*.

This individualized moral reasoning is largely missing in the legislative debates we studied. By and large, the legislators in these debates did in fact treat capital defendants “as members of a faceless, undifferentiated mass.”¹⁶³ No constitutional requirement of any kind exists that requires legislatures to engage in an exercise to humanize capital defendants, and the debates we observed did not demonstrate such an exercise in practice. This does not mean that legislation says *nothing* about society’s—or the

159. *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion).

160. 428 U.S. 280 (1976) (plurality opinion).

161. *Id.* at 304.

162. The long and sad history of ineffective legal representation for capital defendants means that the promise of these protections has frequently been left unrealized in individual cases. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1869 (1994). We certainly would not want to overstate the individuating success of all capital trials in practice.

163. *Woodson*, 428 U.S. at 304 (plurality opinion).

legislators’—standards of decency. Yet the two types of “objective indicators” of society’s morality involve fundamentally different types of moral thinking—one required to be individualized, and one predictably abstract.

Indeed, perhaps legislation and jury verdicts are not two data points that one might look to in deciphering the same “standard of decency”; they are indicators of distinct types of decency. One standard of decency—the willingness or unwillingness to *impose* punishment—is deliberately constrained by a process that aims to humanize the offender, even while demonstrating the full force of his crimes. The other standard of decency—the willingness or unwillingness to *authorize* punishment—may be arrived at without any requirement at all to view the recipient of the punishment as a human being.

Despite the qualitatively different deliberative processes in legislation and jury sentencing, the Court uses both without differentiation to assess “evolving standards of decency.” And the Court never explains, precisely, what it means by a “standard of decency.” Is a “standard of decency” an instinctual, gut-level moral intuition, or is it a value arrived at upon considered reflection? Relatedly, is society’s “standard of decency” about a particular punishment properly understood as the willingness to endorse a penalty on an abstract level or as the willingness to apply a penalty in an individual case? Some commentators have maintained that the Eighth Amendment inquiry should give more weight to the punishments people would be willing to apply in real circumstances, rather than the punishments people would be willing to accept in the abstract.¹⁶⁴ And Justice Marshall would have evaluated the constitutionality of the death penalty not according to people’s *existing* impressions of capital punishment, but rather according to his prediction that “the American people, fully informed as to the purposes of the death penalty and its liabilities, would . . . reject it as morally unacceptable.”¹⁶⁵ But the Court, if anything, has given more weight to legislative processes as evidence of “objective standards of decency,” without inquiring into the type of deliberation or moral reasoning that occurs within them.¹⁶⁶

One might argue that the Court’s attention to both legislative action and jury decision-making as “objective indicators” of “evolving standards of

164. See Smith et al., *supra* note 4, at 2421.

165. *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting).

166. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (“We have pinpointed that the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’” (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated on other grounds by Atkins*, 536 U.S. 304 (2002))).

decency” is an effort to capture both types of deliberation—that which is applied to individual cases and that which is theorized at a more abstract level. Perhaps this is so. But if there comes a time when a conflict arises between the “standards of decency” suggested by the laws on the books and those suggested by the law as enforced through capital jury verdicts, perhaps the individualized moral reasoning of jury decision-making should take priority.¹⁶⁷ To rest our understanding of society’s “evolving standards of decency” on a legislative process that is susceptible to abstractions and resistant to nuanced individualized portrayals of capital defendants diminishes the Eighth Amendment and the protections it provides.

Third, and more briefly, the legislative debates demonstrate a lack of consensus even among the legislators who agree with each other about the core concerns at play. This does not mean that it is impossible to obtain any useful information about the animating principles behind the legislation.¹⁶⁸ By analyzing the substance of the debates, we can note trends about the issues that seemed to be more and less central to the legislators. Moreover, as will be described *infra*, the Court has never required any consensus on the rationales behind punishment—only on the punishment’s existence *vel non*. But the diversity of the points of discussion does support the critique that deciphering a monolithic “consensus” is a challenging enterprise, even within one state’s single legislative decision to abandon the death penalty.

