CAPITAL PUNISHMENT IS CONSTITUTIONAL, AND A "CRUEL AND UNUSUAL PUNISHMENT." NOW. FOR NOW.

I. INTRODUCTION

> [N]ot once in the history of the American Republic has this Court ever suggested the death penalty is categorically impermissible. The reason is obvious: It is impossible to hold unconstitutional that which the Constitution explicitly contemplates. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury," and that no person shall be "deprived of life . . . without due process of law."[1]

In one fell swoop, the late Justice Scalia proves it. Death is not, per se, a cruel and unusual punishment in violation of the Eighth Amendment.[2] Duly noted.

There have, however, been numerous instances in the history of our American Republic where the Supreme Court has restricted the application of capital punishment.[3] Now it is time for the Court to determine whether

1. Glossip v. Gross, 135 S. Ct. 2726, 2747 (2015) (Scalia J., concurring, emphasis omitted).

2. *Id.*

3. *See* Woodson v. North Carolina 428 U.S. 280, 305 (1976) (finding mandatory capital punishment for first-degree murder is unconstitutional); Coker v. Georgia, 433 U.S. 584, 600 (1977) (finding capital punishment unconstitutional for rape); Locket v. Ohio 438 U.S. 586, 608 (1978) (finding that sentencing juries must be able to hear all mitigating factors presented by a defendant rather than a specified list); Beck v. Alabama, 447 U.S. 625, 638 (1980) (finding that juries must be allowed to consider lesser included offense to a capital crime); Godfrey v. Georgia, 446 U.S. 420, 432 (1980) (finding that capital punishment for murder is unconstitutional when the only aggravating factor presented to juries is that the crime was "outrageously or wantonly vile"); Enmund v. Florida, 458 U.S. 782, 801 (1982) (finding capital punishment unconstitutional for participants in a crime who did not kill, attempt to kill, or intend to kill); Ford v. Wainwright, 477 U.S. 399, 417 (1986) (finding capital punishment unconstitutional for the insane); Thompson v. Oklahoma, 417 U.S. 815, 838 (1988) (finding capital punishment unconstitutional for defendants who committed their crimes at age fifteen or younger); Ring v. Arizona, 536 U.S. 584, 609 (2002) (finding judicial determination of aggravating factors an unconstitutional violation of the right to jury trial); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (finding capital punishment unconstitutional for "mentally retarded" defendants); Tennard v. Dretke, 542 U.S. 274, 283-84 (2004) (finding that

these restrictions ensure that capital punishment in America, now, is constitutional. Specifically, the Court should examine whether widely expressed concern over arbitrary imposition of the death penalty reflects evolving standards of decency it should agree with—that capital punishment violates the cruel and unusual clause of the Eighth Amendment.[4] Now, for now.

Evaluating a punishment under the cruel and unusual clause requires a two-part analysis. First, the Court assesses "the evolving standards of decency that mark the progress of a maturing society."[5] "Evolving standards of decency" are marked by societal consensus that a punishment is unacceptable, evidenced by the actions of state legislatures and juries.[6] After evaluating the evidence, and determining a new consensus has emerged, the Court applies its own judgment as ultimate arbiter of constitutionality.[7]

Part II of this paper will discuss the evolution of Supreme Court "evolving standards" jurisprudence, highlighting its departure from majoritarian restraint. Part III will assess current evidence of evolving standards of decency, and argue it demonstrates sufficient consensus to warrant exercise of the Court's independent judgment, though limited to the issue of unconstitutional arbitrariness in application of the death penalty. Part IV will discuss how the Court's jurisprudence should guide its independent judgment. Part V, acknowledging that a finding by the Supreme Court consistent with the arguments made herein would be inconsistent with long standing precedent, argues that a finding that the death penalty is a "cruel and unusual punishment," now, is consistent with principles of *stare decisis.*

II. THE EVOLVING "EVOLVING STANDARD"

A. Evolving Standards and Objective Indicia

The Court assesses evolving standards of decency through "objective indicia."[8] The most important indicium is state legislation abolishing a

all mitigating factors must be considered during the sentencing phase, not just the guilt phase); Roper v. Simmons, 543 U.S. 551, 578 (2005) (finding capital punishment unconstitutional for defendants who committed their crimes at age seventeen or younger); Kennedy v. Louisiana 554 U.S. 407, 447 (2008) (finding capital punishment unconstitutional for crimes against an individual where a victim's life was not taken).

4. U.S. CONST. amend. VIII.
5. *See Roper*, 543 U.S. at 561
6. *See id*.
7. *See id.* at 567.
8. *See id.*

penalty.[9] Frequency of imposition by juries is also persuasive.[10] Ostensibly, the Court uses objective indicia to determine whether a "national consensus" against a penalty exists.[11] If so, the Court exercises its independent judgment to determine whether the penalty is unconstitutional.[12] To find a punishment unconstitutional on the basis of evolving standards of decency, the Court once required a nearly dispositive majoritarian "national consensus" against a punishment.[13] Now, it arguably treats objective indicia of evolving standards as a threshold question,[14] permitting the Court to use its independent judgment to answer the determinative question of whether a punishment is unconstitutional.[15]

B. What Constitutes a National Consensus?

The first use of the term "national consensus" in Supreme Court death penalty jurisprudence is found in Justice O'Connor's *Thompson v. Oklahoma* concurrence in 1988.[16] That the term is now regularly used[17] suggests the Court has interpreted its earlier Eighth Amendment jurisprudence as requiring a clear majoritarian national consensus. However, pre-*Thompson* precedent includes no such explicit requirement, and the Court's recent decisions have correctly adopted a methodology more consistent with the language of "evolving standards."

The Court first used objective indicia to establish evolving standards of decency with respect to capital punishment in *Gregg v. Georgia* in 1976.[18] In *Gregg*, the Court upheld the constitutionality of capital punishment

9. 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.").

10. *See* Enmund v. Florida, 458 U.S. 782, 794 (1982).

11. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 313-16 (2002). I say "ostensibly" because, though this language has become prevalent in Eighth Amendment jurisprudence, this is a new phenomenon. *See infra* Part II-III.

12. *Atkins*, 536 U.S. at 317-21.

13. *See infra* Part II.B.

14. *See infra* Part II.D.

