

CAN CONGRESS OVERTURN KENNEDY V. LOUISIANA?

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As recently illustrated in Kennedy v. Louisiana, the Supreme Court regularly interprets the Eighth Amendment based on the perceived existence of “national consensus.” Although this practice has been the topic of extensive commentary and criticism, the existing debate has overlooked the most natural implication of the Court’s consensus-based argumentation—namely, the possibility that recent Eighth Amendment jurisprudence is subject to federal legislative override. This Article argues from existing case law that Kennedy should be susceptible to democratic correction via countervailing federal legislation. Such legislation would demonstrate that no “national consensus” supports the Court’s holding, thereby suggesting that the punishment in question does not actually violate the Eighth Amendment. One might respond that Kennedy would have found a constitutional violation based on the Court’s “independent judgment,” regardless of whether a supportive national consensus existed. But even assuming that is true, federal legislation could address the concerns that underlie the Court’s independent judgment analysis. Either way, Kennedy’s contingent reasoning would permit at least some correction by the democratic branches. Exploring these possibilities allows us to better understand and justify recent Eighth Amendment jurisprudence, as well as recent substantive due process cases like Lawrence v. Texas that also look to state and federal practice as sources

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of constitutional law. Ultimately, though, the most important consequence of appreciating Kennedy's democratic reversibility has more to do with the President than with the professoriate. As a candidate for President, Barack Obama pointedly criticized Kennedy's holding. If this Article is correct, then the President and Congress now have an opportunity to engage the Court in a dialogue regarding the Eighth Amendment's contemporary practical meaning.

INTRODUCTION	1033
I. WOULD COUNTERVAILING FEDERAL LEGISLATION SHOW THAT NO CONSENSUS EXISTS?	1039
A. Situating <i>Kennedy</i> in Eighth Amendment Jurisprudence.....	1040
B. Legislative Trends and Actually Imposed Sentences	1043
C. The Overriding Importance of Federal Legislation	1046
D. Justifying <i>Kennedy's</i> Methodology: Take One.....	1051
E. Was Consensus Necessary in <i>Kennedy</i> ?	1052
F. Conclusion.....	1057
II. HOW MIGHT CONGRESS ADDRESS THE COURT'S INDEPENDENT JUDGMENT?	1057
A. Justifying <i>Kennedy's</i> Methodology: Take Two	1058
B. Enforcing the Eighth Amendment.....	1061
C. Addressing the Court's Independent Judgment	1065
1. Reasons Within the Judiciary's Expertise.....	1065
2. Reasons Outside the Judiciary's Expertise: Empirics	1068
3. Reasons Outside the Judiciary's Expertise: Value Judgments	1070
D. Conclusion.....	1072
III. WHY CAN'T CONGRESS ALSO OVERTURN <i>LAWRENCE V. TEXAS</i> ?	1073
A. Early Use of Objective Consensus.....	1074
B. The Eighth Amendment as Substantive Due Process.....	1077

C. Absence of Consensus as a
Necessary Condition.....1082

D. Contingency in Substantive
Due Process Case Law1086

E. Conclusion.....1088

IV. DOES *KENNEDY* STAND UP TO CRITICISM?1089

A. State-based Efforts to Overturn *Kennedy*1089

B. Identifying Mechanisms for
Reconsideration1094

C. Chilling and Limbering Eighth
Amendment Jurisprudence.....1096

D. Originalism versus Reversible Eighth
Amendment Doctrine1098

E. Conclusion.....1103

CONCLUSION: FIVE WAYS OF READING *KENNEDY* ...1103

INTRODUCTION

In June 2008, the Supreme Court invalidated a Louisiana statute that made the rape of a child a capital offense.¹ The Court held that “the Eighth Amendment prohibits the death penalty” for child rape offenses that do not entail a victim’s actual or intended death.² Therefore, the Court held that the Louisiana law “is unconstitutional.”³ When courts invoke the Constitution in this way, their edicts are typically received as final pronouncements. Though *Kennedy* itself never said as much,⁴ the Court appeared to have rendered the death penalty for child rape forever unlawful in the United States.⁵

1. LA. REV. STAT. ANN. § 14:42(A)(4), (D)(2) (2010).

2. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008).

3. *Id.*

4. *Kennedy* did not foreclose the possibility of democratic correction. On the contrary, the Court noted only that its holding might make it “more difficult”—not impossible—“for consensus to change” and that such an outcome is justified “at this stage of evolving standards.” *Id.* at 2664–65. *But see infra* note 20.

5. *See* *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (Stewart, J., plurality opinion) (“A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off. Revisions cannot be made in the light of further experience.”).

But events quickly took a turn toward the unexpected. The Court's analysis in *Kennedy v. Louisiana* had emphasized the existence of a "national consensus" regarding the categorical illegitimacy of applying capital punishment to child rapists.⁶ This national consensus finding rested primarily on a survey of relevant state and federal legislation. However, the Court, the parties, and the amici had all overlooked a 2006 legislative amendment to the Uniform Code of Military Justice (UCMJ) making capital punishment available for child rape.⁷ After this oversight came to light, Louisiana and the U.S. Solicitor General requested rehearing, arguing that the "national consensus" that the Court had relied on did not in fact exist.⁸

The Court could have declined the rehearing request on the ground that the exercise of its "independent judgment" fully and independently justified *Kennedy's* holding.⁹ Indeed, two Justices voted to deny rehearing for precisely that reason.¹⁰ In stark contrast, the same five Justices who comprised the *Kennedy* majority chose to deny rehearing on the different ground that *Kennedy's* consensus-based argumentation actually had not been called into question at all:

That the Manual for Courts-Martial retains the death penalty for rape of a child or an adult when committed by a member of the military does not draw into question our conclusions that there is a consensus against the death penalty for the crime in the civilian context and that the penalty here is unconstitutional. The laws of the separate States, which have

6. See, e.g., *Kennedy*, 128 S. Ct. at 2650 (explaining that the Court's holding is "[b]ased both on consensus and our own independent judgment" (emphases added)).

7. 10 U.S.C. § 856 (2006); see also JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. II, R. 1004(c)(9) (2008 ed.); *id.* pt. IV, ¶ 45.f(1).

8. See Petition for Rehearing, *Kennedy*, 128 S. Ct. 2641 (No. 07-343); Motion for Leave to File Brief and Brief for the United States as Amicus Curiae Supporting Petition for Rehearing, *Kennedy*, 128 S. Ct. 2641 (No. 07-343); Supplemental Brief for Respondent in Support of the Petition for Rehearing, *Kennedy*, 128 S. Ct. 2641 (No. 07-343).

9. See *Kennedy*, 128 S. Ct. at 2650–51. For discussion of the proportionality, harm-avoidance, and anti-arbitrariness concerns that underlay the Court's independent judgment, see *infra* Parts II.A and II.C.

10. See *Kennedy v. Louisiana*, 129 S. Ct. 1, 3–4 (2008) (Scalia, J., statement respecting the denial of rehearing), *denying reh'g to Kennedy*, 128 S. Ct. 2641. Chief Justice Roberts joined Justice Scalia's statement. Justices Thomas and Alito voted for rehearing, thereby indicating their view that the newly discovered evidence of federal legislation did warrant reconsideration of *Kennedy's* holding. *Kennedy*, 129 S. Ct. at 1.

responsibility for the administration of the criminal law for their civilian populations, are entitled to considerable weight over and above the punishments Congress and the President consider appropriate in the military context. The more relevant federal benchmark is federal criminal law that applies to civilians, and that law does not permit the death penalty for child rape.¹¹

In other words, the Court rejected Louisiana's rehearing request because the particular type of evidence that had been discovered—a provision of military law—was not sufficiently probative of civilian legal mores to place the Court's national consensus determination in doubt.¹² By contrast, the discovery of a relevant "federal criminal law that applies to civilians" would have shed light on the "more relevant federal benchmark" and so would have constituted compelling evidence of national attitudes weighty enough to stack against the observed practices "of the separate States."¹³ The *Kennedy* rehearing decision thus acknowledged that newly discovered evidence of a preexisting civilian statute might have prompted the Court to reconsider its decision—presumably because there can be no such thing as a national consensus rejected by the national government.

But what if the national consensus identified in *Kennedy* had been cast into doubt by legislation enacted *after* the Court's decision? The answer would appear to be the same. Indeed, once one follows the *Kennedy* rehearing decision in acknowledging that newly discovered evidence of existing federal law might prompt the Court to reconsider its decision, it is hard to resist the conclusion that entirely new federal legislation might have a similar effect. In both scenarios, the Court would have become aware of essentially the same new information only after

11. *Kennedy*, 129 S. Ct. at 2–3 (Kennedy, J., statement respecting the denial of rehearing).

12. Interestingly, the *Kennedy* rehearing decision appears to leave the newly discovered military law intact. This outcome may be explicable with reference to the original *Kennedy* opinion's decision not to pass on the legitimacy of capital punishment for crimes that do not involve death but do involve special governmental interests. See *Kennedy*, 128 S. Ct. at 2659 ("Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State."). Perhaps military crimes, too, are not only "crimes against individual persons" but also "offenses against the State." *Id.*

13. See *Kennedy*, 129 S. Ct. at 2–3.

it had made an initial decision on the matter.¹⁴ The possibility of after-arising evidence of national consensus highlights the inherently contingent nature of consensus-based argumentation: When a particular state of affairs is the source of law, then the law's content becomes dependent on particular factual premises. And those premises may be subject to change or challenge by the political branches.

This Article argues that the contingency of *Kennedy's* reasoning should render the decision at least partially subject to democratic override. On the one hand, *Kennedy's* national consensus finding can be disproved by a countervailing federal law. On the other hand, the premises underlying *Kennedy's* independent judgment analysis can be undermined by new federally imposed criminal justice policies. Thus, an appropriately drafted statute would demonstrate that *Kennedy's* "premises of fact have so far changed . . . as to render its central holding . . . irrelevant or unjustifiable in dealing with the issue it addressed."¹⁵ In short, such a statute could render *Kennedy* ob-

14. Legislation after a court decision arguably carries more weight than a statute already on the books. See *infra* Part I.C. On the other hand, evidence of national consensus arising after a decision may not always be compelling. See *infra* text accompanying notes 101–05 (after-arising legislation should be discounted in some circumstances as the product of "pathological politics"). But see *infra* text accompanying note 68.

15. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (plurality opinion) (asking "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification"); accord *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412–13 (1932) (Brandeis, J., dissenting) ("In cases involving constitutional issues . . . this Court must . . . feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may, as Mr. Chief Justice Taney said, 'depend altogether on the force of the reasoning by which it is supported.'"); BLACK'S LAW DICTIONARY 1622 (8th ed. 2004) (listing the ancient maxim "*Cessante ratione legis cessat et ipsa lex*," or "When the reason of the law ceases, the law itself also ceases"). *Casey* explained that both the Court's abandonment of commercial substantive due process in the New Deal era and its later assault on segregation in the early civil rights era—perhaps the two most important developments in constitutional law in the last century—constituted deviations from settled precedent justified by either changed facts or a changed perception of facts. See *Casey*, 505 U.S. at 863 ("*West Coast Hotel* and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions."). For a recent case in which the Court reversed a prior holding based in part on changed factual conditions, see *Hudson v. Michigan*, 547 U.S. 586, 597 (2006) ("We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago."). The *Hudson* dissenters

solete—a conclusion that would deny *Kennedy* the force of stare decisis and necessitate judicial reconsideration.¹⁶

Once understood as a contingent decision, *Kennedy* takes on new and greater importance, especially for substantive due process jurisprudence. As commentators have observed, *Kennedy*'s methodology is similar to that of other so-called “state counting” decisions, such as *Lawrence v. Texas*.¹⁷ One might therefore wonder whether understanding *Kennedy* as democratically reversible would make decisions like *Lawrence* similarly susceptible to legislative correction. In fact, the opposite is true. *Kennedy* and *Lawrence* are methodologically similar but not identical, with the result that *Lawrence* is immune to legislative override, whereas *Kennedy* is not. This distinction is not a matter of judicial fiat but of constitutional principle. *Kennedy* and *Lawrence* are therefore useful foils for one another, each illuminating the other's reasoning and practical implications.

Accepting *Kennedy*'s factual contingency would also have immediate real-world consequences. At a minimum, *Kennedy*'s many critics,¹⁸ including then-presidential candidate Barack Obama,¹⁹ would have to reevaluate their condemnation of the

have recently employed similar reasoning. See *Kansas v. Marsh*, 548 U.S. 163, 207 (2006) (Souter, J., dissenting for four Justices) (“Today, a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate . . .”). For a discussion of precedent and stare decisis, see *infra* Parts I.E, II.B, & IV.B.

16. See *Casey*, 505 U.S. at 855.

17. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); see also *infra* note 167.

18. See, e.g., Heidi M. Hurd, *Death to Rapists: A Comment on Kennedy v. Louisiana*, 6 OHIO ST. J. CRIM. L. 351, 351, 352 (2008) (calling the Court's national consensus analysis “legal bean counting” and concluding: “I must be frank in saying that I find the Court's justification for its judgment to be disappointing”).

19. See Sara Kugler, *Obama Disagrees With High Court On Child Rape Case*, ASSOCIATED PRESS, June 26, 2008 (“‘I have said repeatedly that I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes,’ Obama said at a news conference. ‘I think that the rape of a small child, 6 or 8 years old, is a heinous crime and if a state makes a decision that under narrow, limited, well-defined circumstances the death penalty is at least potentially applicable, that that does not violate our Constitution.’”). Obama's Republican counterpart at the time, Senator John McCain, also criticized *Kennedy* upon its publication, calling it “profoundly disturbing.” *Id.* Both candidates' remarks were deliberate campaign statements successfully designed to be widely reported in the media. The fact that both major party nominees for the presidency made such comments strongly indicates that the median American voter did not categorically oppose execution as punishment for the rape of children. See generally Supplemental Brief for Respondent in Support of the Petition for Rehearing at apps. A–E, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (No. 07-343) (collecting critical public

Supreme Court's decision in light of its susceptibility to legislative correction.²⁰ More importantly, reading *Kennedy* as a contingent decision shifts attention away from the Court and toward elected officials. As sworn defenders of the Constitution,²¹ the President and Congress are necessarily Eighth Amendment interpreters in their own right. They should accordingly consider whether the Court's decision in *Kennedy* implicitly afforded the federal political branches a role in shaping the Eighth Amendment's contemporary practical meaning.²²

The argument proceeds as follows. Part I reviews *Kennedy*'s "national consensus" analysis and argues that countervailing federal legislation would demonstrate that no such consensus actually exists. Therefore, to the extent that *Kennedy* depended on a supportive national consensus, Part I concludes that countervailing federal legislation should disrupt the Court's holding. But what if the Court's "independent judgment" alone justified the outcome in *Kennedy*, even without any finding of national consensus? Part II answers this question by showing that federal legislation could still overturn *Kennedy* by address-

statements from Obama, McCain, numerous congresspersons, and Harvard Law School Professor Laurence Tribe).