B. Legislators as Constitutional Actors

The “evolving standards of decency” test has garnered much criticism for its reliance on majoritarian legislatures to define the scope of an individual right under the Eighth Amendment—for giving too much power to legislatures in the constitutional analysis.¹⁶⁹ One of the goals of our research was to try to discern whether legislators understand their

167. We readily acknowledge that the Court’s current approach to assessing the significance of jury verdicts also leaves much to be desired and should be modified to more accurately represent community values. The Court tallies capital jury verdicts for death as evidence of society’s standards of decency without accounting for the distorting effect of death qualification, which strikes from the jury venire all potential jurors who are unwilling to impose death as a matter of moral conviction. *See Cover, supra* note 57.

168. *See infra* section IV.C, discussing the significance of the concerns over wrongful execution in the legislative debate.

169. *See supra* note 5.

constitutional role and the power they hold to shape the trajectory of Eighth Amendment doctrine.¹⁷⁰

The simple conclusion we reached from the data was no. We found virtually no evidence that the state legislators in Connecticut, Nebraska, and Illinois understood that their decision-making could impact the United States Supreme Court's analysis of "evolving standards of decency." Instead, the few legislators who came closest to mentioning this issue described the Court as constraining the legislators' independent judgment, rather than following it.¹⁷¹

This ignorance of—or, at least, the absence of discussion by the legislators about¹⁷²—their constitutional role suggests that although the "evolving standards of decency" test in some respects involves a dialogue between the judiciary and the nation's legislatures, in another sense the two types of institutions are not in direct conversation at all.

Of course, we acknowledge that the legislators' apparent ignorance about the constitutional role they play does not, on its own, lead to the conclusion that state legislation is an inappropriate indicator of evolving standards of decency. Indicators need not necessarily be self-aware. Jurors, for example, are never told and undoubtedly do not understand the constitutional significance of their verdicts in the larger Eighth Amendment analysis, but their individual verdicts may still reflect something about the community's willingness to impose the death penalty.¹⁷³ Similarly, other plausible indicators that have been advanced

170. Some jurists and commentators would argue, of course, that this power is merely illusory, as the Court will recast legislative action in a way to justify the conclusions it wishes to reach. *See Atkins*, 536 U.S. at 348–49 (Scalia, J., dissenting). Corinna Barrett Lain argues that the majoritarian force at play in the Eighth Amendment analysis is not the "evolving standards of decency" doctrine itself, but rather non-doctrinal majoritarian forces that influence the Supreme Court's decision-making more broadly. Lain, *supra* note 4, at 5–7.

171. Connecticut State Senator Jason Welch depicts the Court as all but existing to thwart the will of legislators. S. Transcript of Floor Deb. on S.B. 280 (Conn. Apr. 4, 2012), *supra* note 98, at 133 ("[T]he first thing the court does is – is they read the statute . . . I think they're going to draw one conclusion, which I think is the conclusion that we all want them not to draw.") (statement of Sen. Welch). Similarly, colleague John McKinney laments that if the court were to overturn the legislature's work "there's nothing we could do about that legislatively. That's what courts do . . ." *Id.* at 152 (statement of McKinney).

172. Again, absence of legislative debate is not necessarily equivalent to absence of knowledge. But it does suggest that this is not something that legislators are relying on in making their decisions, and not something they deem significant enough to mention. The ignorance about other aspects of the legal framework seem to support the idea, moreover, that at least many legislators do not understand the nuances of constitutional law enough to know their constitutional role.

173. However, see Cover, *supra* note 57, for a critique of the use of death-qualified juries' verdicts as an "objective indicator" of "evolving standards of decency."

by commentators and noted by the Court, such as opinion polls,¹⁷⁴ international practices,¹⁷⁵ and professional organizations' standards,¹⁷⁶ would serve as unwitting indicators in a constitutional analysis. To put it in more everyday terms, a thermometer does not need to comprehend anything at all to be an accurate indicator of the temperature in the room.