15. *Id.*

16. *Compare* Thompson v. Oklahoma, 487 U.S. 815, 849 (1988) (O'Connor, J., concurring), *with* Gregg v. Georgia, 428 U.S. 153 (1976) (no mention of "national consensus"), Coker v. Georgia, 433 U.S. 584 (1977) (no mention of "national consensus"), *and* Enmund v. Florida, 458 U.S. 782 (1982) (no mention of "national consensus").

17. *See* Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 FLA. ST. U. L. REV. 853, 859-70 (2013).

18. *See Gregg*, 428 U.S. at 173 ("[Evolving standards] assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.").

statutes,[19] in part, because after invalidating all capital punishment statutes four years prior in *Furman v. Georgia*,[20] at least thirty-five states had passed new statutes for imposing capital punishment.[21] The Court also found persuasive the 254 death sentences juries handed down between *Furman* and the end of 1974, noting that "[t]he jury also is a significant and reliable objective index of contemporary values because it is so directly involved."[22]

The Court again used objective indicia of evolving standards of decency the following year to determine whether death is a constitutional punishment for the rape of an adult woman, in *Coker v. Georgia*.[23] The evolving standards evidence indicating the punishment was "cruel and unusual" centered on forty-nine states prohibiting the penalty,[24] and that less than ten percent of convicted rapists in Georgia had been sentenced to death—indicating it was being arbitrarily imposed.[25] Since *Coker*, the Court has found evolving standards of decency through much less compelling evidence, a trend that began with its decision in *Enmund v. Florida* in 1982.

In *Enmund*, the Court addressed whether capital punishment is constitutional for felony murder when the defendant neither killed, attempted to kill, nor intended death to result during the commission of a felony.[26] The relevant objective indicia in the case included forty-three states that prohibited the penalty in similar circumstances (six less than in *Coker*),[27] and significant evidence that juries had rejected the punishment.[28] Though the Court noted that the evidence of evolving standards was less compelling than found in *Coker*,[29] it held the objective indicia "nevertheless weigh[ed] on the side of rejecting capital punishment for the crime at issue."[30]

19. *Id.* at 195.
20. 408 U.S. 238 (1972).
21. *Gregg*, 428 U.S. at 179-80.
22. *Id. at* 181-82.
23. Coker v. Georgia, 433 U.S. 584, 593-97 (1977).
24. *See id.* at 595-96.
25. *Id.* at 596-97.
26. Enmund v. Florida, 458 U.S. 782, 787 (1982).
27. *See id.* at 793.
28. *Id.* at 794-96 (only six out of 362 executions since 1955 involved a "nontriggerman" in a felony murder, as of October 1, 1981 only three out of 796 death-row inmates had been sentenced under similar circumstances, and in Florida, only one (the petitioner in the case) out of forty-five felony murder death sentences at the time was a nontriggerman who did not intend death in the commission of the felony).
29. *Id.* at 793.
30. *Id.*

While the *Gregg*, *Coker*, and *Enmund* Courts did not use the term "national consensus" in their objective indicia analysis,[31] two cases decided on the same day in 1989, *Penry v. Lynaugh* and *Stanford v. Kentucky*,[32] effectively affirmed the requirement of a majoritarian "national consensus" to find a punishment unconstitutional.[33] In *Penry*, the appellant argued that an "emerging national consensus" against the execution of the "mentally retarded," compelled the Court to find capital punishment for that class of individuals unconstitutional.[34] At the time, only two states specifically prohibited execution of the "mentally retarded."[35] However, because only fourteen states prohibited capital punishment outright,[36] the Court found no national consensus,[37] and declined on that basis to consider whether execution of the "mentally retarded" was constitutional.[38]

In *Stanford*, the Court considered whether capital punishment was constitutional for individuals who commit their crimes when seventeen years old or younger.[39] It did not include states with outright capital punishment bans in its calculus of a national consensus,[40] limiting its assessment to whether the twelve of thirty-seven states that allowed capital punishment, yet prohibited the execution of individuals who committed their crimes when seventeen years old or younger, constituted a majoritarian consensus.[41] The Court found the objective indicia did "not establish the degree of national consensus [the] Court ha[d] previously thought sufficient to label a particular punishment cruel and unusual."[42] However, even if the Court had included states with outright capital punishment prohibitions (as urged by the dissent),[43] only a slight majority—twenty-seven states—prohibited executing individuals who committed their crimes when seventeen years old or

31. Gregg v. Georgia, 428 U.S. 153 (1976); Coker v. Georgia, 433 U.S. 584 (1977); *Enmund*, 458 U.S. 782.

32. *See* Stanford v. Kentucky, 492 U.S. 361 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989).

33. *See* Penry v. Lynaugh, 492 U.S. 302, 335 ("[T]here is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment."); Stanford v. Kentucky, 492 U.S. 361, 377 ("Having failed to establish a [national] consensus . . . [w]e decline . . . to rest constitutional law on such uncertain foundations.").

34. *Penry*, 492 U.S. at 333-34.

35. *Id.* at 334.

36. *Id.*

37. *Id.*

38. *See id*. at 335; *Stanford*, 492 U.S. at 368.

39. *Stanford*, 492 U.S. at 368.

40. *Id.* at 370-71.

41. *Id.*

42. *Id.* at 371.

43. *Id.* at 384-85 (Brennan, J., dissenting).

younger.[44] While it can be argued that a majority constitutes consensus, such a finding would have been a significant departure from the Court's previous evolving standards jurisprudence.[45]

When the holdings of *Penry* and *Stanford* were later challenged in *Atkins v. Virginia* and *Roper v. Simmons*,[46] respectively, the Court supported departing from the majoritarian approach previously used through a novel interpretation of "evolving standards."

C. The Direction and Consistency of the Change

In *Atkins*, the Court overturned *Penry* to find capital punishment unconstitutional for the "mentally retarded,"[47] and in *Roper*, overturned *Stanford* to find capital punishment unconstitutional for defendants who committed their crimes at age seventeen or younger.[48] The cases had remarkably similar evidence of evolving standards of decency,[49] representing, at best, tenuous claims of a national consensus.[50] In both, thirty states prohibited capital punishment for the class of defendant challenging its imposition,[51] a number well short of the objective indicia establishing a national consensus in *Coker* and *Enmund*.[52] In *Atkins* (and later *Roper*), the Court's majority seems to have been cognizant of its lack of consistency with earlier evolving standards jurisprudence, introducing a significant caveat to its calculations, asserting, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[53]

Using this rubric, objective indicia of a "national consensus" was significantly stronger in both cases. In *Atkins*, the Court found persuasive a twelve-year trend during which sixteen states abolished capital punishment for the "mentally retarded."[54] In *Roper*, the Court reasoned that a weaker trend of five states eliminating the penalty over a fifteen-year period was still

44. *Id*.