20. *Kennedy* itself acknowledged that its holding "raises the question whether the Court's own institutional position and its holding will have the effect of blocking further or later consensus in favor of the penalty from developing" and thus of improperly "intrud[ing] upon the consensus-making process." *Kennedy*, 128 S. Ct. at 2664. *But see supra* note 4.

21. *See* U.S. CONST. art. II, § 1, cl. 8 (presidential constitutional oath); U.S. CONST. art. VI, cl. 3 (constitutional oath for members of Congress, among others); *see also* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

22. Louisiana advanced a very different position in its request for rehearing:

Without rehearing, there will be no practical way for our polity to demonstrate, now or in the future, that this Court's reading of the Eighth Amendment was incorrect. Legislation will be impossible; opponents can, in good faith, point to this Court's June decision as evidence that proponents are acting unconstitutionally in violation of their Oath. Facing such opposition, even the hardiest proponents of legislation similar to Louisiana's statute would, and rightly should, fold.

Supplemental Brief for Respondent in Support of the Petition for Rehearing at 3–4, *Kennedy*, 128 S. Ct. 2641 (No. 07-343) (citation omitted). Without disputing that *Kennedy* can "in good faith" be read to forbid countervailing federal legislation, this Article hopes to show that one may advance a contrary reading in good faith and, as a result, that supporters of legislation overruling *Kennedy* should not simply "fold" upon the decision's mere mention. Rather, they should respond by taking the opinion's reasons seriously and exploring those reasons' implications—as this Article hopes to do.

ing the concerns underlying the Court's independent judgment. For example, federal legislation could create a mandatory framework of aggravating and mitigating factors to structure sentencing juries' discretion and thereby prevent arbitrary imposition of the death penalty. Part III then considers and rejects the possibility that substantive due process cases apparently predicated on national consensus, such as *Lawrence v. Texas*, might also be subject to federal legislative override. This discussion helps to show what *Kennedy* would have had to say to insulate itself from the possibility of democratic correction. Next, Part IV discusses several potential objections: first, that *Kennedy* might better be overturned through other mechanisms, such as state legislation as recently suggested by Professor David A. Strauss; second, that there is no practical mechanism for judicial reconsideration of *Kennedy*; third, that the Court would be deterred from fashioning reversible Eighth Amendment rules; and fourth, that dynamic Eighth Amendment interpretation, whether democratically reversible or not, transgresses originalism and Article V of the Constitution. Instead of providing a first-principles defense of *Kennedy*, Part IV situates dynamic but reversible Eighth Amendment jurisprudence in preexisting constitutional debates. Finally, the Conclusion reviews five ways of reading and understanding *Kennedy*, each of which has different implications for the decision's susceptibility to legislative correction. The Conclusion also identifies five features that a federal statute attempting to overturn *Kennedy* should possess.

I. WOULD COUNTERVAILING FEDERAL LEGISLATION SHOW THAT NO CONSENSUS EXISTS?

The Eighth Amendment capital punishment decisions in *Atkins*,²³ *Roper*,²⁴ and *Kennedy* create a unique type of right with a distinctive jurisprudential basis. What unites these cases and the rights they create is a common methodology organized around two concepts: "national consensus" and the Court's "independent judgment." This Part focuses on the concept of

23. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (execution of mentally retarded persons violates Eighth Amendment).

24. *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (execution of persons who are juveniles at time of crime violates Eighth Amendment).

national consensus in *Atkins*, *Roper*, and *Kennedy*, while the next Part focuses on the Court's independent judgment.

A. *Situating Kennedy in Eighth Amendment Jurisprudence*

Before exploring *Kennedy's* consensus-based approach, it is important to distinguish it, *Atkins*, and *Roper* from other strands of Eighth Amendment case law. For example, the Supreme Court is clear that the Eighth Amendment unconditionally prohibits the infliction of punitive pain for its own sake. This doctrinal strand is founded in the originalist argument that the Eighth Amendment was originally understood to forbid torturous punishments such as, for example, the rack and the screw.²⁵ In light of this longstanding rule, there is no question today that deliberate infliction of pain as punishment is unconstitutional, no matter how popular it might become. The existence of consensus is simply irrelevant in the event that a defendant complains of intentional torture.

In other Eighth Amendment contexts, state and federal practice play a significant but expressly limited role. In *Baze v. Rees*, for example, the Court addressed whether an execution procedure employed by the federal government and most states created an unconstitutional risk of causing severe but undetectable pain.²⁶ The lead three-Justice plurality indicated that the procedure's employment by thirty-six states and the federal government was relevant to the Court's decision to find the

25. See *Baze v. Rees*, 128 S. Ct. 1520, 1559 (2008) (Thomas, J., concurring in the judgment) ("Consistent with the original understanding of the Cruel and Unusual Punishments Clause, this Court's cases have repeatedly taken the view that the Framers intended to prohibit torturous modes of punishment akin to those that formed the historical backdrop of the Eighth Amendment."); *Harmelin v. Michigan*, 501 U.S. 957, 981–82 (1991) (Scalia, J., plurality opinion); see also *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Gregg v. Georgia*, 428 U.S. 153, 169–70 (1976) (plurality opinion) ("The American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned, however, with proscribing 'tortures' and other 'barbarous' methods of punishment."); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878); Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 839–44 (1969); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008) ("As used in the Eighth Amendment, the word 'unusual' was a term of art that referred to government practices that are contrary to 'long usage' or 'immemorial usage.'").

26. *Baze*, 128 S. Ct. at 1520.

procedure constitutional.²⁷ However, a majority of Justices, including the lead plurality, acknowledged that other sorts of empirical data—like scientific studies—might outweigh evidence from state and federal practice.²⁸ Thus, a demonstrable risk of pain can be so great as to be unconstitutional, regardless of national practice.

In a similar vein, the Court at least sometimes assesses national practice when evaluating whether a term of imprisonment (as opposed to a death sentence) constitutes a “grossly disproportionate” punishment for a given offense.²⁹ However, the Court’s gross disproportionality jurisprudence for terms of imprisonment has produced fractured opinions and has not yet crystallized around a consistent methodology.³⁰ It is therefore an open question whether even popular and commonly imposed prison terms may be unconstitutional—possibly because such review is undertaken based in part on the Eighth Amendment’s often overlooked “Excessive bail” and “excessive fines” language, and not exclusively based on the Amendment’s “cruel and unusual” language.³¹

27. *Id.* at 1526–27 (Roberts, C.J., plurality opinion); *see also id.* at 1532 (noting that “it is difficult to regard a practice as ‘objectively intolerable’ when it is in fact widely tolerated”); *id.* at 1532–33 (“This consensus is probative but not conclusive . . .”).

28. *See id.* at 1535 (stating that “petitioners proffered no study” regarding their proposed alternative lethal injection protocol); *id.* at 1540 (Alito, J., concurring) (“[A]n inmate challenging a method of execution should point to a well-established scientific consensus.”); *id.* at 1566 (Breyer, J., concurring in the judgment); *id.* at 1569 (Ginsburg, J., dissenting for two Justices).

29. *See Ewing v. California*, 538 U.S. 11, 23–24 (2003) (plurality opinion); *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

30. *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 72–73 (2003) (“Our cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality . . . [T]he only relevant clearly established law . . . is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the ‘exceedingly rare’ and ‘extreme’ case.” (citations omitted)); *see also* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 692–94 (2005) (“The key cases . . . sit uneasily with each other, and there is still much uncertainty about how the case law will eventually settle, especially given the rarity of majority opinions in this area.”). The Supreme Court’s currently pending Eighth Amendment cases *Sullivan v. Florida* and *Graham v. Florida* may soon provide new clarity in this area.

31. *See Ewing*, 538 U.S. at 32, 33 (Stevens, J., dissenting for four Justices) (“It would be anomalous indeed to suggest that the Eighth Amendment makes proportionality review applicable in the context of bail and fines but not in the context of other forms of punishment, such as imprisonment.” (internal quotation marks omitted)). *But see Harmelin*, 501 U.S. at 978 n.9 (Scalia, J.) (writing for two

In contrast to the aforementioned strands of Eighth Amendment doctrine, the *Atkins*, *Roper*, and *Kennedy* decisions all repeatedly invoke the concept of “national consensus”—a term that does not appear in other strands of Eighth Amendment doctrine.³² Because the concept of national consensus is empirically grounded, these cases suggest that the Eighth Amendment’s meaning is contingent on actual facts. This contingency makes certain claims regarding the scope of the Eighth Amendment falsifiable in a way that may be unique in constitutional law.³³ To be sure, the Supreme Court has great leeway in deciding what metric defines national consensus. National consensus could be discerned, for example, by studying national polling data or by inviting amicus briefs from elected officials. And even after choosing a metric, the Court has ample discretion in identifying the cutoff for when consensus is obtained. But once the Court chooses a metric and cutoff, facts may dictate the legal result.

So what has the Court adopted as its preferred metric and cutoff for ascertaining national consensus? Though the answer will be complicated shortly, the bottom line is that the Court has measured national consensus primarily by looking to the

Justices that “[w]hen two parts of a provision (the Eighth Amendment) use different language to address the same or similar subject matter, a difference in meaning is assumed”).

32. Though the term is a relatively recent innovation in the case law, its underlying idea extends back to *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion). The *Trop* plurality is most famous for invoking “the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 101. Prefiguring *Atkins*, *Roper*, and *Kennedy*, the four-Justice dissent in *Trop* (joined by Justice Harlan) pointed out that objective evidence of decency standards—including nearly a century of federal practice as well as the laws of other countries—belied the majority’s conclusion. *See id.* at 126 (Frankfurter, J., dissenting).

33. Professor Corinna Barrett Lain has recently challenged the prevailing wisdom that the Eighth Amendment is unique in terms of its reliance on state practice. Specifically, Professor Lain has shown that the Supreme Court considers state practice or “state counting” when interpreting a wide array of constitutional rights. *See* Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L. REV. 365 (2009). The cases that Lain cites, however, generally exhibit only limited use of state practice evidence. Lain herself acknowledges that in most doctrinal areas she discusses, “the doctrine is majoritarian not as stated, but as applied,” and that the appearance of state-counting evidence can be “sporadic.” *Id.* at 400. Lain’s suggestion thus seems to be that the Court often considers state-counting in these other contexts as a factor in its analysis—and not as a necessary condition for its ultimate decision, as would be required for the relevant jurisprudence to be contingent.

current status of both state and federal law and has found consensus when at least the federal government and a distinct majority (sixty percent) of states have abandoned the punishment in question.³⁴

B. Legislative Trends and Actually Imposed Sentences

Still, it is important not to oversimplify recent Eighth Amendment case law. In assessing the existence of a “national consensus,” the Court emphasizes that it is “not confined to tallying the number of States with applicable death penalty legislation.”³⁵ Two additional considerations stand out.

First, the Court is concerned with trend lines. *Atkins* started this trend toward trends by concluding: “It is not so much the number of these States that is significant, but the consistency of the direction of change.”³⁶ *Roper* followed suit.³⁷ But these cases’ focus on trend lines only underscores the importance of the underlying tally. In both *Atkins* and *Roper*, trend lines reinforced findings of national consensus where only thirty states and the federal government had eliminated the possibility of the death penalty for the mentally disabled and juveniles.³⁸ Focusing on trends thus helped explain why over a third of states would permit a cruel and unusual punishment. In calling the observed trends “telling”³⁹ and “significant,”⁴⁰ these cases give no hint that trends could prove decisive where a purported consensus was opposed by more than half the states or by the federal government. These cases are therefore consistent with the view that agreement between the national government and a distinct majority of states is the bare minimum required to

34. See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008) (“In these cases the Court has been guided by objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions.” (internal quotation marks omitted)); *Roper v. Simmons*, 543 U.S. 551, 594–95 (2005) (“At present, 12 States and the District of Columbia do not have the death penalty, while an additional 18 States and the Federal Government authorize capital punishment but prohibit the execution of under-18 offenders.”) (O’Connor, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 313–14 (2002).

35. *Kennedy*, 128 S. Ct. at 2653.

36. *Atkins*, 536 U.S. at 315.

37. 543 U.S. at 565–66 (finding the “same consistency of the direction of change” as in *Atkins*, though admitting that the change was “slower”).

38. *Id.* at 564; *Atkins*, 536 U.S. at 313–14.

39. *Atkins*, 536 U.S. at 315 n.18.

40. *Roper*, 543 U.S. at 565.

find a national consensus. In any event, *Kennedy* struck down Louisiana's child rape law despite the acknowledged existence of a small but real and potentially growing trend *toward* such laws.⁴¹ Thus, focusing on legislative trends instead of absolute numbers cannot buttress the Court's holding in *Kennedy*.

Second, the Court considers the number of actually imposed punishments falling within the challenged category. Although this practice is under-theorized in the case law,⁴² evidence of actually imposed punishments is uniquely probative of national views. To be sure, enactment of a law authorizing a particular punishment is a concrete act of greater consequence than, for example, a private citizen's decision to answer a pollster's questions or a politician's decision to file an amicus brief. The relative concreteness of actual criminal legislation presumably underlies the Court's attention to such laws when ascertaining national consensus.⁴³ Still, it is one thing to approve of a punishment in the abstract and something else to actually apply that punishment in a specific case to a specific person. Executives with pardon power, prosecutors, and juries feel the difference. One might therefore say that statutes measure national views on punishment at wholesale, whereas actually imposed punishments measure them at retail. Actually imposed punishments loomed particularly large in *Kennedy*, where the Court highlighted that in about forty years only two quite recent capital sentences had been imposed in child rape cases.⁴⁴

Even in *Kennedy*, however, the Court used evidence of actually imposed punishments only to "confirm"⁴⁵ its overall conclusion regarding national consensus, much as it cited international law in *Roper* only as "confirmation" of an independently demonstrated conclusion.⁴⁶ The Court is right to be cautious.

41. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2657 (2008).

42. *Cf. Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (Stewart, J., plurality opinion) ("The jury also is a significant and reliable objective index of contemporary values because it is so directly involved.").

43. *Cf. Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (rejecting poll data).

44. *See Kennedy*, 128 S. Ct. at 2657–58.

45. *Id.* at 2657 ("These statistics confirm our determination from our review of state statutes that there is a social consensus against the death penalty for the crime of child rape.").

46. *Roper v. Simmons*, 543 U.S. 551, 575 (2005); *see also* Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB.

Popular support for a punishment's regular application is perfectly consistent with the punishment's being applied rarely, even in relation to the frequency with which its attendant crime occurs or is charged.⁴⁷ For example, death sentences usually require unanimity among jurors, thus affording veto power to jurors who are relatively reluctant to impose the punishment.⁴⁸ Moreover, many viable capital charges are never brought for reasons unrelated to capital punishment's perceived illegitimacy. For example, prosecutors may use the threat of capital punishment to obtain resource-saving plea bargains.⁴⁹ Thus, a dearth of actually imposed punishments for particular crimes might not reliably reflect popular opposition to such punishment.