Yet it remains worthwhile to closely consider the legislators' lack of awareness that they play a meaningful role in the Court's assessment of capital punishment's constitutionality. The legislators' failure to recognize their own constitutional significance lends nuance to some of the primary conceptual critiques and defenses of the "evolving standards of decency" doctrine itself.

One of the benefits of a constitutional doctrine that links individual rights to objective indicators of society's contemporary values is increased democratic legitimacy. The doctrine ties controversial judicial decisions that overturn punishments sanctioned by democratically elected legislatures and authorized in individual cases by unanimous juries to the will of those very same institutions. However, as we found that state legislators showed no awareness that Eighth Amendment doctrine is tethered to their own decision-making, the Court's attempts to couch its decisions in the legitimacy of majoritarian sentiment seem rather ineffective. The legislators in our study gave no indication that they perceived the Court to be acting in accordance with "evolving standards of decency" as reflected in the decisions of democratically elected legislatures such as themselves. If legislators are unaware of the "objectivity" and democratic bona fides of Eighth Amendment doctrine, it appears unlikely that ordinary Americans would have a greater understanding. The state legislators' failure to recognize their constitutional role suggests the Court may not be achieving the perceived legitimacy its doctrine was designed to inspire.¹⁷⁷

174. See generally Niven et al., *supra* note 145, at 110, 113 (noting the superior reliability of opinion polls relative to other proxy-based indicators of public sentiment).

175. *Roper v. Simmons*, 543 U.S. 551, 575–78 (2004); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (plurality opinion).

176. *Hall v. Florida*, 572 U.S. ___, 134 S. Ct. 1986, 1993 (2014); *id.* at 2002 (Alito, J., dissenting) ("Now, however, the Court strikes down a state law based on the evolving standards of *professional societies*, most notably the American Psychiatric Association (APA).").

177. The legislators' failure to see themselves as playing a significant constitutional role begs the question of what would happen if legislators embraced their constitutional role more explicitly, morphing from constitutional *indicators* to constitutional *actors*. Legislators on both sides of the political spectrum could engage in expressive legislation with the explicit purpose of influencing United States Supreme Court jurisprudence, even where that legislation would likely have little practical impact on the ground in their state because of limited usage of the death penalty. For example, lawmakers opposed to the death penalty, even in states that had already abolished the

At the same time, the legislators' failure to embrace their constitutional significance may serve to weaken the majoritarian nature of the "evolving standards" test in ways that may alleviate some of the critiques that have been levied against it. If state legislators perceive themselves to be constrained by the Court, even when they are not, an informal, non-doctrinal counter-majoritarian check may curtail some amount of legislative excess in ways that may be normatively desirable.¹⁷⁸

C. *The Evasiveness of Innocence in Supreme Court Eighth Amendment Doctrine*

In each of the jurisdictions we studied, the legislators banned the death penalty. Should their reason for doing so matter in the constitutional analysis?

The Court has never held that the reasoning behind the passage of legislation has constitutional significance in the "evolving standards of decency" inquiry. But arguably, such a rationale—if decipherable—is itself indicative of contemporary "standards of decency," and legislative history is thus an under-investigated source of constitutionally significant information. Individual floor statements may be idiosyncratic and only tangentially relevant to the "evolving standards of decency" inquiry, and concerns of legislators who are far outnumbered and outvoted may do little to represent community values. But if we accept the Court's premise that legislation itself is an indicator of "evolving standards of decency," and if substantial numbers of legislators who speak in favor of ultimately successful legislation express a consistent rationale for their support, that rationale may be quite helpful to our understanding of the value that legislation represents.¹⁷⁹ Although we recognize that individual floor

practice as a whole, could introduce and seek to pass resolutions reflecting their opposition to certain types of practices that might occur within a capital regime. On the other hand, legislators in favor of certain capital punishment practices outlawed by the Court—such as the death penalty for child rape, prohibited in *Kennedy v. Louisiana*—could seek to pass expressive resolutions (or actual legislation) supporting such practices with an eye toward changing the Court's perception of "evolving standards of decency." Cf. Richard M. Re, *Can Congress Overturn Kennedy v. Louisiana?*, 33 HARV. J.L. & PUB. POL'Y 1031, 1103 (2010) (advancing an interpretation of *Kennedy v. Louisiana* as having a "democratically reversible holding").