45. *See id*. at 369-71 (majority opinion).

46. *See* Atkins v. Virginia, 536 U.S. 304 (2002); Roper v. Simmons, 543 U.S. 551 (2005).

47. *Atkins*, 536 U.S. at 321.

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

49. *Id.* at 564.

50. *See id.* at 588 (O'Connor, J., dissenting).

51. *See id.* at 564.

52. *Supra* Part II.B. In *Coker*, forty-nine states prohibited the penalty; in *Enmund*, forty-three prohibited the penalty.

53. *Roper*, 543 U.S. at 566 (quoting Atkins v. Virginia, 536 U.S. 304, 515 (2002)).

54. Atkins v. Virginia, 536 U.S. 304, 314-16 (2002).

persuasive, because the slower rate of abolition was "counterbalanced by the consistent direction of the change."[55]

Despite the importance ascribed to these trends in both cases, the Court never affirmatively stated that a national consensus existed. In *Atkins*, the Court only went so far as determining "it is fair to say that a national consensus has developed."[56] In *Roper*, the Court was even more cautious, simply stating that objective indicia provided "sufficient evidence" of changes in societal values to warrant exercise of its independent judgment on whether the punishment was unconstitutional.[57]

D. The Role of the Court's Independent Judgment

The Court's move away from requiring majoritarian consensus to find a punishment unconstitutional is reflected in the language the Court has used to explain the role of its independent judgment. Over time, the Court has increasingly emphasized its role as ultimate arbiter in cases restricting application of the death penalty, limiting the role of objective indicia in its determination.

In *Coker*, the first case where objective indicia was used to establish that evolving standards of decency restricted application of capital punishment,[58] the Court used the deferential standard that "judgment should be informed by objective factors to the *maximum possible extent*."[59] In *Enmund*, it stated that objective indicia "*weigh heavily* in the balance."[60] In *Atkins*, the Court interpreted *Coker* and *Enmund* as requiring a "*review* [of] the judgment of legislatures" before the Court's "own judgment is 'brought to bear.'"[61] By the time *Roper* was decided, the Court had abandoned all pretext of deference to objective indicia of a national consensus, stating evidence of evolving standards of decency provided mere "essential instruction," while emphatically reserving ultimate judgment for itself.[62] The language the Court used is telling: "*[w]e* then must determine, in the exercise of *our own independent judgment*, whether the death penalty is [unconstitutional] . . . ."[63]

55. *Roper*, 543 U.S. at 565-66.
56. *Atkins*, 536 U.S. at 316.
57. *Roper*, 543 U.S. at 565-68.
58. *See* Coker v. Georgia, 433 U.S. 584 (1977).
59. *Id.* at 592 (emphasis added).
60. Enmund v. Florida, 458 U.S. 782, 797 (1982) (emphasis added).
61. *Atkins*, 536 U.S. at 313 (quoting *Coker*, 433 U.S. at 597) (emphasis added).
62. *Roper*, 543 U.S. at 564.
63. *Id.* (emphasis added).

E. A National Consensus is Not Required for the Court to Exercise Its Independent Judgment

As demonstrated above, the Supreme Court now treats objective evidence of a "national consensus" as a framework for evaluating whether evolving standards of decency permit independent judicial assessment of whether a penalty is unconstitutional. While the number of states that forbid a penalty is highly persuasive, the Court has found that such evidence is not, and should not, be dispositive. The decisions in *Atkins* and *Roper* reflect this approach by evaluating evolving standards of decency through the lens of direction and consistency of change. In future challenges to capital punishment statutes under the Eighth Amendment, the Court should not be constrained by a majoritarian "how many total states have abolished" framework. Its focus should instead be whether the objective indicia of evolving standards of decency permit a finding that capital punishment is unconstitutional in the Court's independent judgment, a decision that must be rooted in the Court's evolving standards jurisprudence.

III. *ATKINS* AND *ROPER* AS GUIDANCE FOR WHETHER IT IS NOW APPROPRIATE FOR THE COURT TO EXERCISE ITS INDEPENDENT JUDGMENT ON WHETHER CAPITAL PUNISHMENT IS UNCONSTITUTIONAL

A. There is No National Consensus Based on Outright Abolition

Presently, there are the eighteen states with outright bans on capital punishment.[64] This number falls well short of a majoritarian "national consensus" against the penalty. However, objective indicia of direction and consistency of change toward abolition do provide the Court the "essential instruction" required to "exercise [its] own independent judgment" on whether capital punishment is constitutional now.

B. Direction and Consistency of the Change

The current trend in state legislative action is substantially comparable to those assessed in *Atkins* and *Roper*. When *Atkins* was decided, sixteen states had abolished the penalty over the previous twelve years.[65] In *Roper*, it was five states over fifteen years.[66] In the last nine years, six states have

64. *32 States with the Death Penalty and 18 States with Death Penalty Bans*, PROCON.ORG, http://deathpenalty.procon.org/view.resource.php?resourceID=001172 (last updated Dec. 9, 2016).

65. *Atkins*, 536 U.S. at 314-16.

66. *Roper*, 543 U.S. at 565-66.

abolished capital punishment,[67] resulting in a rate of abolition within the range of those found persuasive in *Atkins* and *Roper*.