Kennedy's decision to relegate evidence of actually imposed punishments to a confirmatory role is especially appropriate given that such evidence is necessarily linked to the status of state legislation. To be sure, a dearth of actually imposed punishments may show that a law on the books has effectively been abandoned. And that is in fact how the Court deployed

POL'Y 653, 668 (2009) (noting that *Roper* presented foreign sources "as secondary confirmation of an independently made decision").

47. Where relevant executions have taken place in significant numbers, the Court has made relatively sophisticated use of jury-based evidence. *See, e.g.*, *Enmund v. Florida*, 458 U.S. 782, 794–96 (1982) (comparing execution rates between crimes, surveying national death-row population, and highlighting the difficulty of obtaining charging and other data); *Coker v. Georgia*, 433 U.S. 584, 596–97 (1977) (plurality opinion) (arguing that at most ten percent of Georgia rape convictions since 1973 resulted in capital sentences).

48. The *Roper* dissenters made the different argument that "it is not only possible, but overwhelmingly probable, that the very considerations which induce [respondent] and [his] supporters to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should rarely be imposed." *Roper*, 543 U.S. at 614 (Scalia, J., dissenting) (quoting *Stanford v. Kentucky*, 492 U.S. 361, 374 (1989)). But the whole point of looking to jury-based evidence is to ascertain whether the penalty is rarely applied for reasons that relate to publicly held Eighth Amendment values. As the main text indicates, that inference is problematic. To the extent the inference is valid, however, such evidence does strengthen the case for finding a national consensus against the penalty.

49. To measure the impact of discretionary prosecutorial decisions, the Court could investigate the relative frequency of a particular type of death penalty prosecution in a particular jurisdiction. For example, the Court could have evaluated the percentile frequency with which Louisiana sought the death penalty in murder cases as opposed to child rape cases. *See id.* at 614 (Scalia, J., dissenting) (suggesting that the rarity of capital juvenile cases may be the result of the rarity of juvenile capital crimes). The Court, however, has not engaged in such refined analysis.

jury evidence in *Atkins* and *Roper*.⁵⁰ But it adds nothing to point out how rarely a punishment has been imposed when there has been no lawful opportunity to impose it.⁵¹ As a result, evidence of jury sentences was of little use in *Kennedy*. Five of the six states that provided capital punishment for child rape had not permitted that punishment long enough for prosecutors to obtain capital sentences.⁵² Thus, jury-based evidence was not probative of contemporary views in those states. The only state whose laws recently created an opportunity for imposing death for child rape had in fact requested that penalty four times and obtained consent from juries twice.⁵³ These decisions by prosecutors and juries make it hard to discount Louisiana's legislative judgment that capital punishment is sometimes an appropriate punishment for the rape of a child. But if evidence of actually imposed sentences was of little moment to the majority, it was equally unhelpful for the dissenters, who could not argue that Louisiana's "50% record" of obtaining capital sentences in child rape significantly undermined the majority's national consensus analysis based on the legislative decisions of forty-four states.⁵⁴ At most, the dissent's discussion of jury-imposed capital sentences demonstrated that Louisiana's legislative decision to restore the death penalty for child rape could not be discounted. But that defensive point would fall far short of counterbalancing the fact that forty-four state legislatures had rejected the punishment in question. Thus, the jury debate in *Kennedy* was really just a side-show to the main debate regarding patterns of state and federal legislation.

C. *The Overriding Importance of Federal Legislation*

Ultimately, the Court's consideration of trend lines and actually imposed sentences cannot counteract the overriding im-

50. See *id.* at 564 ("*Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent"); *id.* at 567 (highlighting "the infrequency of [the punishment's] use even where it remains on the books"). This is also how the *Lawrence* Court deployed such evidence in the substantive due process context. See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

51. See *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion).

52. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2672 n.8 (2008) (Alito, J., dissenting).

53. *Id.*

54. *Id.*

portance of federal legislation. Indeed, it is hard to see how the existence of countervailing federal legislation would not overwhelm the Court's other "objective indicia"⁵⁵ of national consensus. Federal legislation of course requires not only a majority of the democratically apportioned House, but also the concurrence of the nationally elected President and, in practice, a supermajority of the directly elected Senate. If anything, looking to federal law to debunk national consensus errs on the side of imposing *too high* of a bar, since it is quite possible that a stable but slim national majority might approve of a particular punishment and yet forever fail to express that preference through law.⁵⁶

To be clear, the point is not that all federal legislation necessarily springs from majoritarian popular support or reflects a consensus view.⁵⁷ Legislation overturning *Kennedy* might not reflect an anti-*Kennedy* consensus so much as the absence of any consensus one way or the other. The issue might simply be controversial, such that there is no clear majority view, as by definition required to find "consensus."⁵⁸ However, federal legislation *rejecting* a purported consensus view does conclusively demonstrate that there is actually no such consensus. Although there is nothing illogical about saying that there is a sufficiently

55. *Id.* at 2650 (majority opinion) (collecting cases); see also *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) ("[W]e look to objective indicia that reflect the public attitude toward a given sanction.").

56. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 67 (1980) ("The existing antimajoritarian influences in Congress . . . are not well situated to get legislation passed in the face of majority opposition. That makes all the more untenable the suggestion . . . that courts should invalidate legislation in the name of a supposed contrary consensus."); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1339 (2001) ("[Article I's] procedures make federal law more difficult to adopt by creating a series of 'veto gates.' . . . Multiple veto gates establish, in effect, a supermajority requirement."); see also THE FEDERALIST NO. 73, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.").

57. See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1098–99 (1988) (arguing that because ours is a representative democracy, "it is quite possible for the Constitution to be amended under Article V even if the amendment is in fact opposed by a majority of the electorate"); see also *infra* note 293.

58. See, e.g., WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 482 (1993) (defining "consensus" in part as "group solidarity in sentiment," "general agreement," and "the judgment arrived at by most of those concerned").

widespread national consensus to bring outlier states into the fold,⁵⁹ there *is* something illogical about enforcing a purported “consensus” either in the teeth of majoritarian opposition or in the face of equally divided opinion.⁶⁰

There are also special reasons to conclude that federal legislation attempting to countermand *Kennedy* would be even more probative of national views than normal federal legislation. The Supreme Court is an esteemed institution. Polls consistently indicate that the public respects the Court more, on average, than the democratically elected Congress.⁶¹ By striking down Louisiana’s capital punishment statute, *Kennedy* put the Court’s public authority against a particular mode of punishment and raised public awareness of the issue. This heightened awareness was to some extent inevitable because of the publicity attracted by all controversial Supreme Court decisions. As it hap-

59. This premise is, for example, fundamental to customary international law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

60. This point should not be confused with a more commonly raised substantive criticism of the Court’s national consensus methodology that sometimes masquerades as a purely logical indictment. Take the following statement from Justice Scalia’s *Roper* dissent: “Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus.” *Roper v. Simmons*, 543 U.S. 551, 609 (2005) (emphasis added). Scalia’s real point is substantive rather than logical. The quoted statement assumes that states without the death penalty at all should not count toward a national consensus against a particular type of death penalty practice. Others have echoed this point. See, e.g., Richard A. Posner, *Forward: A Political Court*, 119 HARV. L. REV. 31, 90 (2005) (arguing that *Roper* “concocted” a “national consensus” only “by treating states that have no capital punishment as having decided that juveniles have a special claim not to be executed (the equivalent of saying that these states had decided that octogenarians deserve a special immunity from capital punishment)"); Editorial, *The Blue State Court*, WALL ST. J., Mar. 2, 2005, at A16 (saying, in critique of *Roper*, that the “dozen states that have no death penalty offer no views about special immunity for juveniles”). But that substantive claim is plainly disputable. For example, one might agree with the *Roper* majority that complete condemnation of the death penalty implies condemnation of a particularly problematic death penalty practice. See *Roper*, 543 U.S. at 574; Guido Calabresi, *Forward: Antidiscrimination and Constitutional Accountability*, 105 HARV. L. REV. 80, 144 n.210 (1991) (“[T]he 14 states that have no death penalty are presumably just as, if not more, opposed to executing minors as they are to executing anyone else . . .”). Setting aside that substantive dispute, Justice Scalia (and *Roper*’s other critics) must agree that it is *logically* possible to conclude that there is a national consensus against a particular punishment when a distinct majority of *all states* do not permit that punishment. And that is just what *Roper* concluded.

61. See, e.g., VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS 13 (2003).

pened, however, the specific timing of *Kennedy*—six months before a presidential election—guaranteed extensive exposure. In fact, both major-party candidates for President commented on the case immediately upon its publication.⁶² And particularly after the opinion's factual error became public, newspaper editorials across the country opined on the legitimacy and morality of executing persons convicted of raping children.⁶³ If the public understood that Congress could reverse the Court's decision, then the catalytic effect of the Supreme Court's intervention would have been even greater. At a minimum, elected federal officials would have had to explain publicly why they did or did not support such a measure. A federal law attempting to reverse *Kennedy* would thus be even more compelling evidence of national views on punishment than normal federal criminal legislation. Undoubtedly, such an attention-getting statute would offer more compelling evidence of national attitudes toward punishment than the relatively obscure, low-visibility UCMJ amendment that the Court found insufficient to warrant reconsideration after *Kennedy*.⁶⁴

Even if the Court were to break from its established practice by prioritizing trend lines and actually imposed sentences over state practice, federal legislation would remain the most reliable marker of national consensus. A new federal law overruling *Kennedy* would be powerful evidence of a current trend toward adoption of the previously proscribed punishment. Further, such a statute would indicate that there are many eligible voters, and therefore eligible jurors,⁶⁵ who would be prepared to impose capital punishment for the rape of children. A federal law would especially illuminate jurisdictions that in recent years have not afforded prosecutors and juries the opportunity to impose capital punishment in child rape cases.

Of course, the passage of federal legislation permitting a particular punishment would not guarantee that the punishment

62. See Kugler, *supra* note 19.

63. See, e.g., Editorial, *Punishing an Enormity: Child rape is an unforgivable offense, but not a capital crime*, WASH. POST, June 28, 2008, at A14.

64. See *Kennedy v. Louisiana*, 129 S. Ct. 1, 2–3 (2008) (Kennedy, J., statement respecting the denial of rehearing), *denying reh'g to Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

65. See Jury Selection and Service Act, 28 U.S.C. § 1863 (2006) (linking voting with jury service in the federal system).

would ultimately be imposed at all, much less with greater frequency than in the past. Nor would it be a guarantee of a permanent new trend in favor of the authorized punishment. Accordingly, if in the years after countervailing federal legislation it were *still* true that the punishment had rarely been imposed and that states were rejecting the punishment in increasing numbers, those developments might raise the difficult question of whether evidence from actually imposed punishments and trends in state practice might cast doubt on countervailing evidence from federal legislation.⁶⁶ But that hypothetical scenario has not yet materialized. In the meantime, *Kennedy's* prohibition on the punishment should not be defended with reference to speculative future events.

The importance of federal legislation extends beyond its ability to indicate national attitudes regarding punishment. When attempting to generalize about the varied and often conflicting viewpoints of many millions of people, it is necessary to choose a method of aggregating those views. Any method of aggregation will be subject to criticism. Fortunately, the Constitution offers a principled basis for choosing among these options, as Article I specifies how to identify aggregate national views for the purposes of federal law.⁶⁷ Again, it is important not to oversimplify matters. Federal law may be ambiguous, conflicted, or concordant with patterns of state legislation and actually imposed sentences; in such cases, it may make sense for courts to consider non-Article I methods of aggregating national views. But insofar as federal legislation does speak to a material question of national consensus, courts should defer to the constitutionally privileged answer. "The People" and their elected representatives have been on notice for well over two hundred years as to how to fashion federal law with a single voice.⁶⁸ Courts should pause before prioritizing an alternative mechanism for popular expression on a nationwide scale.

66. See *infra* text accompanying notes 101–05 (after-arising legislation may be the product of "pathological politics" and temporary changes in national mood).

67. See U.S. CONST. art. I, § 7; see also U.S. CONST. art. V.

68. See *United States v. Lee Yen Tai*, 185 U.S. 213, 222 (1902) ("A statute enacted by Congress expresses the will of the people of the United States in the most solemn form.").

D. *Justifying Kennedy's Methodology: Take One*

In view of the Court's apparent reliance on the existence of a national consensus, *Kennedy* is best understood as having issued a finding of presumptive unconstitutionality, subject to federal legislative override. One can reconstruct *Kennedy's* reasoning as follows: As an initial matter, the Court concluded that an on-point national consensus existed. Federal law did not permit the punishment in question, and the great majority of states had abandoned it as well. That crucial finding of national attitude demonstrated a potential need to vindicate the Eighth Amendment's guarantee against unusual punishments. But it is not enough for a punishment to be unusual; it must also be cruel.⁶⁹ After all, some punishments are presumably unusual because they are unusually merciful. Accordingly, the Court had to exercise its own independent judgment to ensure that the empirically observed national consensus pertained to a punishment that did in fact implicate Eighth Amendment values. In *Kennedy*, those values included the need to avoid unduly disproportional punishment, potentially harmful effects on victim witnesses, and arbitrariness in the punishment's application.⁷⁰ Having discerned a national democratic judgment to abandon the punishment in question, *Kennedy* denied individual states the authority to legislate in this area, including the authority to enact procedural reforms designed to address the Court's concerns.

Of course, some critics dispute that capital punishment for child rape is a disproportionate, harmful, and arbitrary punishment. These critics instead insist that the death penalty is widely viewed as a proportionate punishment for the rape of a child and that the dearth of child rape capital statutes is the

69. See Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 18–19 (2009) (arguing that state counting alone does not provide a source of federal law because “[i]n a federal regime, merely being unusual (absent cruelty) is a virtue, not a vice”).

70. For example, the Court concluded that the rape of children is a less harmful crime than murder and that capital punishment is a disproportionately harsh punishment. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2654, 2661 (2008). The Court also noted that child victims would play a part in the trial and, therefore, the execution of perpetrators—some of whom will be the victims' family members. *Id.* at 2663–64. And the Court held that the undeveloped state of death penalty law in connection with rape created a risk of arbitrary punishment. *Id.* at 2660.

product of a legal-historical accident.⁷¹ For the moment, however, the point is that the Court's chosen mode of analysis indicated the contrary. The Court's independent judgment analysis thus complemented and did not attempt to supplant the Court's effort to construe the outputs of democratic processes. On this reading, *both* the national consensus *and* independent judgment findings were necessary to the Court's ultimate conclusion; neither was sufficient.

Importantly, the foregoing approach creates a democratic mechanism for correcting the Court's errors while still completely remedying the perceived constitutional violation. The reconstructed analysis above assumes, consistent with every relevant Eighth Amendment case, that federal civilian law does not permit the punishment in question. Therefore, the only observed violations are state violations, which the Court's holding completely cures, regardless of whether that holding is reversible by federal statute.