178. This dynamic pairs in an interesting way with Professor Corinna Barrett Lain's argument that although the "evolving standards of decency" test is majoritarian in nature, and although the outcomes of the Court's Eighth Amendment cases are largely consistent with majoritarian sentiment, those outcomes are largely traceable not to doctrine but to the influence of non-doctrinal majoritarian forces. Lain, *supra* note 4, at 5–7.

179. In the realm of statutory interpretation, legislative history is a common—though sometimes controversial—reference point. See *supra* note 1; see, e.g., *United States v. City of San Francisco*,

statements, in isolation, may have little persuasive value,¹⁸⁰ policy concerns expressed repeatedly throughout the debates may carry more weight.

Of course, there are dangers associated with increased attention to legislative history in identifying “evolving standards of decency.” While legislative outcomes are defined and quantifiable, the legislative record can be elusive and difficult to measure. Legislators may feel free to wax poetic on the record in ways that are inconsistent with their actual views, while legislative outcomes result from legislators’ actions rather than their mere words. Legislative history can be manipulated and as such its use is controversial even in the more direct enterprise of interpreting statutory text.¹⁸¹

Still, it is worth comment that the most common moral preoccupation we observed among the anti-death penalty legislators was the risk of executing the innocent. Forty percent of the death penalty opponents spoke with concern about wrongful convictions. Interestingly, this “standard of decency” has only a tenuous link to existing Eighth Amendment precedent.¹⁸² The Court has not focused on, nor articulated a way to analyze, the risk of executing the innocent in its Eighth Amendment jurisprudence. If we do take legislative history seriously as an indicator of society’s “evolving standards of decency,” the frequent mention of this concern points in favor of increased attention by the Court to innocence in Eighth Amendment jurisprudence.

It may come as a surprise to many that the Court has never held that a convicted yet demonstrably innocent person has a constitutional right to be released from jail or spared execution. In *Herrera v. Collins*,¹⁸³ the majority went only so far as to “assume, for the sake of argument in

310 U.S. 16, 22 n.10 (1940) (“Reference to congressional debates may be made to establish a common agreement upon the general purpose of an Act.” (citation omitted)).

180. *NLRB v. SW Gen., Inc.*, 580 U.S. ___, 137 S. Ct. 929, 942–43 (2017) (opining that “floor statements by individual legislators rank among the least illuminating forms of legislative history”).

181. See, e.g., Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 *YALE L.J.* 266, 269–71 (2013) (describing the controversy over, and decline in reliance on, legislative history since the mid-1980s).

182. By contrast, the primary moral preoccupation we observed in the pro-death penalty legislators—retribution—is well-recognized by the United States Supreme Court as a legitimate penological basis for imposing capital punishment. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion); *Enmund v. Florida*, 458 U.S. 782, 798 (1982)). When exercising its independent judgment as to whether a punishment violates the Eighth Amendment, the Court has focused on whether the punishment meaningfully contributes to the deterrent and retributive goals of the death penalty. *Atkins*, 536 U.S. at 318–20.