	States Abolished	**Time Period**	**Abolish/Year**
Atkins v. Virginia	16	12 years	1.33
Roper v. Simmons	5	15 years	.33
Right Now	6	9 years	.67

C. Additional Objective Indicia

There is a valid argument that the direction and consistency of change in state legislation lends sufficient objective indicia for the Court to exercise its independent judgment in accordance with *Atkins* and *Roper*—especially when considering the weak trend the Court found persuasive in *Roper*.[68] However, those trends came within the context of a majority of states rejecting the penalty.[69] Therefore, to appropriately exercise its independent judgment on whether capital punishment is constitutional, now, the Court must demonstrate additional convincing evidence of evolving standards of decency. Two fertile areas for doing just that, are actions of state governors and sentencing juries.

i. Governor-Imposed State Moratoria

In the past several years, state governors in Colorado, Washington, Oregon, and Pennsylvania have imposed moratoria on capital punishment.[70] As actions by state governors, they are appropriate indicators of evolving standards of decency by the same rationale used for looking at legislative enactments.[71] They are actions by statewide governmental entities, duly elected to act in the best interests of the state's citizens, and subsequently accountable at the ballot box. Governor-imposed moratoria can therefore be

67. *32 States with the Death Penalty and 18 States with Death Penalty Bans*, *supra* note 64.

68. *Roper*, 543 U.S. at 565-66.

69. *Id.* at 564.

70. Ken Armstrong, *Another Death Penalty Moratorium*, THEMARSHALLPROJECT (Feb. 13, 2015), https://www.themarshallproject.org/2015/02/13/another-death-penalty-moratorium#.lymzsoDT5.

71. *See* Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting) ("[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.").

understood as actions reflecting shifting attitudes among state citizenry regarding the appropriateness of a punishment.

By adding states with governor-imposed moratoria to those that categorically ban the death penalty, the twenty-three states prohibiting capital punishment, now still falls well short of a majoritarian "national consensus." However, adding states with governor-imposed moratoria to those with recently enacted legislative abolition does create a compelling argument for evolving standards of decency based on consistency and direction of change. Ten states that permitted capital punishment eight years ago no longer do.

	States Abolished	**Time Period**	**Abolish/Year**
Atkins v. Virginia	16	12 years	1.33
Roper v. Simmons	5	15 years	.33
Now	6	9 years	.67
+ Governor Imposed	6+4=10	9 years	1.11

Admittedly, using state moratoria as objective indicia of evolving standards of decency is unprecedented,[72] namely because it has never been available to the Court in previous evolving standards capital punishment challenges.[73] However, objective indicia related to imposition of death penalties by juries have regularly been assessed and found to be persuasive evidence of evolving standards of decency.[74]

ii. Sentencing Jury Trends

In 1996, American juries sentenced 315 defendants to death for their crimes.[75] By 2001, less than half that number—155—received a death sentence.[76] In 2007, when the current trend of state level abolition began,[77]

72. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002); *Roper*, 543 U.S. at 565-66.

73. *See, e.g.*, *Atkins*, 536 U.S. at 312; *Roper*, 543 U.S. at 565-66.

74. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 181 (1976).

75. *Death Sentences by Year: 1976-2015*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/death-sentences-year-1977-2009 (last visited Jan. 14, 2017).

76. *Id.*

77. *See 32 States with the Death Penalty and 18 States with Death Penalty Bans*, *supra* note 64.

juries handed down 120 death sentences.[78] In 2015, the number was down to forty-nine.[79]

Because this significant reduction in death sentences has occurred in lockstep with legislative abolition and governor-imposed moratoria, there are clearly evolving standards of decency regarding the death penalty demonstrated by a consistent direction of change.[80] Yet, while the indicia are certainly persuasive, the Court should determine *why* societal attitudes have changed, to glean "essential instruction" for rendering its ultimate judgment.[81]

D. Underlying Cause of Evolving Standards

In *Atkins* and *Roper*, the Court determined that evolving standards of decency reflected a view that capital punishment was a disproportionate punishment for the class of defendants in each case.[82] It was on that basis that the Court exercised its independent judgment, evaluating whether the punishment was unconstitutional as "excessive."[83] Any inquiry into whether capital punishment is unconstitutional, now, should focus on the rationale for contemporary evolving standards of decency. A prominent part of the inquiry should be the rationale expressed by the four governors that imposed moratoria on executions.

In 2011, Governor Kitzhaber of Oregon announced his moratoria, citing the fact that death penalty "is not applied equally to all."[84] Similarly, Governor Jay Inslee of Washington instituted his moratoria in 2014, in part, because he was "not convinced equal justice is being served."[85] Later that year Colorado Governor John Hickenlooper stated that "Colorado's system for capital punishment is not flawless,"[86] an opinion supported by a Colorado

78. *Death Sentences by Year: 1976-2015*, *supra* note 75.

79. Kim Bellware, *2015 Was a Historic Year for the Death Penalty In America*, HUFFINGTON POST (Dec. 16, 2015), http://www.huffingtonpost.com/entry/death-penalty-2015_us_56707eb5e4b011b83a6d077a.

80. Roper v. Simmons, 543 U.S. 551, 565-66 (2005).

81. *See id.* at 564.

82. *See id.* at 563-64, 568.

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

84. *Gov. John Kitzhaber of Oregon Declares a Moratorium on all Executions*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/gov-john-kitzhaber-oregon-declares-moratorium-all-executions (last visited Jan. 14, 2017).

85. John Bacon, *Washington Governor Suspends Death Penalty*, USA TODAY (Feb. 12, 2014), http://www.usatoday.com/story/news/nation/2014/02/11/washington-death-penalty-inslee/5394917.

86. JOHN W. HICKENLOOPER, OFFICE OF THE GOVERNOR, EXECUTIVE ORDER D 2013-006, at 2.

judge who believed "[the death penalty] is simply the result of happenstance, the district attorney's choice, the jurisdiction in which the case is filed, [and] perhaps the race or economic circumstance of the defendant."[87] The most recent moratorium was announced in 2015 by Governor Tom Wolf of Pennsylvania,[88] who defended his decision on the basis that the death penalty system in Pennsylvania is "error prone, . . . and anything but infallible."[89] These factors are clearly related to the adequacy of statutes imposing the death penalty, now, and specifically reflect concerns that the death penalty is applied in an arbitrary manner. Because the concern is so prevalent, it should heavily influence the Court's independent judgment on whether capital punishment is constitutional.

E. Can the Court Exercise Its Independent Judgment?

If it wants to exercise independent judgment on whether capital punishment is constitutional, the Court could easily find an *Atkins* or *Roper* type "national consensus" against the death penalty. Now, eighteen states prohibit capital punishment,[90] four states have governor-imposed moratoria on executions, and fifteen states with prisoners on death row have not carried out a single execution in the past five years.[91] Additionally, in 2015, 86% of executions were carried out by three states,[92] and nearly two thirds of new death sentences were imposed by only 2% of American counties.[93] When considered in conjunction with the "direction and consistency of the change" toward abolition, to use the words of *Atkins*, "it is fair to say that a national consensus has developed."