E. *Was Consensus Necessary in Kennedy?*

Yet *Atkins*, *Roper*, and *Kennedy* may not have depended on the existence of a national consensus.⁷² As the Court has repeatedly explained, its independent judgment will be "brought to bear" before any Eighth Amendment finding regarding evolving standards of decency.⁷³ This statement highlights an abiding ambiguity in the case law: Was the presence of a national consensus *necessary* to the conclusions in *Atkins*, *Roper*, and *Kennedy*? The question divides commentators,⁷⁴ and the

71. See, e.g., *id.* at 2665 (Alito, J., dissenting).

72. See Bidish Sarma, *Still in Search of a Unifying Principle*, 118 YALE L.J. POCKET PART 55, 59 (2008) (noting after *Kennedy* that the Court might declare laws "unconstitutional without the typical inquiry into the number of state legislatures that have abandoned the practice" and that the "opportunity to appeal to the Court's independent judgment provides great hope for those seeking to defeat the death penalty").

73. E.g., *Kennedy*, 128 S. Ct. at 2658; *Roper v. Simmons*, 543 U.S. 551, 563 (2005); *Atkins v. Virginia*, 536 U.S. 304, 313 (2002). The phrase originally appeared in *Coker*. See *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion).

74. Compare, e.g., Andrew B. Coan, *Well, Should They? A Response to If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 213, 232 (2007) (suggesting that national consensus may be "a necessary, not a sufficient, condition for the Court to find an Eighth Amendment violation"), with Bradford R. Clark, *Constitutional Structure, Judicial Discretion, & the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1159 (2006) (suggesting that "the

Court has yet to resolve it squarely.⁷⁵ In *Atkins*, for example, the Court ultimately concluded that the Court's "independent evaluation of the issue reveals no reason to disagree" with the national consensus.⁷⁶ *Atkins* thus avoided answering whether an Eighth Amendment violation would have arisen even *in the absence* of such a consensus.⁷⁷ *Roper* and *Kennedy* are also ambiguous on this point.⁷⁸

The matter was presented most directly in the *Kennedy* rehearing decision. Dissenting from the denial of rehearing, Justice Scalia and Chief Justice Roberts asserted that *Kennedy*

Court was willing to determine the constitutionality of the juvenile death penalty based on criteria wholly unrelated to the existence of a national consensus against such punishment" and that it might ignore changing popular views); see also *infra* notes 80 & 257.

75. To the same end, one might also ask whether the absence of a consensus was sufficient for the Court *not* to establish new Eighth Amendment rights in *Stanford v. Kentucky*, *Penry v. Lynaugh*, and *Thompson v. Oklahoma*. In all three cases, the answer is yes. In *Stanford*, Justice O'Connor's fifth-vote concurrence explained that the lack of any national consensus was decisive in that case, but might not be in others. 492 U.S. 361, 380–82 (1989) (O'Connor, J., concurring in part). In *Penry*, the majority opinion noted that it conducted a proportionality analysis while "[r]elying largely on objective evidence such as the judgments of legislatures and juries" and concluded that "there is insufficient evidence of such a consensus today." 492 U.S. 302, 335, 340 (1989). Finally, in *Thompson*, Justice O'Connor's decisive fifth-vote concurrence expressly refrained from imposing a general constitutional rule due to her uncertainty regarding the existence of a relevant national consensus. 487 U.S. 815, 848–49 (1988).

76. *Atkins*, 536 U.S. at 321; see also *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

77. In explaining its general method, *Atkins* suggested that a consensus finding is necessary to any determination of unconstitutionality. In particular, *Atkins* stated that "in cases involving a consensus, our own judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." 536 U.S. at 313. This passage, however, could merely mean that a finding of consensus creates a presumption of unconstitutionality that would not otherwise exist.

78. *Roper* states that consensus analysis constitutes "essential instruction," thereby leaving open whether the Court can reject its lessons. 543 U.S. at 564. In its general statement of method, *Kennedy* states: "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." 128 S. Ct. at 2650 (emphasis added). To say that the constitutional inquiry "depends" on national consensus suggests that the absence of consensus might be dispositive. Consistent with that view, *Kennedy* later says that "objective evidence of contemporary values . . . is entitled to great weight." *Id.* at 2658. Elsewhere, however, *Kennedy* stated that prior cases had considered the existence of "objective indicia of consensus" to be simply a "relevant concern." *Id.* at 2651.

rested ultimately on the Court's "independent judgment" and not on any finding of national consensus.⁷⁹ Therefore, they argued, the discovery of the overlooked military law—and, presumably, the passage of a new civilian law—could not undercut the Court's holding.⁸⁰ Yet they are only two Justices, and neither was part of the *Kennedy* majority.⁸¹ Moreover, the majority's statement respecting the denial of rehearing conspicuously avoided the dissenters' analysis.⁸² Instead, the majority stated its continued belief that the relevant national consensus existed despite the newly discovered contrary evidence.⁸³ The majority thus seemed determined to leave open the possibility that new evidence of national attitude might disrupt the Court's conclusion.

In refusing to rest its decision entirely on its own independent judgment, the Court remained true to its established practice. At least since *Gregg v. Georgia*, the Court has not invalidated a capital provision under the Eighth Amendment based solely on its own independent judgment.⁸⁴ Nor has the Court deployed the consensus approach to invalidate a federal capital statute.⁸⁵ Instead, the Court has targeted outlier state practices while relying on "objective indicia" of consensus and emphasizing that "Eighth Amendment judgments should not

79. See *Kennedy v. Louisiana*, 129 S. Ct. 1, 3–4 (2008) (Scalia, J., statement respecting the denial of rehearing), *denying reh'g to Kennedy*, 128 S. Ct. 2641.

80. Some commentators had drawn the same conclusions after *Atkins* and *Roper*. See, e.g., Wayne Myers, *Roper v. Simmons: The Collision of National Consensus and Proportionality Review*, 96 J. CRIM. L. & CRIMINOLOGY 947, 985 (2006) ("[T]he true impetus of the decision [in *Roper*] is the majority's independent moral judgment."); see also *supra* note 74.

81. The other two *Kennedy* dissenters—Thomas and Alito—voted for rehearing, thereby indicating their disagreement with the Scalia-Roberts view. See *Kennedy*, 129 S. Ct. at 1.

82. See *id.* at 2–3 (Kennedy, J., statement respecting the denial of rehearing).

83. See *supra* text accompanying note 11.

84. See Motion for Leave to File Brief and Brief for the United States as Amicus Curiae Supporting Petition for Rehearing at 9–10, *Kennedy*, 128 S. Ct. 2641 (No. 07-343) ("Nor has the Court ever exercised its 'independent judgment' in the line of cases in which it has applied this two-step analysis to bar the imposition of the death penalty for a particular offense or offender in the face of a national consensus supporting it.").

85. See *id.* at 7 ("The Court has never held the death penalty unconstitutional under its 'national consensus' analysis where Congress has *authorized* death for the offense at issue.").

be, or appear to be, merely the subjective views of individual Justices.”⁸⁶

In some cases, the Court’s reliance on objective evidence of state practice may be linked to principles of stare decisis, particularly the longstanding rule that one legitimate reason to overrule a past precedent is to account for changes of fact.⁸⁷ The need to reckon with changes of fact may explain why the Court has relied so heavily on objective measurements of national consensus in *Atkins* and *Roper*, which (unlike *Kennedy*) overruled past precedents.⁸⁸ Indeed, *Atkins* and *Roper* suggest that the cases they overruled were correct at the time they were decided,⁸⁹ a possibility that highlights both the dynamism of national consensus-based argumentation and the Court’s reliance on it. Drawing on the same stare decisis principles, one would think that a holding capable of expanding dynamically based on changing facts should also be able to constrict in the same way and on the same basis. If so, then a change in relevant federal law should prompt the Court to reconsider *Kennedy*.

It is also possible that the existence of a national consensus is sometimes but not always necessary to decisions like *Atkins*, *Roper*, and *Kennedy*. Consider the Court’s “gross disproportionality” jurisprudence for non-capital punishment.⁹⁰ Under that still quite unsettled line of cases, the weight afforded to the existence of a national consensus appears to vary with the situation.⁹¹ The existence of a “national consensus” would never be *sufficient* to trigger an Eighth Amendment violation. And a sufficiently confident “independent judgment” by the Court would always be capable of yielding a finding of unconstitutionality. But in a close case, the existence or absence of a national consensus might prove decisive—especially if there were

86. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

87. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (plurality opinion).

88. *Atkins* overruled *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Roper* overruled *Stanford v. Kentucky*, 492 U.S. 361 (1989), and superseded *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

89. *See Atkins v. Virginia*, 536 U.S. 304, 314–15 (2002) (“Much has changed since [*Penry*].”); *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (“To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, it suffices to note that those indicia have changed.”)

90. *See supra* note 30.

91. *Id.*

a national consensus *opposing* a conclusion that the Court had independently reached.⁹²

Applying that approach to *Kennedy*, the question becomes whether *Kennedy* strained the Court's independent judgment. As that judgment becomes more certain, the finding of national consensus becomes less necessary to the outcome. As is so often the case in this area, however, the tea leaves are hard to read. Many statements in controversial majority opinions are simply meant to show respect for persons with opposing views, rather than to signify any genuine hesitancy as to the result. Still, *Kennedy*—more than *Atkins* or *Roper*—went out of its way to highlight the strength of opposing moral intuitions. For example, the Court began its independent judgment analysis with the following oblique concession: "It must be acknowledged that there are moral grounds to question a rule barring capital punishment for a crime against an individual that did not result in death."⁹³ And in its conclusion, the Court observed: "*In most cases* justice is not better served by terminating the life of the perpetrator rather than confining him."⁹⁴ These statements imply that morality and justice sometimes favor the execution of child rapists. To the extent that these statements indicate a more general cautiousness about *Kennedy's* independent judgment conclusion, the Court may have found reassurance in its national consensus analysis. Thus, *Kennedy* may have depended on the existence of a supportive national consensus even if *Atkins* and *Roper* did not.

92. Justice O'Connor appears to have viewed national consensus and the Court's independent judgment as fungible factors such that either one might sometimes be decisive. See *supra* note 75; see also *Roper*, 543 U.S. at 598 (O'Connor, J., dissenting) ("In my view, the objective evidence of national consensus, standing alone, was insufficient to dictate the Court's holding in *Atkins*. Rather, the compelling moral proportionality argument against capital punishment of mentally retarded offenders played a *decisive* role in persuading the Court that the practice was inconsistent with the Eighth Amendment. Indeed, the force of the proportionality argument in *Atkins* significantly bolstered the Court's confidence that the objective evidence in that case did, in fact, herald the emergence of a genuine national consensus.").

93. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008). The Court further observed: "We cannot dismiss the years of long anguish that must be endured by the victim of child rape." *Id.*

94. *Id.* at 2665 (emphasis added).

F. Conclusion

In the end, the role of national consensus remains uncertain. If the Court's independent judgment can render a statute unconstitutional under the Eighth Amendment, the Court has given no hint why or when that would be appropriate.⁹⁵ Moreover, *Kennedy* appeared to exhibit special hesitation in arriving at its independent judgment determination. Extant case law thus suggests but does not decide that the existence of a supportive national consensus was necessary to the outcome at least in *Kennedy*, even if not in *Atkins* and *Roper*. If that is correct, then *Kennedy's* holding is contingent and its rationale could be falsified through the passage of a contrary federal law. Still, the Court has left itself room to act in future cases based exclusively on its own judgment. The next Part considers whether *Kennedy* would still be democratically reversible in that event.

II. HOW MIGHT CONGRESS ADDRESS THE COURT'S INDEPENDENT JUDGMENT?

The foregoing Part assumed both that a national consensus was necessary to *Kennedy's* Eighth Amendment holding and (by logical implication) that the Court's independent judgment alone did not suffice to justify the Court's conclusion. Part I therefore concluded that a federal statute repudiating *Kennedy* would negate the Court's holding. Yet the Court's independent judgment may sometimes or even always suffice to invalidate a legally prescribed punishment under the Eighth Amendment. In that event, corrective federal legislation might succeed in knocking out only one of *Kennedy's* two independently sufficient foundations. The second foundation and, therefore, the Court's ultimate conclusion would remain intact and fully binding on Congress.

But federal law can do more than just debunk judicially identified national consensuses. It can also challenge the factual and moral assumptions that underlie the Court's independent judgment. What was once a valid judicial decision can thus be-

95. Some commentators have provided useful suggestions. See, e.g., Calabresi, *supra* note 60, at 144 ("[T]he burden should be placed on those who would do something most civilized lands forbid to show that majoritarian support for it *in fact* exists.").

come obsolete and ripe for reconsideration. This Part argues that *Kennedy v. Louisiana* is democratically reversible even if the Court's independent judgment is always or sometimes a sufficient condition for findings of unconstitutionality. The key is to appreciate that *Kennedy's* contingency runs deeper than its analysis of national consensus and, indeed, pervades its independent judgment analysis as well.

A. *Justifying Kennedy's Methodology: Take Two*

As discussed in Part I, *Atkins*, *Roper*, and *Kennedy* may have found Eighth Amendment violations because the punishments at issue were *both* unusual *and* cruel. On that view, these cases are concerned with the legitimate punitive powers of local majorities. In other words, *Kennedy* and its ilk might rest in part on the idea that there are some punishments that national majorities object to and that local majorities are therefore foreclosed from imposing (regardless of whether individual states have adopted procedural reforms responsive to the Court's independent judgment). These cases would then rest on arguments from consensus because the fact of consensus itself is an integral part of what generates a violation in the first place.

But what if the Court is actually willing to find Eighth Amendment violations in cases like *Kennedy* based solely on the Court's independent judgment, without persuasive evidence of national consensus? Such a possibility is hardly unthinkable, for at least three interrelated reasons. First, the Eighth Amendment's grammatically conjunctive "cruel *and* unusual" language is understood to entail unitary principles, such as the principle that intentional infliction of pain is prohibited, that operate regardless of consensus.⁹⁶ To the extent that the Eighth Amendment also entails a unitary proportionality principle, anti-harmfulness principle, or anti-arbitrariness principle, such a principle might likewise operate based on the Court's "independent judgment," even without any national consensus.⁹⁷

Second, the imposition and review of criminal punishments frequently entails consideration of issues within the judiciary's

96. See *supra* note 25 and accompanying text.

97. See *supra* note 70 (listing arguments in *Kennedy* potentially deploying those principles).

expertise.⁹⁸ Granted, Congress generally deserves deference in matters of federal policy, including federal sentencing policy.⁹⁹ Legislators, however, have no special institutional connection with criminal justice practice and so may be unaware or systematically under-appreciative of problems in those areas, even when those problems are all too apparent to judges.¹⁰⁰ Thus, there is an institutional competence argument that the Supreme Court should vindicate Eighth Amendment values when the federal legislature has failed to consider or properly assess relevant facts.

Third, courts might be suspicious of legislative judgments concerning Eighth Amendment interests. Embellishing its past claims,¹⁰¹ the Court might reason from the “pathological politics” of criminal punishment—that is, the idea that normally healthy interest group politics break down in connection with issues of criminal justice.¹⁰² As many commentators have noted,

98. See *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (stating sentencing is “a matter uniquely within the ken of judges”); see also *infra* Part II.C.1.

99. See *United States v. Evans*, 333 U.S. 483, 486 (1948) (“In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions.” (emphasis added)).

100. See *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) (“[L]ike my Brethren, I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty.”).