183. 506 U.S. 390 (1993).

deciding this case, that in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.”¹⁸⁴ The Court went on to emphasize that “the threshold showing for such an assumed right would necessarily be extraordinarily high.”¹⁸⁵ If we piece together the concurring and dissenting opinions in *Herrera*, a majority of the justices did voice support for the “fundamental legal principle that executing the innocent is inconsistent with the Constitution”;¹⁸⁶ yet the Court has never explicitly so held. Although the Court did later rule that a demonstration of actual innocence can be a so-called “gateway” into habeas review for a petitioner with a procedurally-defaulted constitutional claim,¹⁸⁷ the freestanding constitutional significance of an individual post-conviction petitioner’s factual innocence remains uncertain.¹⁸⁸

In light of the Court’s hesitancy to constitutionalize protections for actually innocent habeas petitioners, it should perhaps be less surprising that the risk of executing the innocent has played only a minor role in the Court’s Eighth Amendment analysis to date. The Court has long held that, because death is different in quality and finality than other punishments,

184. *Id.* at 417.

185. *Id.*

186. *Id.* at 419 (O’Connor, J., concurring) (joined by Kennedy, J.) (“[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event.”); *id.* at 429 (White, J., concurring) (“In voting to affirm, I assume that a persuasive showing of “actual innocence” made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case.”); *id.* at 430 (Blackmun, J., dissenting) (joined by Stevens, J., and Souter, J.) (“Nothing could be more contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent.” (citations omitted)).

To the contrary, Justices Scalia and Thomas would have explicitly held that there was no freestanding constitutional innocence claim cognizable in habeas corpus proceedings. *Id.* at 427–28 (Scalia, J., concurring) (“There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction In saying that such a right exists, the dissenters apply nothing but their personal opinions to invalidate the rules of more than two-thirds of the States, and a Federal Rule of Criminal Procedure for which this Court itself is responsible. If the system that has been in place for 200 years (and remains widely approved) ‘shock[s]’ the dissenters’ consciences, perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of ‘conscience shocking’ as a legal test.”).

187. *Schlup v. Delo*, 513 U.S. 298, 315, 326–27 (1995).

188. *See also* *House v. Bell*, 547 U.S. 518, 554–55 (2006) (declining once again to resolve what a “hypothetical freestanding innocence claim would require” because, whatever the burden, “this petitioner has not satisfied it”).

there exists a need for increased “reliability.”¹⁸⁹ In most instances, that “reliability” has been discussed in the context of the decision to impose death rather than life—in other words, with respect to punishment rather than guilt. This orientation toward punishment has some exceptions. In *Beck v. Alabama*,¹⁹⁰ in deciding that a capital jury must be given the opportunity to return a verdict of guilt for a lesser included offence, the Court explained that the rationale behind invalidating “procedural rules that tended to diminish the reliability of the sentencing determination” in capital cases “must apply to rules that diminish the reliability of the guilt determination.”¹⁹¹ In *Atkins*, when analyzing the constitutionality of executing individuals with intellectual disability, the Court did note the concern that “[m]entally retarded defendants in the aggregate face a special risk of wrongful execution.”¹⁹² And in two dissents in recent years, Justices Souter and Breyer have discussed at some length the significance of wrongful convictions and wrongful executions to the constitutionality of the death penalty as a whole or of certain practices within it.

In *Kansas v. Marsh*,¹⁹³ Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, would have struck down as unconstitutional a statute making the death penalty mandatory when jurors found the mitigating and aggravating circumstances to be equally balanced.¹⁹⁴ In reaching this conclusion, Justice Souter asserted that compelling new evidence of wrongful convictions in capital cases demonstrates a risk of erroneous executions and necessarily affects the Eighth Amendment analysis:

Today, a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences, by requiring them when juries fail to find the

189. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (“Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”).

190. 447 U.S. 625 (1980).

191. *Id.* at 637–38.

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

193. 548 U.S. 163 (2006).