Upon finding a "national consensus," the Court could then exercise its independent judgment on virtually any basis, including whether capital punishment serves any penological goal,[94] or whether it fundamentally

87. *Id.*

88. *See* Armstrong, *supra* note 70.

89. Kevin Conlon, *Pennsylvania Governor Halts Death Penalty While "Error Prone" System Reviewed*, CNN (Feb. 14, 2015), http://www.cnn.com/2015/02/13/us/pennsylvania-death-penalty-moratorium.

90. *32 States with the Death Penalty and 18 States with Death Penalty Bans*, *supra* note 64.

91. *See Executions by State and Year*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/node/5741 (last visited Jan. 14, 2017); *Death Row Inmates by State*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year (last visited Feb 23, 2017).

92. *The Death Penalty in 2015: Year End Report*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/YearEnd2015 (last visited Jan. 14, 2017).

93. *Id.*

94. *See* Atkins v. Virginia, 536 U.S. 304, 316-20 (2002) (investigating whether capital punishment furthers either penological goal of retribution or deterrence).

violates the dignity of man.[95] But given that only eighteen states categorically prohibit the death penalty,[96] well short of any number the Court has previously used to establish a "national consensus," the Court would be wise to limit its inquiry. The focus of the Court should be whether there is a basis to give constitutional weight to the specific concerns driving evolving standards of decency. Specifically, the Court should determine whether the death penalty is unconstitutional, now, due to the arbitrary imposition concerns expressed by state governors imposing moratoria. To do so, the Court should seek guidance from *Furman*, where in overturning all existing death penalty statutes, the five concurring justices expressed concerns over arbitrariness.[97] The Court should then address the holding in *Gregg*, where the Court determined new statutes had resolved the issues raised in *Furman*.[98]

IV. *FURMAN* AND *GREGG* AS GUIDANCE FOR EXERCISING INDEPENDENT JUDGMENT

A. Furman *and* Gregg

Furman and *Gregg* are the only cases to directly address the constitutionality of capital punishment.[99] These cases had radically different outcomes. *Furman* effectively abolished capital punishment in 1972,[100] while *Gregg* reinstated it in 1976.[101] The dramatic difference between the cases lies in *Gregg*'s judgment that capital punishment regimes can avoid impermissible arbitrariness through carefully crafted statutes. The Court used a narrow concept of arbitrariness, defining it as excessive discretion for juries. Accordingly, it found that statutes providing appropriate guidance and discretion for juries resolved concerns over arbitrariness raised in *Furman*, and were therefore constitutional.[102] Because both cases were plurality decisions,[103] neither controls as precedent the Court must follow. However,

95. *See* Gregg v. Georgia, 428 U.S. 153, 182 (1976) ("The Court must also ask whether it comports with the basic concept of human dignity at the core of the Amendment.").

96. *32 States with the Death Penalty and 18 States with Death Penalty Bans*, *supra* note 64.

97. Furman v. Georgia, 408 U.S. 238 (1972).

98. *Gregg*, 428 U.S. at 193-95.

99. *See id.* at 168-69 ("[U]ntil *Furman v. Georgia*, the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution.") (citation omitted).

100. *See Furman*, 408 U.S. 238.

101. *See Gregg*, 428 U.S. 153.

102. *See id*. at 192.

103. *See Furman*, 408 U.S. 238; *Gregg*, 428 U.S. 153.

the concerns of arbitrariness expressed in *Furman*, and whether they have been resolved by the judgment in *Gregg*, should weigh heavily in the Court's independent assessment of whether capital punishment is unconstitutional now.

B. The Arbitrariness Concerns of Furman

Although the concurring justices in *Furman* based their conclusions on differing rationale,[104] all five raised concerns related to arbitrariness in the application of capital punishment.[105] Justice Brennan noted that capital punishment was applied in a "trivial number of the cases in which it is legally available."[106] Justice Marshall was concerned that "the burden of capital punishment falls upon the poor, the ignorant, and the under privileged members of society."[107] Justice Douglas felt it was being applied "sparsely, selectively, and spottily to unpopular groups."[108] Justices Stewart and White used the most evocative language to condemn the arbitrary nature of capital punishment at the time. White asserted there was "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not,"[109] while Stewart went a step further, declaring that limited application of the death penalty made it "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[110]

C. The Court "Solves" Arbitrariness Concerns in Gregg

The plurality in *Gregg* interpreted the concurrences in *Furman* as holding capital punishment unconstitutional when applied in an arbitrary or capricious manner.[111] It then focused on *Furman*'s concerns over unconstitutional arbitrariness, finding that states can always remedy those concerns through carefully constructed statutes.[112] The Court specifically found that Georgia's capital punishment regime properly addressed arbitrariness through a bifurcated trial, where the sentencing jury was given adequate guidance to determine whether the defendant deserved death.[113]

104. *See Furman*, 408 U.S. 238.
105. *See id*.
106. *See Furman*, 408 U.S. at 293 (Brennan, J., concurring).
107. *Id*. at 365-66. (Marshall, J., concurring).
108. *Id*. at 256 (Douglas, J., concurring).
109. *Id*. at 313 (White, J., concurring).
110. *Id*. at 309 (Stewart, J., concurring).
111. *See* Gregg v. Georgia, 428 U.S. 153, 195 (1976).
112. *Id*.
113. *Id.*

The Court conceded, however, that statutes similar to Georgia's would not in all circumstances be found constitutional.[114] That assessment has proven prescient. The Court has subsequently imposed numerous additional constitutional protections for capital defendants, to further ensure the death penalty is not imposed in an arbitrary manner. As amended through later jurisprudence, the finding of the Court in *Gregg* can properly be stated as follows:

> States can avoid arbitrary imposition of capital punishment through trials with bifurcated guilt and sentencing phases.[115] To ensure arbitrariness is avoided, the guilt phase jury must be permitted to consider a lesser included offense to a capital crime,[116] the sentencing jury (not a judge)[117] must find sufficiently defined aggravating factors to permit the death penalty,[118] and the defendant must be allowed to present all possible mitigating evidence.[119]

Hereinafter, this amended *Gregg* "holding" will be referred to as "the rule."