101. See *Roper v. Simmons*, 543 U.S. 551, 566 (2005) (noting that evidence of national consensus against the juvenile death penalty carries “special force in light of the general popularity of anticrime legislation”); *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (highlighting “the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime”).

102. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) [hereinafter Stuntz, *Pathological Politics*] (“Voters demand harsh treatment of criminals; politicians respond with tougher sentences (overlapping crimes are one way to make sentences harsher) and more criminal prohibitions. This dynamic has been particularly powerful the past two decades, as both major parties have participated in a kind of bidding war to see who can appropriate the label ‘tough on crime.’”); see also Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 753 (2005) (discussing development of sentencing law in connection with “interest group dynamics and the lack of public information” and “the mobilization of public fears by entrepreneurial politicians”); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1276 (2005); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089 (1993); Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 344 (2008) (“*Roper* and *Atkins* are readily explained as an effort by

the groups most adversely affected by punishment's excesses are relatively unlikely to wield political influence, and political grandstanding can yield largely expressive laws and prosecutions whose consequences fall arbitrarily on only a few defendants unable to attract public sympathy.¹⁰³ The Eighth Amendment arguably anticipates these sorts of democratic defects and so directs the judiciary to monitor the cruelty of punishments, at least when those punishments have become exceptional over time. In this way, gradually accumulated popular trends toward mercy become judicially secured against future backsliding.¹⁰⁴ This process is akin to constitutional amendment, whereby entrenched convictions preclude later changes of heart.¹⁰⁵

Once the Eighth Amendment is viewed as a guarantor of unitary principles, as an outlet for unique judicial competence, or as a means of curing political pathologies, it is but a short additional step to conclude that the Court might enforce a finding of national consensus even in the face of countervailing federal legislation. A federal law attempting to overturn *Kennedy* might be especially reflective of national views because of the statute's inevitable popular salience.¹⁰⁶ But the Court could flip that argument on its head by concluding that a Congress or President bent on overturning an Eighth Amendment decision would not disprove the existence of a national consensus so much as reflect a rapid and potentially temporary shift in national views following political efforts to demagogue the Court's decision.¹⁰⁷ Certainly the Court would have grounds

the Supreme Court to counteract the politics of death."); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 784–85 (2006).

103. See Stuntz, *Pathological Politics*, *supra* note 102, at 530–32.

104. *But see* Harmelin v. Michigan, 501 U.S. 957, 990 (1991) (Scalia, J., plurality opinion) (announcing the judgment of the Court that "[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions").

105. See *infra* Part IV.D. *Kennedy* may have endorsed this conception of Eighth Amendment jurisprudence. See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2664–65 (2008).

106. See *supra* text accompanying notes 62–63.

107. The high profile 2008 presidential campaign remarks concerning *Kennedy*, see *supra* note 19, could be interpreted in that way, potentially explaining why the Court did not treat the remarks as an independent basis for reconsidering *Kennedy*, despite Louisiana's implicit suggestion to that effect. See Supplemental Brief

for caution, particularly in connection with issues like child rape and capital punishment that may be especially susceptible to sensationalism. After all, the same reasoning that might have prompted the Court to intervene in the first place would still hold true: Both before and after congressional intervention, the democratic branches would be constrained by Eighth Amendment principles, comparatively inexpert in matters of criminal punishment, and potentially driven toward excessive cruelty by pathological politics.

Still, new legislation should ultimately be judged at least in large part by its actual content. The question is therefore whether a federal statute might address the Court's independent judgment in a way that should garner the Court's approval, despite the three interrelated concerns just discussed.

B. *Enforcing the Eighth Amendment*

Before describing how a statute might prompt the Court to revise its independent judgment analysis, it is important to ask the threshold question whether Congress has the constitutional authority to enact such a law. Part I did not consider this issue because it is relatively uncontroversial that Congress has the authority to criminalize child rape, provided that the statute includes a suitable "jurisdictional element."¹⁰⁸ For example, the Commerce Clause¹⁰⁹ could serve as the basis for a capital statute applicable to civilians who commit child rape after transporting their victims across state lines for the purpose of committing the rape.¹¹⁰ As argued in Part I, such a statute would refute *Kennedy's* national consensus analysis and so might in itself disrupt *Kennedy's* holding. Yet the issue of constitutional authority becomes more complex in connection with *Kennedy's* independent judgment. To unsettle that analysis, at least as applied to the states, Congress would have to remedy defects in state capital

for Respondent in Support of the Petition for Rehearing at 4 n.1 & apps. A–E, *Kennedy*, 128 S. Ct. 2641 (No. 07-343).

108. *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995).

109. U.S. CONST. art. I, § 8, cl. 3.

110. *Cf.* 18 U.S.C. § 1958 (2006) (capital murder for hire); 18 U.S.C. § 2243 (2006) (abuse of minor); 18 U.S.C. § 2251 (2006) (sexual exploitation of children). In the past, the Supreme Court has also considered jurisdictionally limited criminal statutes promulgated under Congress's territorial power. *See Coker v. Georgia*, 433 U.S. 584, 593 n.6 (1977) (plurality opinion) (counting in jurisdictional tally 18 U.S.C. § 2031, a now-repealed federal rape law applicable in federal territories).

punishment procedures, as described below. Does Congress have authority to command such changes? The short answer is that it does, thanks to the enforcement power set out in Section 5 of the Fourteenth Amendment.¹¹¹

The enforcement power allows Congress to strike at cruel and unusual punishments.¹¹² To use familiar legalese, the Fourteenth Amendment incorporates most of the Bill of Rights, including the Eighth Amendment.¹¹³ Though critics of capital punishment have often argued for using the enforcement power to limit the lawful scope of capital punishment,¹¹⁴ Congress has made only limited use of its Section 5 power to enforce the Eighth Amendment. Still, Congress has flexed this muscle, as the Supreme Court has implicitly acknowledged.¹¹⁵ Congress may thus have had the authority to enact prophylactic legislation defending the Eighth Amendment rights of persons charged under capital child rape statutes even before *Kennedy*.¹¹⁶ *Kennedy's* confirmation of serious Eighth Amendment

111. U.S. CONST. amend. XIV, § 5.

112. The Supreme Court has repeatedly recognized that Section 5 provides the federal government with special power to curb traditional state prerogatives in defense of constitutional rights. *See, e.g.,* *United States v. Morrison*, 529 U.S. 598, 619 (2000).

113. *See, e.g.,* *United States v. Price*, 383 U.S. 787, 789 (1966); *Robinson v. California*, 370 U.S. 660 (1962) (incorporating the “cruel and unusual punishments” clause against the states).

114. Reformers have long proposed using the enforcement power to limit the availability of capital punishment. *See, e.g.,* Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1813–15 (1970); Daniel J. Leffell, Note, *Congressional Power to Enforce Due Process Rights*, 80 COLUM. L. REV. 1265, 1285 n.128 (1980); *see also* *Furman v. Georgia*, 408 U.S. 238, 247–48 n.10 (1972) (Douglas, J., concurring) (noting proposed federal legislation to place a moratorium on the death penalty, based on the Section 5 enforcement power). A federal effort to overrule *Kennedy* might be a test case in anticipation of more far-reaching congressional oversight of death penalty processes.

115. As Eugene Gressman and Angela Carmella have noted:

In *Hutto v. Finney*, 437 U.S. 678 (1978), the Court implicitly assumed that Congress has Section 5 power to incorporate the Eighth Amendment into the Fourteenth Amendment . . . so as to authorize the award of attorneys’ fees in civil rights actions brought against states to enforce the Eighth Amendment right to freedom from cruel and unusual punishments.

Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 126 n.243 (1996).

116. *See* *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power *even if* in the process it prohibits conduct which is not itself unconstitutional . . .” (emphasis added)).

problems in this area only strengthens the case for congressional power.

Yet a legislative effort to overturn *Kennedy* via the Section 5 enforcement power may seem paradoxical. Focusing on Section 5's use of the verb "enforce," the Supreme Court has sensibly construed Section 5 to mean that Congress may not use its enforcement power to *undermine* constitutional rights.¹¹⁷ To use a familiar metaphor, any congressional action relating to Section 5 is a "one-way ratchet." Thus, Congress cannot ratchet downward a constitutional right already announced by the Supreme Court.¹¹⁸ Doing so would transform the enforcement power into a two-way ratchet, which is not a "ratchet" at all.¹¹⁹ Given this well-established limit on Congress's Section 5 authority, how can Congress use its enforcement power to countermand judicially recognized constitutional rights?

The answer is that Congress would not be countermanding a constitutional right so much as disrupting the factual premises that gave rise to the right. Once those premises have been unsettled, the Court itself should recognize that *Kennedy's* formerly appropriate rule has become obsolete. That is, the Court should acknowledge that facts "have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."¹²⁰ That conclusion would deprive *Kennedy* of the force of stare decisis.¹²¹

By conditioning certain Eighth Amendment rights on the status of federal legislation, the Supreme Court itself has introduced the possibility that a statute might simultaneously revise

117. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966) ("We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."); see also *City of Boerne*, 521 U.S. at 519; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732–33 (1982).

118. See William Cohen, *Congressional Power To Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606–08 (1975) (describing "ratchet" theory).

119. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1884 (1993) (defining "ratchet" in part as a mechanism "to allow effective motion in one direction only").

120. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (plurality opinion); see also *supra* note 15 (discussing changes of fact or perception of fact and stare decisis).

121. See *supra* note 15. For discussion of vertical stare decisis concerns, see *infra* Part IV.B.

and enforce Eighth Amendment rights.¹²² The uniquely contingent nature of recent Eighth Amendment jurisprudence explains why this Article's argument is consistent with the Court's enforcement power precedents.¹²³ It also explains why Congress's ability to overturn *Kennedy* is consistent with both the Constitution's supremacy over federal legislation¹²⁴ and the Supreme Court's supremacy over Congress in matters of constitutional interpretation.¹²⁵

In sum, the Eighth Amendment analysis that invalidated Louisiana's capital statute critically depended on contingent assertions regarding national consensus and criminal justice.¹²⁶ As Part I argued, a federal statute that made child rape a capital offense for civilians would undermine *Kennedy*'s national consensus finding. It is now time to ask whether the Court's independent judgment is similarly susceptible to legislative correction.

122. Consider also the Court's attention to legislatively provided remedies when establishing constitutional causes of action, *see* *Bush v. Lucas*, 462 U.S. 367 (1983), and when evaluating the ongoing need for prophylactic Fourth Amendment rules, *see* *Hudson v. Michigan*, 547 U.S. 586, 597 (2006).

123. Consider, for example, *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."). *Boerne* struck at the Religious Freedom Restoration Act (RFRA), but a federal statute that relied on the enforcement power to overturn *Kennedy* would be quite different. Whereas RFRA attempted to extend constitutional solicitude where the Supreme Court believed no constitutional problems existed, a statute that attempted to overturn *Kennedy* by addressing the Court's independent judgment would take for granted the serious constitutional problems that the Court itself had identified.

124. *See* U.S. CONST. art. VI, cl. 2.

125. *See* *City of Boerne*, 521 U.S. at 524 ("The power to interpret the Constitution in a case or controversy remains in the Judiciary."); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

126. A statute attempting to displace *Kennedy*'s holding would be unlike the many federal statutes that have been enacted in apparent defiance of on-point Supreme Court constitutional holdings. For example, in *Texas v. Johnson*, 491 U.S. 397 (1989), the Supreme Court found that a state statute prohibiting flag burning violated the First Amendment. Congress then enacted a similar statute, which in *United States v. Eichman*, 496 U.S. 310 (1990), the Court also invalidated. These results made sense together, because every First Amendment consideration that pertained to the state flag burning statute also applied to the federal counterpart. *See id.* at 323 (Stevens, J., dissenting) (acknowledging in *Eichman* "the fact that the Court today is really doing nothing more than reconfirming what it has already decided" in *Johnson*). Not so with *Kennedy*. *See also* *infra* notes 248–54 and accompanying text (discussing *Gonzales v. Carhart*).

C. *Addressing the Court's Independent Judgment*

Different types of reasons make up the Court's independent judgment. In particular, it is important to distinguish between reasons that are within the Court's special expertise and those that are not, and within the latter category to distinguish further between reasons that concern empirical facts and those that concern moral views.

1. *Reasons Within the Judiciary's Expertise*

Kennedy repeatedly relied on considerations bearing on the Court's unique competence as the head of the Judicial Branch. One example is *Kennedy's* acute anxiety regarding the reliability of child witnesses, particularly when they must testify against family members eligible for capital punishment.¹²⁷ Another is *Kennedy's* emphasis on the risk of arbitrariness when capital punishment is applied in a novel context that lacks well-established aggravating and mitigating factors.¹²⁸ These types of reasons—relating to reliability and arbitrariness—do not depend on the existence of national attitudes. Rather, they concern values that have constitutional force wholly independent of national views. When the Court says that punishments may be inequitably meted out or that innocent people may suffer, it does not matter whether that view is popularly held. What matters is whether the view is correct.¹²⁹ Moreover, these ar-

127. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663–64 (2008).

128. *Id.* at 2660–61. The Court's concern regarding the potential "extension" of capital punishment to child rape, *id.* at 2658, is in some tension with its claim that there is a national consensus against the punishment. One would expect that *either* the punishment is rare because it is unpopular *or* the punishment is popular and therefore will be broadly applied—yet *Kennedy* at times suggests that both are true. Compare *id.* at 2661 (noting that no one has been executed for child rape over the past forty years), with *id.* at 2660 ("[U]nder respondent's approach, the 36 States that permit the death penalty could sentence to death all persons convicted of raping a child less than 12 years of age. This could not be reconciled with our evolving standards of decency and the necessity to constrain the use of the death penalty."). Perhaps the Court meant to argue in the alternative by demonstrating that, even if the punishment does turn out to be popular, it would engender arbitrariness problems.

129. National popularity is potentially relevant to unconstitutional arbitrariness—not just in the Eighth Amendment context but in substantive due process case law as well. As *Kennedy* explained, a rarely imposed punishment is likely to be imposed arbitrarily because arbitrariness concerns "are all the more pronounced where, as here, the death penalty for this crime has been most infrequent." *Id.* at 2661. This argument calls to mind the maxim that "death sentences

guments reflect expert predictive judgments about how the criminal justice system is likely to operate given certain conditions. And such judgments are a paradigmatic area of unique judicial competence. Judges are chosen for their legal acumen and expertise. They manage trials, impose sentences, rule on habeas petitions, and observe the results. Like the National Labor Relations Board, the Federal Energy Regulatory Commission, or any other expert agency, the judiciary wields expertise meriting deference. Unlike those agencies, the Court sits at the apex of a constitutionally coordinate branch and enforces the Eighth Amendment. The Court might therefore refuse to defer to contrary congressional judgments in this area.