194. *Id.* at 203 (Souter, J., dissenting).

worst degree of culpability: when, by a State's own standards and a State's own characterization, the case for death is "doubtful."¹⁹⁵

Justice Thomas, writing for a majority of the Court, criticized Justice Souter's argument, asserting that the possibility of the erroneous conviction and execution of innocents did not present a constitutional problem:

Because the criminal justice system does not operate perfectly, abolition of the death penalty is the only answer to the moral dilemma the dissent poses. This Court, however, does not sit as a moral authority. Our precedents do not prohibit the States from authorizing the death penalty, even in our imperfect system. And those precedents do not empower this Court to chip away at the States' prerogatives to do so on the grounds the dissent invokes today.¹⁹⁶

In 2015, Justice Breyer wrote a landmark dissent in *Glossip v. Gross*,¹⁹⁷ in which he called upon the Court to revisit the global question of the death penalty's constitutionality under the Eighth Amendment.¹⁹⁸ Among the four primary reasons he cited for his belief that capital punishment is unconstitutional was that its "lack of reliability" rendered it cruel.¹⁹⁹ He cited extensive evidence that the death penalty had been wrongly imposed on individuals who were later exonerated and, even worse, that innocent individuals had in fact been executed. He suggested that "there are too many instances in which courts sentence defendants to death without complying with the necessary procedures; and they suggest that, in a significant number of cases, the death sentence is imposed on a person who did not commit the crime."²⁰⁰ To Justice Breyer, this evidence, which simply did not exist at the time *Gregg* was decided,²⁰¹ provides a new basis for reconsidering the constitutionality of the death penalty as a whole.

195. *Id.* at 207–08; *see also id.* at 210–11 ("We are thus in a period of new empirical argument about how "death is different": not only would these false verdicts defy correction after the fatal moment, the Illinois experience shows them to be remarkable in number, and they are probably disproportionately high in capital cases. While it is far too soon for any generalization about the soundness of capital sentencing across the country, the cautionary lesson of recent experience addresses the tie-breaking potential of the Kansas statute: the same risks of falsity that infect proof of guilt raise questions about sentences, when the circumstances of the crime are aggravating factors and bear on predictions of future dangerousness." (citations omitted)).

196. *Id.* at 181.

197. 572 U.S. ___, 135 S. Ct. 2726 (2015).

198. *Id.* at 2755 (Breyer, J., dissenting).

199. *Id.* at 2756.

200. *Id.* at 2759.

201. *Id.*

Legislative decisions to abolish the death penalty *in order to eliminate the risk of executing the innocent* lend support to this line of reasoning. The concern over mistakes—over executing the innocent—was the single most important issue for death penalty opponents. As the risk of executing the innocent begins to take greater prominence in the courts as an Eighth Amendment concern, the data we analyzed in our study corroborates that it is significant to legislators, and suggests that a capital punishment system that bears a significant risk of executing the innocent might contravene our “evolving standards of decency.”

CONCLUSION

The Court’s reliance on legislation as a singularly influential “objective indicator” of “evolving standards of decency” cloaks legislative action with constitutional significance. The questions of how closely legislation tracks community values and how legislators understand their dual roles are thus of fundamental importance to the trajectory of Eighth Amendment doctrine.

By aggregating and categorizing the floor statements from the legislative debates leading to the abolition of the death penalty in Connecticut, Illinois, and Nebraska, we present a picture of how legislators reached the weighty decision to abolish the death penalty—a picture that is useful for its own sake. The data set obtained also provides a baseline from which to critically analyze the Court’s use of legislation as “objective indicators” of “evolving standards of decency.” Our analysis here led us to three primary observations. First, while we recognize that legislation has some value as evidence of contemporary values, the legislative history behind the passage of these death penalty laws prompts a degree of caution. In our case studies, we found support for the critique that legislation may diverge from popular opinion and that legislation represents an abstracted form of moral reasoning. Second, we found little evidence to suggest that legislators understand that the laws they enact impact the constitutionality of the death penalty nationwide—a lack of awareness that may have positive and negative effects. And third, we noted that the foremost moral concern animating the prevailing legislators—concern over executing the innocent—might itself have Eighth Amendment significance as an indicator of “evolving standards of decency.”