D. Challenging Capital Punishment Under Furman and Gregg

Any challenge to the constitutionality of capital punishment, now, should begin with an assessment of whether "the rule" eliminates unconstitutional arbitrariness. If it does not, the Court should then determine whether *any* system for imposing capital punishment can properly address the concerns raised in *Furman*. Of course, because these inquiries would be based on the plurality holdings in *Gregg*, the Court is not actually bound by them. However, given the intense emotional nature of the national debate over the death penalty, the Court should treat *Gregg* as binding precedent, to increase the legitimacy of any finding against capital punishment. As such, the Court should only overturn the holdings if doing so is consistent with accepted principles of *stare decisis.*

114. *Id.*
115. *Id.*
116. *See* Beck v. Alabama, 447 U.S. 625 (1980).
117. *See* Ring v. Arizona, 536 U.S. 584 (2002).
118. *See* Godfrey v. Georgia, 446 U.S. 420 (1980).
119. *See* Locket v. Ohio, 433 U.S. 586 (1978); Tennard v. Dretke, 542 U.S. 274 (2004).

V. *GREGG* AS STARE DECISIS FOLLOWING *PLANNED PARENTHOOD V. CASEY*

A. "Central" and "Primary" Holdings

	"Central Holding"	**"Primary Holding"**
Roe v. Wade	Women have the right to an abortion before viability, free from undue burdens.	Women have the right to an abortion in the first trimester, free from government interference.
Gregg v. Georgia **(PLURALITY)**	"It is possible to construct capital-sentencing systems capable of meeting *Furman's* constitutional concerns."	"The concerns expressed in *Furman* . . . can be met by . . . ensur[ing] that the sentencing authority is given adequate information and guidance." (as amended above to "the rule")

An appropriate and apt methodology for assessing the holdings of *Gregg*, now, is the Court's reasoning in *Planned Parenthood v. Casey*.[120] In *Casey*, the Court found a law that clearly violated the precedent established in *Roe v. Wade*, did not violate *Roe*'s "central holding" and was therefore constitutional.[121] The primary holding in *Roe*,[122] overturned in *Casey*, was the right to an abortion that was free from government interference during the first trimester.[123] The *Casey* plurality held that the first trimester limitation was merely a framework for constitutional application of the "central holding"—that a woman has a right to an abortion before viability free from an undue burden.[124] The holdings in *Gregg* discussed above can similarly be understood as "central" and "primary" holdings. By finding that statutes can effectively eliminate arbitrary imposition of the death penalty through bifurcated trials and sufficient jury guidance, the Court applied a framework for its "central holding," that "[i]t is possible to construct capital-sentencing systems capable of meeting *Furman's* constitutional concerns."[125]

120. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

121. *Id.* at 878-901.

122. The Court in *Casey* actually used the term "central holding," whereas the term "primary holding" is my own.

123. *Id.* at 872.

124. *Id.* at 873.

125. For an explanation on arbitrariness, *see* Gregg v. Georgia, 428 U.S. 153, 173 (1976). ("This means, at least, that the punishment not be 'excessive.' The inquiry into 'excessiveness' has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain.

B. Prudential and Pragmatic Considerations

In *Casey*, the Court acknowledged the importance of respect for stare decisis,[126] yet held that "prudential and pragmatic considerations" should be assessed to determine whether the precedent is consistent with "the ideal of the rule of law."[127] The prudential and pragmatic considerations used were: (1) "whether the rule has proven to be intolerable simply in defying practical workability"[128]; (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation"[129]; (3) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"[130]; and (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[131] In applying these considerations, all need not side conclusively in favor of upholding, or overturning, a rule.[132] What is important is whether they cumulatively show that upholding or overturning the rule is consistent with "the ideal of the rule of law."[133]

In *Casey*, the Court analyzed the prudential and pragmatic considerations for *Roe*'s central and primary holdings.[134] In a challenge to the constitutionality of capital punishment, now, the Court should do the same with the central and primary holdings in *Gregg*. Overturning *Gregg*'s central holding would abolish capital punishment. It would be a finding that unconstitutional arbitrariness can never be eliminated through carefully constructed statutes. A finding overturning the primary holding of *Gregg*, as amended to "the rule," would hold that capital punishment statutes have not yet eliminated unconstitutional arbitrariness. Such a finding would abolish the death penalty, for now, and commute all existing death sentences to life

. . . Second, the punishment must not be grossly out of proportion to the severity of the crime." (citation omitted)).

126. *Casey*, 505 U.S. 833, 854 (1992) (citing Powell, *Stare Decisis and Judicial Restraint*, 1991 J. SUPREME COURT HISTORY 13, 16) ("the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable").

127. *Id.*

128. *Id.* (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)).

129. *Id.* (citing United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924)).

130. *Id.* at 855 (citing Patterson v. McClean Credit Union, 491 U.S. 164, 173-74 (1989)).

131. *Id.* (referencing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).

132. *See id.* at 854-55.

133. *Id.*

134. *Id.* at 854-79.

in prison without parole.[135] Because this paper accepts capital punishment as constitutional, the following *Casey*-style inquiry will be limited to whether overturning "the rule" is consistent with "the ideal rule of law." To determine the issue, each "prudential and pragmatic consideration" will be assessed in turn.

1. Whether the rule has proven to be intolerable simply in defying practical workability.

Conceptually, "the rule" does not defy practical workability per se. States easily can, and do, mandate the requirements established by the Court. However, the cost of providing required procedural protections results in a rule that defies "real world" practical workability.

"The rule" ensures that capital defendants are entitled to present all mitigating evidence against a death sentence.[136] As a result, prosecutors seeking the death penalty must hire expensive experts such as psychologists to rebut the mitigating evidence.[137] This is one of many additional costs associated with capital trials.[138] For some counties, the cost can be prohibitive,[139] and ultimately determine whether the district attorney seeks the death penalty.[140] Deciding to pursue the death penalty on the basis of cost, as opposed to the merits of an individual case, suggests "the rule" actually causes additional arbitrariness, and is therefore intolerable as a matter of practical workability. After all, almost nothing could constitute a more arbitrary imposition of the ultimate sanction than the status of a spreadsheet in the county comptroller's office.

2. Whether there is reliance that would add a special hardship to the consequences of overruling and add inequity to the cost of repudiation.