Yet even the Court's expert independent judgment leaves room for congressional intervention. One possibility is that Congress might permit capital punishment for child rape only when reliable forensic evidence corroborates victim testimony.¹³⁰ That heightened procedural safeguard would remedy any danger arising from what the Court called "unreliable, induced, and even imagined child testimony."¹³¹ The Court's more general analysis—that the child victim "and the accused are, *in most instances*, the only ones present when the crime was committed"¹³²—would not be refuted, but rather rendered irrelevant by Congress's targeted intervention. The Court also points out that "the question in a capital case is not just the fact of the crime, including, say, proof of rape as distinct from abuse short of rape, but details bearing upon brutality in its commission," and those details "are subject to fabrication or

are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring). There is a powerful analogue in *Lawrence*. As Cass Sunstein has argued, *Lawrence* arguably rested on the view that "when constitutionally important interests are at stake, due process principles requiring fair notice, and banning arbitrary action, are violated if criminal prosecution is brought on the basis of moral judgments lacking public support, as exemplified by exceedingly rare enforcement activity." Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 27–28 (emphasis added).

130. See *Kennedy*, 128 S. Ct. at 2675 (Alito, J., dissenting) (noting that the Court's concerns would be addressed by state laws that allowed the death penalty "in only those child-rape cases in which the independent evidence is sufficient to prove all the elements needed for conviction and imposition of a death sentence").

131. *Id.* at 2663 (majority opinion). The Court seems to have in mind something like the chilling plot of Ian McEwan's novel *Atonement*, whose film version was released in 2007. IAN MCEWAN, *ATONEMENT* (2001).

132. *Kennedy*, 128 S. Ct. at 2663 (emphasis added).

exaggeration, or both.”¹³³ Again, however, a legislative rule could address the Court’s concern. Besides requiring forensic confirmation, child victims could simply be disqualified from testifying at the sentencing phase except at the defendant’s behest.¹³⁴ Legislative adoption of some or all of these approaches might mitigate or eliminate the Court’s concerns.

Congress might also set out a carefully crafted set of aggravators for capital cases involving the rape of a child.¹³⁵ Such an approach would speak directly to the Court’s desire “to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way.”¹³⁶ Indeed, the Court’s discussion of this point highlights the potential usefulness of legislative intervention. The Court notes that it is “difficult to identify standards” appropriate in this context given that “[w]e have developed a foundational jurisprudence in the case of capital murder to guide the States and juries in imposing the death penalty” over a span of “more than 32 years.”¹³⁷ The Court then explained that it was averse to “beginning the same process for crimes for which no one has been executed in more than 40 years,”¹³⁸ thereby expanding the death penalty “to an area where standards to confine its use are indefinite and obscure.”¹³⁹ In other words, designing appropriate aggravators in the capital punishment context was hard work, may have involved constitutional errors, and ultimately yielded an imperfect product. And the Court was not excited or optimistic about engaging in the process again in a new context.

Appropriate congressional intervention could entirely and instantly replace the judicial “process” that the Court consid-

133. *Id.*

134. For an example of child disqualifications that are specifically designed to restrict child testimony, see MASS. GEN. LAWS ch. 233, § 20 (2008) (“An unemancipated, minor child, living with a parent, shall not testify before a grand jury, trial of an indictment, complaint or other criminal proceeding, against said parent, where the victim in such proceeding is not a member of said parent’s family and who does not reside in the said parent’s household.”).

135. See *Kennedy*, 128 S. Ct. at 2674 (Alito, J., dissenting) (noting that some states had specified aggravators for child rape and that other such aggravators are easily imaginable).

136. *Id.* at 2660 (majority opinion).

137. *Id.* at 2660–61.

138. *Id.* at 2661.

139. *Id.*

ered so constitutionally problematic.¹⁴⁰ The result could easily be—and very likely would be—fairer and more restrictive than the analogous judicially created rules in the murder context.¹⁴¹ For example, aggravators could include the age of the victim, the number of victims, whether the perpetrator abused a trust relationship, and whether the victim suffered severe physical injury apart from the rape.¹⁴²

2. *Reasons Outside the Judiciary's Expertise: Empirics*

Empirical Eighth Amendment reasoning is exemplified by arguments from deterrence. *Kennedy* is explicit in recognizing both the legitimacy of deterrence as a goal of punishment and the empirical difficulty with deterrence-based arguments. In the Court's words, "it cannot be said with any certainty that the death penalty for child rape serves no deterrent . . . function."¹⁴³ That uncertainty in itself, the Court suggested, constituted a reason not to strike at Louisiana's child rape statute. The Court, however, reasoned that deterrence arguments supported by mere speculation cannot "overcome other objections," specifically those relating to proportionality.¹⁴⁴ In other words, the Court's ambivalent evaluation of the likelihood of deterrence indirectly strengthened, and may have rendered dispositive, separate considerations. Later, *Kennedy* again adverted to the empirical uncertainty surrounding deterrence. Although the Court recognized that Louisiana's law might cause rapists to experience "a marginal increase in the incentive to kill" their victims, any such effect "is counterbalanced by a marginally increased deterrent to commit the crime at all."¹⁴⁵ Ultimately, however, the Court held that "uncertainty on the point makes the argument for the penalty less compelling than for homicide

140. *But see* Jeffrey L. Fisher, *The Exxon Valdez Case and Regularizing Punishment*, 26 ALASKA L. REV. 1, 38 (2009) (arguing that *Kennedy* "seems to conclude that there is simply no way to create any system that would punish the worst child rapes with death in any kind of standardized manner").

141. *See Kennedy*, 128 S. Ct. at 2674 (Alito, J., dissenting) (collecting murder aggravators deemed permissible by prior Supreme Court decisions, including "whether the defendant was a 'cold-blooded, pitiless slayer'" (quoting *Arave v. Creech*, 507 U.S. 463, 471 (1993))).

142. *See id.* (proposing an overlapping set of aggravators).

143. *Id.* at 2661–62 (majority opinion).

144. *Id.* at 2662.

145. *Id.* at 2664.

crimes.”¹⁴⁶ Once again, the Court avoided making specific predictive judgments, but in a way that influenced its overall constitutional analysis.

This kind of reasoning from empirical uncertainty, which in different guises is typical of the Court’s capital punishment jurisprudence from *Furman*¹⁴⁷ to *Baze*,¹⁴⁸ leaves open the possibility that a strong deterrence showing might “overcome other objections,”¹⁴⁹ particularly if Congress were to address those concerns separately.¹⁵⁰ And because this kind of argument rests on matters of fact, Congress should not be discouraged from legislating in defiance of *Kennedy* on the basis of new empirical evidence. Of course, Congress’s evaluation of such evidence might be controversial. Congress could attempt to countermand *Kennedy* based not only on newly discovered evidence but also on a different evaluation of the very studies that the Court deemed inconclusive. At an extreme, Congress could engage in a bad faith effort to reverse *Kennedy* based on false or insincerely evaluated empirical information. The Court may therefore have to pass on whether Congress’s empirical judgment is sufficiently credible to displace the Court’s.¹⁵¹ But when evaluating empirical conclusions, the Court should accord the legislature’s views significant deference, as it has repeatedly done in the modern death penalty context.¹⁵² Thus, Congress should have substantial, though not unlimited, leeway in questioning

146. *Id.*

147. See *Furman v. Georgia*, 408 U.S. 238, 302 (1972) (Brennan, J., concurring) (“In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that as currently administered the punishment of death is necessary to deter the commission of capital crimes.”).

148. See *Baze v. Rees*, 128 S. Ct. 1520, 1538 (2008) (rejecting challenge to lethal injection procedure in part because “the alternative that petitioners belatedly propose has problems of its own, and has never been tried by a single State”).

149. *Kennedy*, 128 S. Ct. at 2662.

150. See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997) (noting that the Court “must give considerable deference, in examining the evidence, to Congress’ findings and conclusions”).

151. See *id.* at 195 (“In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress. Our sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.” (citation and internal quotation marks omitted)); Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 104 (“[C]ongressional findings can inform the Court’s constitutional judgment; they cannot substitute for it.”).

152. See *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (plurality opinion).

the Court's independent judgment insofar as that judgment rests on empirical conclusions.¹⁵³

3. *Reasons Outside the Judiciary's Expertise:
Value Judgments*

The most prominent examples of value-based reasoning in *Kennedy* concern proportionality and retribution. These principles are linked in that each is predicated on value judgments regarding the gravity of the offense. Such determinations are inherently moral judgments, as the Court acknowledges. In *Kennedy*, for instance, the Court reasoned that "in terms of moral depravity and of the injury to the person and to the public," murder is inherently more severe than rape, even when the victims are children.¹⁵⁴ This statement is avowedly value-based. Not only does the Court refer to "moral depravity," but it also discusses the possibility of "injury . . . to the public."¹⁵⁵ That type of abstract, depersonalized "injury" presumably relates to retributive values. Thus, the Court later concluded: "In measuring retribution, as well as other objectives of criminal law, it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape."¹⁵⁶ Needless to say, even the inclusion of retribution as a legitimate goal of punishment constitutes a fundamental and highly contestable value choice.

The Court's value-laden statements could be read more modestly. As explained in Part I.D, the Court's independent judgment analysis might constitute an added constraint on Eighth Amendment jurisprudence. That is, punishments might become unconstitutional only when a given punishment has become sufficiently unusual *and* the punishment is cruel. On that approach, *Kennedy's* aforementioned statements about "moral depravity" and "retribution" would simply be read as acknowledging the possibility that popularly held beliefs re-

153. See generally Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971); see also Irving A. Gordon, *The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. U. L. REV. 656 (1977).

154. *Kennedy*, 128 S. Ct. at 2654 (quoting *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion)).

155. *Id.*

156. *Id.* at 2662.

garding morality, retribution, and proportionality explain why states and juries have turned away from the death penalty when imposing punishment for the rape of children. Consistent with that reading is the Court's aforementioned statement that it is "appropriate to distinguish" between murder and child rape.¹⁵⁷ That expression may suggest that although the states acted reasonably in distinguishing child rape from murder, it was not *necessary* for them to have done so; a decision to draw no such distinction might also have been "appropriate." The present Part assumes, however, that the Court's independent judgment constitutes an independently sufficient basis for finding a punishment unconstitutional, even apart from any finding regarding the existence of a national consensus. Accordingly, this Part assumes that the Court's tentative, value-based conclusions have their own constitutional force.

Nor is it implausible for the Court to ascribe some constitutional force to its own moral judgments. True, the Justices are not selected primarily on the basis of their moral wisdom, are in many respects demographically unrepresentative of the national community, and are generally expected to defer to and effectuate the elected branches' moral views.¹⁵⁸ These facts limit the Court's moral authority vis-à-vis the federal political branches and suggest that the moral views of the current Court should not by themselves have Eighth Amendment effect in defiance of popularly held convictions.¹⁵⁹ Still, Supreme Court Justices do have certain advantages over their elected colleagues. The Justices' life tenure offers them considerable insulation from normal accountability mechanisms and might facilitate greater allegiance to conscience over time.¹⁶⁰ In

157. *See id.*

158. *See ELY, supra* note 56, at 103 ("In a representative democracy value determinations are to be made by our elected representatives . . .").

159. *See Coker*, 433 U.S. at 592 ("Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices . . ."); *Gregg v. Georgia*, 428 U.S. 153, 175–76 (1976) (plurality opinion) ("In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)) (internal quotation marks omitted)); *see also Solem v. Helm*, 463 U.S. 277, 290 (1983); *Gore v. United States*, 357 U.S. 386, 393 (1958).

160. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 25–26 (Yale Univ. Press, 2d ed. 1986) (1962) ("Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar . . . This is crucial in sorting out the enduring values of a society . . .").

comparison, democratic pathologies might generate unrepresentative expressions of morality from officials maneuvering for reelection and electorates voting based on half-truths or incomplete information.¹⁶¹ A Court sensitive to these concerns would want to respect and effectuate the nation's true moral convictions while simultaneously screening out false indicators of the same.

One intuitive way to strike the desired balance would be to attribute special weight to long-settled Eighth Amendment holdings predicated on value judgments. When democratically elected branches have had ample opportunity to correct an alleged judicial misstep and have repeatedly chosen not to, there is reason to think that the Court's determination was consistent with national moral views.¹⁶² Surely a rule that has long gone unchallenged would be more reflective of national morality than one that the legislature immediately reversed. Unfortunately, it is hard to say that *Kennedy* is presently accruing credibility on this ground, as the elected branches lack clear guidance that they can challenge the Court's moral judgment. A relatively quick attempt to do so even in the face of such uncertainty, however, would signal strong opposition.¹⁶³

D. Conclusion

Each of the three types of reasons that factor into the Court's independent judgment analysis is susceptible to congressional override in its own way. Reasons relating to constitutional characteristics such as reliability and arbitrariness can be rendered irrelevant when Congress legislatively strikes at those evils. Reasons relating to empirical fact can be overcome by reasonable congressional fact-finding, especially regarding new or sophisticated evidence. And reasons from moral argument

161. See *supra* text accompanying note 102.

162. See *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992) (inferring congressional acquiescence from longstanding Supreme Court interpretation).

163. See Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 58 (2008) ("The less likely the courts are to sustain the statute, the lower the net benefits to the legislator of passing it. Therefore, as the probability of judicial acceptance drops, the higher the anticipated benefits of the statute would have to be to justify enacting it."); see also *supra* text accompanying note 66 (suggesting that evidence from actually imposed punishments and trends in state practice might eventually cast doubt on countervailing evidence from federal legislation).

can be cast into doubt by timely, deliberate national legislation. Moreover, the various strands of analysis that make up the Court's independent judgment are interdependent. As the Court put it: "Each of these propositions, standing alone, might not establish the unconstitutionality of the death penalty for the crime of child rape."¹⁶⁴ "Taken in sum, however," the Court found them compelling.¹⁶⁵ It seems, for example, that a perceived lack of any strong argument from deterrence indirectly meant that greater weight was placed on concerns of arbitrary application. Further, the Court's independent judgment is at least informed by its finding of national consensus. Thus, the Court sometimes weighs moral considerations, including retributive values, in a way that it might not if national views were less settled. Federal legislation affecting one type of Eighth Amendment reason might therefore indirectly challenge the Court's overall constitutional analysis.

III. WHY CAN'T CONGRESS ALSO OVERTURN *LAWRENCE V. TEXAS?*

Saying that there is a "national consensus" on a certain issue is a lot like saying the issue implicates the nation's fundamental values or traditions. Both statements are about beliefs actually held by most Americans over some period of time. This similarity has garnered special attention in recent years because of *Lawrence v. Texas*, in which the Supreme Court evaluated the history of state sodomy prohibitions on the way toward finding such laws incompatible with fundamental national values.¹⁶⁶ The methodological parallels between *Lawrence* and *Kennedy* are obvious and widely commented on.¹⁶⁷ *Lawrence* thus showcases the convergence of substantive due process and Eighth Amendment doctrines during the last fifty years.

164. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2664 (2008).

165. *Id.*

166. 539 U.S. 558, 573 (2003).

167. See, e.g., Ronald J. Krotoszynski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923, 987-96 (2006); Lain, *supra* note 33, at 372 ("Despite these decisions' different nomenclatures, the Court's analysis in each proceeded in the same lockstep fashion."); Sheldon Bernard Lyke, *Lawrence as an Eighth Amendment Case: Sodomy and the Evolving Standards of Decency*, 15 WM. & MARY J. WOMEN & L. 633, 649 (2009).