A finding that capital punishment statutes do not eliminate unconstitutional arbitrariness, now, may require the Supreme Court to commute all existing death sentences to life in prison without parole. Doing so would negate the results of substantial investments of time and money by the state. It would also negate the time and emotion victims' families have

135. Whether a finding of unconstitutionality requires retroactive application is beyond the scope of this paper, but it was the course the Court took in *Furman* and should be followed.

136. Locket v. Ohio, 433 U.S. 586 (1978); Tennard v. Dretke, 542 U.S. 274 (2004).

137. *See Who Killed the Death Penalty?*, THE ECONOMIST (Dec. 19, 2015), http://www.economist.com/news/united-states/21684142-many-suspects-are-implicated-capital-punishments-ongoing-demise-one-stands-out-who.

138. *See id.*

139. *Id.*

140. *Id.*

invested in capital prosecutions. These investments are the type of reliance that would add inequity to the cost of repudiation. However, this potential inequity is attenuated by additional factors.

i. Reliance by the State

The process for imposing the death penalty on a defendant is a long and arduous one.[141] It requires significant investment by the state at trial,[142] especially during the penalty phase where they must prove aggravating factors, and rebut the defendant's mitigation evidence.[143] The state also invests a significant amount of money conducting the constitutionally required appeals process.[144] Despite the substantial investment in prosecuting capital cases, a finding by the Court that commutes all death sentences to life in prison without parole, would not necessarily add any special hardship or inequity to the state. Most notably, the inequity imposed on the state would be mitigated by the money it would save through repudiation of "the rule," and commuting death sentences to life in prison. In California, for example, it is estimated the state would save $150 million annually through such a change.[145]

ii. Reliance by Victims' Families

Reliance on "the rule" by victims' families carries a far greater risk of inequity associated with this prudential and pragmatic consideration. They spend countless hours attending trials. Then they relive their trauma during the appeals process,[146] as the crime's perpetrator appears again and again in court.[147] However, for many, these hardships are endured because they know that in the end the perpetrator will be put to death and justice will be done. Such reliance should not be lightly cast aside and certainly constitutes the sort of "special hardship" and "inequity" the Court should look to in determining whether to overrule precedent.

141. *Death Sentence Appeals Take Time for a Reason*, LAWYERS.COM, http://criminal.lawyers.com/criminal-law-basics/death-sentence-appeals-take-time-for-a-reason.html (last visited Mar. 19, 2016).

142. *Who Killed the Death Penalty?*, *supra* note 137.

143. *Id.*

144. *See id.*

145. *Taxpayer Coalition Launches Effort to Replace California Death Penalty*, YES ON 62 (Dec. 14, 2015), http://www.justicethatworks.org/2015/12/14/taxpayer-coalition-launches-effort-to-replace-california-death-penalty.

146. *See Who Killed the Death Penalty?*, *supra* note 137.

147. *See id.*

However, not all families of victims actually want the defendant to be executed[148] and, for many, a finding that commutes all death sentences would be welcome news.[149] Others, who do not object to the execution of the defendant, might also embrace such a ruling. They may be unwilling to endure the endless appeals process, and a finding commuting the death sentence of all death row inmates would give them the closure victims' families deserve. This is especially true given recent uncertainty over whether the states can constitutionally execute death row inmates.

Once all appeals have been exhausted, a death sentence is supposedly final, and uncertainty over whether justice will be done should end. However, the last several years have proved otherwise, as the drugs for a three-drug execution protocol upheld as constitutional by the Court in *Baze v. Reese*,[150] have become increasingly unavailable.[151] As a result, states have experimented with alternative methodologies,[152] leading to numerous "botched" executions,[153] public outcry,[154] and ultimately a challenge to one revised method in *Glossip v. Gross*—specifically the use of Midazolam to render prisoners unconscious prior to administering paralyzing drugs that stop the heart and kill the prisoner.[155] While the Court upheld the use of Midazolam, there will likely continue to be problems administering death sentences in the United States—making it impossible to predict when, if ever, a death sentence will become a death penalty. The resulting uncertainty leaves victim's families in limbo as they await final resolution.

iii. Inequity is Substantially Mitigated

Although there has been significant reliance on "the rule" by states and victims' families, commuting all existing death sentences would save states money, ensure the perpetrators of these violent crimes are never in the news again, give closure to victims' families, and thereby mitigate the potential "special hardship" and "inequity" of reliance on "the rule."

148. *See id.*

149. *See id.*

150. *See* Baze v. Rees, 553 U.S. 35 (2008).

151. *See Who Killed the Death Penalty*?, *supra* note 137.

152. *See id.*

153. Ben Crair, *2014 Is Already Worst Year in the History of Lethal Injection*, NEWREPUBLIC (July 23, 2014), https://newrepublic.com/article/118833/2014-botched-executions-worst-year-lethal-injection-history

154. Xavier Symons, *Botched Execution Sparks Outcry in US*, BIOEDGE (July 25, 2014), http://www.bioedge.org/bioethics/botched_execution_sparks_outcry_in_us/11067.

155. *See* Glossip v. Gross, 135 S. Ct. 2726 (2015).

> 3. Whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.

"The rule" is rooted in the well-accepted doctrine that states should be allowed to administer penalties as they see fit, as long as they do not violate the constitution. Additionally, rather than entertaining the notion that capital punishment statutes might be outright unconstitutional, the Court has routinely modified them, implicitly upholding the idea that states can address unconstitutional arbitrariness through carefully constructed capital punishment schemes. The primary holding of *Gregg* as amended to "the rule" is therefore certainly not a "remnant of abandoned doctrine."

> 4. "Whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."

i. Actions of State Legislatures and Juries

The most drastically changed facts from *Gregg* are those comprising objective indicia of evolving standards. When the Court decided *Gregg*, thirty-five states had enacted death penalty statutes in the previous four years, and juries were demonstrating great zeal in imposing the death penalty.[156] Now, though thirty-two states allow capital punishment, the most recent enactment of a death penalty statute was twenty-three years ago, and six states have abolished capital punishment in the last nine years.[157] In addition, death sentences have reduced from 315 in 1996 to forty-nine in 2015.[158] This dramatic reduction is likely due to the emergence of facts related to exonerations of death row inmates, proving the death penalty is not imposed exclusively on the very worst criminals.

ii. Exonerations

A changed set of facts, in the sense that they not exist when *Gregg* was decided, are exonerations based on DNA evidence. Since the first DNA exoneration in 1989, twenty death row inmates have been exonerated based on post-conviction DNA evidence.[159] This is irrefutable proof that innocent

156. *See 32 States with the Death Penalty and 18 States with Death Penalty Bans*, *supra* note 64.

157. *Id.*

158. *See The Death Penalty in 2015: Year End* Report, *supra* note 92*; supra* Part III.C.ii.

159. *DNA Exonerations in the United States*, INNOCENCE PROJECT, http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide (last visited Jan. 29, 2017).

individuals are sentenced to death in the United States of America.[160] In fact, one study suggests that at least four percent of death sentences are based on wrongful convictions.[161] This data indicates that personal prejudices come into play in capital punishment proceedings, and that "the rule" has not addressed the constitutional concerns of *Furman*.

iii. Execution Methods

As noted above, there has recently been significant turmoil surrounding methods of execution. This is another fact unavailable to the *Gregg* Court when it found that arbitrariness in the death penalty can be eliminated through carefully constructed statutes. This fact suggests that overturning "the rule" is consistent with the ideal rule of law, when understood in the context of concerns over arbitrariness.

Drug companies are refusing to sell drugs for use in executions.[162] It is likely that only some states will be able to procure drugs to execute individuals constitutionally. That some individuals will be executed based on the ability of their state to procure such drugs, while others who committed equally heinous crimes will not, is precisely the sort of arbitrariness concern raised in *Furman*. The growing inability of states to carry out executions in a constitutional manner should therefore weigh on the side of overturning "the rule."

iv. The Underlying Facts in Furman

One set of facts that have not changed, yet should be viewed differently, are the underlying evidence of arbitrariness noted by the concurring justices in *Furman*.[163] A deep dive through the data is not necessary, because the concerns of the *Furman* Court are the exact concerns raised by governors imposing statewide moratoria on executions.[164] What is most important is to understand that the Court in *Gregg* viewed these facts as something that could be resolved through carefully constructed statutes ensuring significant jury guidance. Time has shown the belief to be a fallacy. While some critics argue that concerns over arbitrariness are really just concerns with the justice system at large, the Court has repeatedly held that "death is different."[165]

160. Dara Lind, *At Least 4 Percent of People Who Get Sentenced to Death Are Innocent*, VOX (June 29, 2105), http://www.vox.com/2014/4/29/5664890/at-least-4-percent-of-death-sentences-false-convictions-innocent.

161. *Id.*

162. *See Who Killed the Death Penalty?*, *supra* note 137.

163. *See supra* Part IV.B.

164. *See supra* Parts IV.B, III.D.

165. Gregg v. Georgia, 428 U.S. 153, 188 (1976).

Levels of arbitrariness that might be acceptable in the context of life sentences simply cannot be acceptable when imposing the ultimate sanction.

v. Facts Support Overturning "The Rule"

The decision in *Gregg* was predicated on facts that showed widespread approval for the death penalty.[166] Now, that is no longer the case. The Court also assumed the criminal justice system could achieve just results. That assumption has been categorically disproved by facts regarding exonerations of death row inmates, and the fact that states are experiencing difficulties carrying out executions in a constitutional manner. Most importantly, the facts indicating unconstitutional arbitrariness in *Furman* have not changed, and should therefore be seen differently than they were in *Gregg*. All these facts suggest "the rule" has been robbed of significant application and justification and can be overturned in accordance with "the ideal rule of law."

C. Final Tally

Prudential and Pragmatic Consideration	**Supports Overruling**
Defies Practical Workability	Probably
Reliance Hardship and Inequity	50/50
Remnant of Abandoned Doctrine	No
Changed Facts Rob Application or Justification	Yes

If current capital punishment statutes have not lived up to the promise of *Gregg*, that carefully constructed statutes can eliminate unconstitutional arbitrariness in application of the death penalty, the Court should not feel bound by the primary holding of *Gregg*, and would be justified in finding capital punishment unconstitutional, now.

VI. CONCLUSION

The quote from Justice Scalia that begins this note does not *actually* conclusively prove capital punishment is constitutional. It is, however, a well-accepted argument, and supported by the Court's death penalty jurisprudence. Some would argue that the Court's jurisprudence also supports an alternate finding, that capital punishment is per se unconstitutional and should be permanently abolished. However, there is not yet a sufficient national consensus to support such a finding, despite "the

166. *Id.* at 180-82.

consistency of the direction of change" in societal attitudes toward the death penalty.

Contemporary objective indicia of "evolving standards of decency" are rooted in the fallibility of the criminal justice system, and the burdens capital trials and appeals place on the state and victims' families. These concerns in no way reflect even a tenuous national consensus that capital punishment is inherently wrong. Perhaps such a consensus is emerging. Perhaps these concerns will lead to significant state level abolition. Perhaps there will soon be objective indicia consistent with *Enmund* and *Coker*, actually compelling a finding that capital punishment should be permanently abolished. That is not for the Court to predict. The Court must assess evolving standards of decency and their constitutional implications, now.

Now, there is a "national consensus" based on "evolving standards of decency" that the death penalty is being arbitrarily imposed. Because the death penalty is being arbitrarily imposed, all capital punishment statutes should be found unconstitutional. The *Gregg* plurality was certain that carefully constructed death penalty statutes can eliminate arbitrariness. They were right, under a very limited conception of arbitrariness. In reality, bifurcated juries, aggravating factors, mitigating evidence, procedural guarantees, and mandatory appeals have failed to resolve the concerns raised in *Furman*. That does not mean a statute can never remedy those concerns; it just means capital punishment is unconstitutional now, for now.

Now, because Supreme Court death penalty jurisprudence supports such a finding. For now, because standards of decency can change. For now, because precedent doesn't support outright abolition. For now, because perhaps states *can* resolve the concerns of the *Furman* Court.

Though likely anathema to most abolitionists, this is a prudent course of advocacy for the three thousand human beings currently on death row.[167] Because while many believe the Court should stop "tinker[ing] with the machinery of death,"[168] a suitable course of action, now, would be to find capital punishment unconstitutional, for now.

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167. *Death Row Inmates by State*, *supra* note 91.

168. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

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