Because *Lawrence* looks so much like *Kennedy*, it is tempting to read both or neither as democratically reversible. That is, someone who agreed that *Kennedy* created a democratically reversible rule might wonder whether *Lawrence* should be read the same way, and someone who is sure that *Lawrence* created an irreversible constitutional rule might insist that *Kennedy* did so as well. However, both of these conclusions are incorrect because they rest on the same false premise. Although the two opinions are methodologically similar in many respects, *Kennedy* permits legislative correction in ways that *Lawrence* does not. Still, there is much to learn from the comparison, as each case is an effective foil for the other. In particular, reviewing *Lawrence* helps to distinguish between what *Kennedy* actually said and what it would have had to say to insulate itself from democratic correction.

A. *Early Use of Objective Consensus*

Lawrence is informed by a long tradition of state counting in substantive due process cases.¹⁶⁸ Consider the famous substantive due process case *Rochin v. California*,¹⁶⁹ which today would be resolved under the Fourth Amendment.¹⁷⁰ In *Rochin*, the majority held that evidence obtained from coercive stomach pumping was constitutionally inadmissible as a matter of fundamental fairness.¹⁷¹ The Court arrived at its conclusion by invoking “certain decencies of civilized conduct.”¹⁷² Justice Douglas concurred to criticize the Court’s methodology, sardonically noting that “the Court now says that the rule which the majority of the states have fashioned violates the ‘decencies of civilized conduct.’”¹⁷³ For adopting its vague standard and ignoring objective evidence of “civilized” norms,¹⁷⁴ Douglas accused the Court of making its rule “turn not on the Constitution but

168. Substantive due process and Eighth Amendment dissents during the early- and mid-twentieth century regularly made at least some resort to objective indicia of national values. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 126 (1958) (Frankfurter, J., dissenting for four Justices); *Snyder v. Massachusetts*, 291 U.S. 97, 131 (1934) (Roberts, J., dissenting for four Justices).

169. 342 U.S. 165 (1952).

170. See *County of Sacramento v. Lewis*, 523 U.S. 833, 849 n.9 (1998).

171. *Rochin*, 342 U.S. at 168.

172. *Id.* at 173.

173. *Id.* at 178 (Douglas, J., concurring).

174. *Id.* at 173 (majority opinion).

on the idiosyncrasies of the judges who sit here.”¹⁷⁵ The sentiment underlying Douglas’s separate opinion was that appropriate forms of empirical evidence can debunk subjective evaluations of national attitude. More specifically, Douglas presumed that such evidence included state legislation, at least when widespread and longstanding.

The signal event in the jurisprudential evolution of arguments from consensus was Justice Harlan’s dissent in *Poe v. Ullman*.¹⁷⁶ Unlike the majority, Harlan’s dissent found the case ripe and so reached the underlying constitutional question of whether the state could prohibit married persons’ use of contraception.¹⁷⁷ Harlan said that it could not. Later, in *Griswold v. Connecticut*, Harlan’s conclusion won the Court’s support, but the majority adopted different reasoning.¹⁷⁸ Harlan accordingly concurred separately to outline his own approach and to direct readers toward his earlier analysis in *Poe*.¹⁷⁹ Harlan’s *Poe* dissent has thus come to be read as though it were one of the remarkable opinions in *Griswold*¹⁸⁰—indeed, especially remarkable, because it prefigured the outcome in that watershed case. Harlan’s *Poe* dissent is particularly important for those who are scandalized by the main opinion in *Griswold*, in which Justice Douglas deployed his controversial constitutional “penumbras” analysis in a way that seemed capable of justifying any number of privacy rights.¹⁸¹ In contrast, Harlan’s more limited approach has long been considered more compelling.¹⁸²

Harlan’s discussion in *Poe* is quite varied. He canvassed an argument much like Douglas’s “penumbras” analysis in the *Griswold* majority opinion.¹⁸³ He meditated at length on the

175. *Id.* at 179 (Douglas, J., concurring).

176. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

177. *Id.* at 523.

178. 381 U.S. 479 (1965).

179. *Id.* at 499 (Harlan, J., concurring).

180. Indeed, major constitutional law textbooks publish Harlan’s *Poe* dissent appended to or even instead of his *Griswold* concurrence. See, e.g., BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1346 (5th ed. 2006).

181. See *Griswold*, 381 U.S. at 484.

182. See, e.g., Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543, 1565 (2008) (“In *Griswold*, Justice Harlan . . . attempted to discipline the use of substantive due process, by reference to long-standing traditions, and this view is now taken to provide the most plausible understanding of *Griswold*.” (footnote omitted)).

183. See *Poe v. Ullman*, 367 U.S. 497, 549–50 (1961) (Harlan, J., dissenting).

uniqueness and centrality of marriage in America's cultural tradition.¹⁸⁴ And he noted that the State had never actually enforced its measure against married persons, thereby leaving it a constant but unfulfilled "threat."¹⁸⁵ Finally, in a short paragraph, Harlan added his opinion's most famous passage:

But conclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the *use* of contraceptives a crime. Indeed, a diligent search has revealed that no nation, including several which quite evidently share Connecticut's moral policy, has seen fit to effectuate that policy by the means presented here.¹⁸⁶

By adverting to objective evidence of tradition, Harlan avoided or at least mitigated the appearance of judicial legislation. He thus added objective substance to the *Rochin* majority's reassurance that the "vague contours of the Due Process Clause do not leave judges at large."¹⁸⁷ Ironically, Harlan prominently quoted that line, along with *Rochin's* admonition that Justices "may not draw on our merely personal and private notions,"¹⁸⁸ while ultimately relying on the fundamentally empirical approach outlined in Douglas's *Rochin* dissent. Equally ironic, Harlan transformed Douglas's critique into an affirmative theory of substantive due process and then offered that theory as an alternative to Douglas's own analysis in *Griswold*.

Harlan's approach to consensus-based argumentation prefigures recent Eighth Amendment doctrine. Harlan assessed state and federal statutes, and even the policies of other coun-

184. *Id.* at 546–53.

185. *Id.* at 523.

186. *Id.* at 554–55 (footnotes omitted). Earlier in his dissent, Harlan had pointed out the difficulty courts encounter in issuing controversial moral judgments without the benefit of empirical data:

If we had a case before us which required us to decide simply, and in abstraction, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views.

Id. at 547.

187. *Id.* at 544 (quoting *Rochin v. California*, 342 U.S. 165, 170–71 (1952)).

188. *Id.*

tries.¹⁸⁹ And he was concerned not just with the law on the books, but also with past enforcement practices.¹⁹⁰ Harlan thus defined the relevant tradition narrowly: While admitting that many states regulated distribution of contraceptives by health professionals and that Connecticut had undertaken prosecutions against hospitals, Harlan focused on the use of contraceptives by married people.¹⁹¹ This carefully targeted inquiry indicated that the private acts of married persons were specially protected. In all these respects, Harlan anticipated the Court's Eighth Amendment decisions in *Atkins*, *Roper*, and *Kennedy*, which also conducted narrowly drawn inquiries into federal and state practice.

B. *The Eighth Amendment as Substantive Due Process*

More than any other privacy case, *Lawrence v. Texas* blurred the methodological line between substantive due process and the Eighth Amendment.¹⁹² *Lawrence* began by debunking *Bowers*'s analysis of American history and tradition,¹⁹³ noting that by the time *Bowers* was decided, only twenty-four states plus the District of Columbia still outlawed sodomy.¹⁹⁴ That roughly even split calls to mind the (somewhat more stringent) standards of recent Eighth Amendment case law. Again, *Atkins*, *Roper*, and *Kennedy* all prohibited as unusual punitive practices that were limited to at most twenty states.¹⁹⁵ *Lawrence* then turned to trend lines. Before 1961, all fifty states had criminalized sodomy.¹⁹⁶ So by the time *Bowers* conducted its survey of state practice, proponents of sodomy criminalization had lost half their state adherents. And many states that retained anti-sodomy laws rarely if ever enforced them in the relevant con-

189. *Id.* at 554–55 & n.16. *Roper* followed Harlan in considering foreign practice. See *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

190. See *Poe*, 367 U.S. at 554 (Harlan, J., dissenting).

191. See *id.*

192. 539 U.S. 558 (2003).

193. See Coan, *supra* note 74, at 233 (“The Court’s ‘emerging awareness’ analysis is primarily an attack on the historical consensus rationale of *Bowers v. Hardwick* . . .”).

194. *Lawrence*, 539 U.S. at 572 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

195. *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (twenty states); *Lawrence*, 539 U.S. at 573 (thirteen states made sodomy a crime, and of those, four enforced these laws only for homosexual sodomy); *Atkins v. Virginia*, 536 U.S. 304, 313–15 (2002) (twenty states).

196. *Lawrence*, 539 U.S. at 572.

text—that is, against consenting adults.¹⁹⁷ *Lawrence* characterized the foregoing evidence as proof of an “emerging awareness” that adults should enjoy the freedom to engage privately in intimate sexual acts, including sodomy.¹⁹⁸ The trend was already so strong by the 1980s, according to the Court in *Lawrence*, that “[t]his emerging recognition should have been apparent when *Bowers* was decided.”¹⁹⁹ And it “became even more apparent” with time, as the number of anti-sodomy states dropped to thirteen.²⁰⁰ *Lawrence* thus paralleled both the trend-based reasoning in *Atkins*²⁰¹ and the use of actual enforcement evidence in *Roper*.²⁰²

The similarity between *Lawrence* and *Kennedy* extends beyond their common interest in objective indicia of popular views. Even more revealingly, *Lawrence* established approximately the same relationship between empirical evidence and judicial judgment: “History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”²⁰³ This point resembles *Kennedy*’s statement that “objective evidence of contemporary values as it relates to punishment for child rape is entitled to great weight, but it does not end our inquiry”²⁰⁴ and that “the Constitution contemplates that in the end our own judgment will be brought to

197. *Id.* at 569–70.

198. *Id.* at 571–72.

199. *Id.* at 572.

200. *Id.* at 573.

201. Substantive due process jurisprudence tempers its commitment to trends by evincing special caution in the face of rapidly changing or otherwise unstable state and federal practice. See *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (“the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide”); see also *Dist. Attorney’s Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2322 (2009) (“In the past decade, 44 States and the Federal Government” have passed post-conviction DNA evidence statutes, thereby demonstrating that “other responsible solutions” were still “being considered in Congress and state legislatures” (internal quotation marks omitted)); *id.* at 2316 (“States are currently engaged in serious, thoughtful examinations” of post-conviction DNA procedures (quoting *Glucksberg*, 521 U.S. at 719) (internal quotation marks omitted)). Substantive due process doctrine’s concern that trends be stable can be likened to *Roper*’s concern to find the “same consistency of direction of change.” *Roper v. Simmons*, 543 U.S. 551, 565–66 (2005); accord *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

202. See 543 U.S. at 564.

203. *Lawrence*, 539 U.S. at 572 (internal quotation marks and alteration omitted).

204. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658 (2008).

bear.”²⁰⁵ In contrast, older substantive due process cases use the notion of American “history and tradition” to invite investigation into practices during the nineteenth century and beyond. Thus *Bowers* emphasized that sodomy was illegal in the original thirteen states,²⁰⁶ and *Washington v. Glucksberg* insisted that substantive due process rights must be “deeply rooted in this Nation’s history and traditions.”²⁰⁷ *Lawrence* makes clear, however, that “we think that our laws and traditions in the past half century are of most relevance here”²⁰⁸—a rough approximation of the forty-year time frame considered in *Kennedy*’s evaluation of national consensus. In all these ways, *Lawrence* and *Kennedy* methodologically unite the Eighth Amendment and substantive due process analyses.

Kennedy could even be deemed a species of post-*Lawrence* fundamental rights jurisprudence. On that view, the *Griswold* privacy principle—which constitutionally protects acts of sexual intimacy—is akin to the Eighth Amendment’s anti-cruelty norm: The Court’s independent judgment in applying the privacy principle would potentially be sufficient to void a statute all by itself. But in applying the privacy principle, the Court will be critically informed by the presence of national consensus, and perhaps even international consensus, especially in close cases. If this parallel is not quite convincing, the reason may be that substantive due process doctrine is typically framed in positive terms, glorifying the protected right. But the language of liberty can also be expressed by vilifying the negative.²⁰⁹ Sometimes, the vilification approach can be a savvy rhetorical move—as when the Eighth Amendment prohibits cruelty instead of celebrating criminals’ immunity from certain punishments. Taking this lesson to heart, one might say that

205. *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion)).

206. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

207. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks and citations omitted). Prefiguring *Roper*’s consideration of foreign legal sources, *Glucksberg* noted that “in almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide.” *Id.* at 710.

208. *Lawrence*, 539 U.S. at 571–72.

209. See Judith N. Shklar, *The Liberalism of Fear*, in *POLITICAL LIBERALISM: VARIATIONS ON A THEME* 149, 155 (Shaun P. Young ed., 2004) (“[O]ne may . . . be less inclined to celebrate the blessings of liberty than to consider the dangers of tyranny and war that threaten it.”); Judith N. Shklar, *Putting Cruelty First*, in *ORDINARY VICES* 7 (1984).

Lawrence's brand of substantive due process doctrine proceeds as though there were a constitutional provision that prohibited "intrusive and unusual" punishments. And in that case, the only methodological difference between *Lawrence* and *Kennedy* would be the substitution of "intrusive" for "cruel" — that is, of *Griswold's* anti-intrusiveness principle for the Eighth Amendment's anti-cruelty principle.

Yet this substitution is important because the Court is more willing to rely on its own independent judgment in defending privacy as opposed to Eighth Amendment rights. In other words, unusualness seems less necessary in the substantive due process context. *Griswold's* anti-intrusiveness principle is thus "stronger" than the Eighth Amendment's anti-cruelty principle. The privacy principle's relative strength is both cause and consequence of its role in the controversial domain of abortion law. Consider *Roe v. Wade*, where the Court candidly acknowledged at the outset that "a majority of the States" at the time had laws similar to the Texas law under review.²¹⁰ *Roe* later noted that by the late 1950s, "a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother."²¹¹ These findings were diametrically opposed to the state of affairs that Justice Harlan's *Poe* dissent found to be "conclusive."²¹² After all, it is hard to condemn a longstanding national norm for its "utter novelty."²¹³ *Roe* did observe in passing that "a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws."²¹⁴ But the Court immediately undermined this potentially significant recent trend by finding a long-term trend toward *more* restrictive abortion regulation.²¹⁵ Having found that both the status quo and long-term trends supported abortion restric-

210. 410 U.S. 113, 118 (1973).

211. *Id.* at 139.

212. *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting).

213. *Id.*

214. *Roe*, 410 U.S. at 140.

215. *Id.* ("[A]t common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect.").

tions, *Roe* unsurprisingly did not attempt to align its ultimate holding with any developing consensus or norm.²¹⁶

In *Casey*, too, the Court eschewed arguments from consensus—and understandably so.²¹⁷ The Court had to harmonize its theory of abortion rights with its invocation of *stare decisis*.²¹⁸ Any reliance on national views or attitudes would have been badly out of place in an opinion whose main theme was that the judiciary should stand resolute against the shifting winds of popular sentiment.²¹⁹ *Casey* navigated this challenge by grounding *Roe*'s holding in earlier case law, especially Justice Harlan's highly respected *Poe* opinion.²²⁰ Yet *Casey* did so without mentioning the consideration that Harlan ultimately deemed "conclusive"—namely, contemporaneous state practice.²²¹ *Casey* thus reproduced lengthy passages from *Poe* in which Harlan meditates on "history" and "tradition" in relatively subjective terms while avoiding the opinion's comparatively brief discussion of objective metrics of national values.²²² The resulting impression is that the privacy principle is more an art than a science, and more concerned with culture than legal code. *Casey* accordingly argued more from the existential nature of the choice to engage in an abortion than from an analysis of past legislative practice. As the Court put it, "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."²²³ *Casey* thus further entrenched a robust conception of "reasoned judgment"²²⁴—which is to say, the Court's independent judgment—in the domain of personal privacy rights.

216. See Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 839–40 (1986) ("The Court in *Roe* stated only that it does not believe any consensus exists on when human life begins.").

217. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (plurality opinion) (defending the Court's holding "[w]hether or not a new social consensus is developing on" abortion).

218. *Id.* at 854–69.

219. *Id.* at 868.

220. See *id.* at 848–50. Remarkably, the main text of the *Casey* plurality includes not one but two lengthy block quotations from Harlan's *Poe* dissent, for a total of over 300 words. *Id.*

221. *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting).

222. See *Casey*, 505 U.S. at 848–50 (plurality opinion).

223. *Id.* at 852.

224. *Id.* at 849.

C. *Absence of Consensus as a Necessary Condition*

Although *Lawrence* discussed evidence of state practice, it did not purport to depend on the existence of a supportive national consensus regarding the illegitimacy of punishing sodomy. Instead, the central argument in *Lawrence* echoed *Casey*'s.²²⁵ The Court viewed consensual private sodomy as one among many "personal decisions" of existential import, similar to decisions "relating to marriage, procreation, contraception, family relationships, child rearing, and education."²²⁶ Early on, *Lawrence* drew attention to this point by criticizing *Bowers* for asking the narrow question whether the physical act of sodomy merited constitutional protection.²²⁷ This critique reflects the non-empirical side of Harlan's conception of constitutional judgment.²²⁸ Instead of focusing only on laws regarding the specific conduct at issue, *Lawrence* contemplated the broader cultural values that underlie such laws. These sometimes implicit principles are aspirational and so can endure frequent transgression.²²⁹ They are like the Declaration of Independence's universally cherished but unrealized and imperfectly articulated statement that "all men are created equal."²³⁰ To be sure, *Lawrence* followed Harlan (as well as both *Bowers*²³¹ and *Glucksberg*²³²) in defining the right at issue narrowly when gauging state practice. But *Lawrence* defined the right broadly—as a

225. *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003) (quoting *Casey*, 505 U.S. at 851 (plurality opinion)).

226. *Id.* at 574.

227. *Id.* at 566–67 ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

228. See *Poe v. Ullman*, 367 U.S. 497, 549–50 (1961) (Harlan, J., dissenting).

229. Cf. *Lawrence*, 539 U.S. at 578–79 ("[T]hose who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment . . . knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

230. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

231. See *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

232. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("[W]e have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest." (internal quotation marks omitted)).

right to engage in private sexual intimacy—when applying its own judgment to national values and traditions.

When the Court defines a right broadly, the right's foundations in tradition become much more secure. To reject *Lawrence*, the Court implied, would mean repudiating the entire tradition of personal privacy for intimate sexual acts, including intimate sexual acts performed by heterosexuals—and even by married heterosexuals, the relatively narrow subject of *Griswold*.²³³ Because the Court yoked its holding to such a broad and ancient tradition, it is hard to believe that any mere statute would prompt the Court to reconsider its determination. To be sure, conclusions based on broad traditions might still be called into question by strong showings of countervailing consensus regarding specific issues: If the existence of a specific national consensus is evidence of an entrenched tradition, then it is illogical for the Court to upend a specific consensus in the name of a more general tradition. At a minimum, the existence of tension between a specific consensus and a generalized tradition indicates that there are actually two competing traditions at stake.²³⁴ Thus, even if decisions like *Lawrence* do not rest on the existence of a supportive consensus as to the particular practice at issue, the Court's independent appraisal of national tradition may be sufficient to yield constitutional holdings only in the absence of a narrowly drawn countervailing national consensus.²³⁵ Put another way, the difference be-

233. See *Lawrence*, 539 U.S. at 573–74 (“The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”).

234. See *Glucksberg*, 521 U.S. at 722 (“[T]he outlines of the ‘liberty’ specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition.”); *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J., writing plurality opinion, joined on note 6 by only Rehnquist, C.J.); J.M. Balkin *Tradition, Betrayal, and the Politics of Deconstruction*, 11 *CARDOZO L. REV.* 1613, 1618 (1990) (“[O]ur most specific historical traditions may often be opposed to our more general commitments to liberty or equality. . . . Traditions do not exist as integrated wholes. They are a motley collection of principles and counterprinciples . . .”).

235. Professor Hills has argued that *Kennedy* and other Eighth Amendment cases effectively adopt this approach, because they purport to identify national consensus where—in Hills’s view—no such consensus existed. See Hills, *supra* note 69, at 21 (“[T]he Court bases a national ‘consensus’ on the laws of far too few

tween the two cases may be that a supportive consensus was necessary in *Kennedy*, whereas only the absence of consensus was necessary in *Lawrence*.

Consistent with the absence-of-consensus reading, *Lawrence* was repeatedly satisfied to show that historical evidence was murky or indecisive.²³⁶ The Court, in other words, was not determined to know which way the historical evidence leaned, so long as the question was a close one.²³⁷ At the same time, *Lawrence* was at pains to show that there was no narrowly drawn countervailing consensus—that is, that there was no longstand-

states for state counting to be regarded as a convincing source of a national constitutional norm.”); *id.* at 23 (“[I]t is sufficient for the Court to show that its holding has not been *rejected* by a majority of the States.”); *see also* Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 893–94 (2006) (“In effect, the Rehnquist Court’s Eighth Amendment doctrine provided a majority of the states the capacity to veto the Court, while allowing the Court to advance its own doctrine if the states were deadlocked on an issue.”). Yet in relying on the existence of national consensus, *Kennedy* and its forerunners plainly and (given the then extant evidence) reasonably concluded that established national views *at least favored* the outcome ultimately endorsed by the Court. *See, e.g.*, *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2653 (2008) (“The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it.”); *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (explicitly rejecting petitioner’s no-consensus position, in which petitioner conceded that there was not a “national consensus in favor of capital punishment for juveniles but still resist[ed] the conclusion that any consensus exists against it”). To say that national views favor a certain position is different from saying that a position “has not been *rejected* by a majority.” Hills, *supra* note 69, at 23. Moreover, the Court employs standard usage when it uses the term “consensus” to mean majority support. *See* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 482 (1993) (defining “consensus” in part as “the judgment arrived at by most of those concerned”). Part IV.D discusses the normative question whether *Atkins* and *Roper* found consensus based on too few states.

236. *See, e.g.*, *Lawrence*, 539 U.S. at 567–68; *see also id.* at 571 (“In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.”).

237. In contrast, Cass Sunstein has argued that *Lawrence* rested on the idea that criminal prosecutions of homosexuals were “brought on the basis of moral judgments lacking public support.” Sunstein, *supra* note 129, at 28. Sunstein apparently means that *Lawrence* hinged on a finding that anti-sodomy laws were actually opposed by a majority, or perhaps even a supermajority, of Americans. *See id.* at 73 (“I have suggested the possibility of a third and narrower reading, one that stresses, as the Court did, that a criminal ban on sodomy is hopelessly out of accord with contemporary convictions.”).

ing national tradition of criminalizing homosexual sodomy.²³⁸ *Lawrence* thus held that the factual predicates of *Bowers* could be legally discredited simply by showing that they are “not without doubt.”²³⁹ Also consistent with the modified approach is *Lawrence*’s emphatic statement that “*Bowers* was not correct when it was decided”²⁴⁰—that is, in 1986, when there were still “25 States with laws prohibiting the relevant conduct.”²⁴¹ Finally, *Lawrence* expressly declined to pass on the then ubiquitous state practice of limiting legal marriage to heterosexuals,²⁴² thus leaving open the question of whether laws not allowing for same-sex marriage would survive in the event that new trends in state law erode the longstanding countervailing national consensus against same-sex marriage rights.

Unlike *Casey* and *Lawrence*, recent Eighth Amendment cases have defined rights narrowly not just when evaluating state practice but also when applying the Court’s independent judgment. Thus, *Kennedy* did not attempt to include Louisiana’s statute within a broader category of concededly illegitimate state regulations, such as privacy violations, or even a broader category of concededly illegitimate punishments, such as torture. Instead, the Court explored relatively focused issues, such as whether “[t]he incongruity between the crime of child rape and the harshness of the death penalty poses risks of overpunishment”²⁴³ and whether “there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other.”²⁴⁴ Far from viewing itself as vindicating a longstanding tradition, *Kennedy* self-consciously fashioned one more incremental compromise between still-unsettled values while acknowledging that the Court’s capital jurisprudence served competing goals, exhibited “tension between general rules and case-specific circumstances,” “pro-

238. See, e.g., *Lawrence*, 539 U.S. at 568 (“At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.”).

239. *Id.* at 571.

240. *Id.* at 578.

241. *Id.* at 573. *Lawrence* noted, however, that those laws were rarely enforced. See *supra* note 50.

242. *Id.* at 578.

243. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2662 (2008).

244. *Id.* at 2660.

duced results not all together satisfactory,” and, even after *Kennedy*, was “still in search of a unifying principle.”²⁴⁵

By defining the relevant inquiry narrowly, *Kennedy* implicitly conceded that the right at issue lacked broader sources of support in American law and culture. Under those circumstances, it was especially important to find a contemporary national consensus with regard to the specific right asserted—as *Atkins*, *Roper*, and *Kennedy* in fact all argued at length. Narrowly defining the relevant right also had the advantage that, if the Court’s evaluation of national values turned out to be incorrect, the Court’s understanding of fundamental American values and traditions—and, therefore, the Court’s credibility—would remain intact.²⁴⁶ *Kennedy* is thus the kind of judicial decision that can comfortably tolerate democratic correction.

D. Contingency in Substantive Due Process Case Law

The relative strength of the anti-privacy principle as a general matter does not in itself establish that *Lawrence* is immune to democratic correction. Instead, whether a particular substantive due process holding should be read to be democratically reversible is case dependent. Consider the differences between *Kennedy* and the way that the Court would treat a state statute consigning child rapists to the rack. The latter law would be invalidated on the ground that it violated the original meaning of the Eighth Amendment—what might be called the Eighth Amendment’s anti-torture principle.²⁴⁷ Because it transgresses a particularly strong form of Eighth Amendment principle, a state law imposing the rack would be beyond Congress’s power to save. But just as there are various strands of Eighth Amendment jurisprudence, so too there are distinct strands of substantive due process. Accordingly, cases falling within different categories may be more or less amenable to democratic correction.

Consider *Stenberg v. Carhart*²⁴⁸ and *Gonzales v. Carhart*²⁴⁹—the former invalidating a state law imposing what is commonly referred to as a “partial birth abortion” ban and the latter up-

245. *Id.* at 2658–59.

246. *See supra* Part III.B.

247. *See supra* note 25 and accompanying text.

248. 530 U.S. 914 (2000).

249. 550 U.S. 124 (2007).

holding a federal law regarding a similar ban. Without fully exploring these complex decisions, it suffices to point out that in *Gonzales* the Court found it significant that the federal ban was accompanied by congressional findings relevant to the undue burden analysis.²⁵⁰ In particular, Congress had found that there was “a medical consensus that the prohibited procedure [was] never medically necessary.”²⁵¹ Paralleling the methodology exhibited in *Kennedy*, *Gonzales* relied in part on Congress’s “medical consensus” finding while also emphasizing the Court’s “independent constitutional duty” to evaluate that finding.²⁵² Indeed, even the dissenters in *Gonzales* afforded some deference to Congress’s factual determinations,²⁵³ just as the Court has done in other constitutional rights cases.²⁵⁴ The relevant point of disagreement was therefore not whether congressional findings were relevant to the undue burden analysis as a general matter, but rather whether the particular congressional findings at issue in that case were so erroneous as to be unsupported even under a deferential standard. *Gonzales* thus highlights a way in which even abortion rights might be susceptible to democratic influence.

In *Lawrence*, by contrast, there are no conditions for Congress to alleviate and no facts for Congress to assess. Instead, *Lawrence* directly applied a broad principle—namely, the principle that moral considerations alone cannot justify governmental intrusion into matters of private sexual intimacy.²⁵⁵ In this respect, *Lawrence* is more like an Eighth Amendment decision prohibiting a form of torture than it is like *Kennedy*. To be sure, the anti-torture principle has an originalist basis, whereas the

250. *See id.* at 141. *See generally* John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 69 (2008).

251. *Gonzales*, 550 U.S. at 165–66.

252. *Id.* at 165.

253. *See id.* at 178–79 (Ginsburg, J., dissenting) (endorsing district court holdings that relevant congressional findings were “unreasonable and not supported by the evidence”).

254. *See, e.g.,* *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997) (“The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process. Even when the resulting regulation touches on First Amendment concerns, we must give considerable deference, in examining the evidence, to Congress’ findings and conclusions . . .”).

255. *Lawrence* expressly left open the possibility that certain interests justify governmental intrusion into what would otherwise be private conduct. *See Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003).

sexual intimacy principle is grounded in the Court's interpretation of American values and traditions. But that difference is irrelevant here. What matters is that the two principles are comparably fixed. Partly because the privacy principle is so broad, it is not understood to be contingent on present factual conditions—or if it is contingent, only a massive disruption of the status quo could cast it into doubt. Barring such a rupture, newly arising or discovered facts cannot dislodge the principled basis for *Lawrence*.

To further bear out this point, compare a hypothetical case striking down an across-the-board abortion ban with either of the two *Carhart* cases. In both situations the Court would apply *Casey's* undue burden principle to particular facts. But in the case of a blanket ban, there would be no factual uncertainty relevant to the principle's application. As a result, the undue burden would find direct application, without the need for any intermediary findings. By contrast, the so-called "partial birth abortion" bans at issue in the *Carhart* cases forced the Court to determine the extent to which the ban of a particular method of abortion affects women's access to abortions. That intermediate factual determination created room for congressional fact-finding. *Lawrence* is more like the hypothetical case striking down a blanket abortion ban than it is like either *Carhart* decision. After all, there was no serious question in *Lawrence* that the criminal conduct at issue was an intimate sexual act conducted in private. The Court therefore applied its privacy principle directly.

E. Conclusion

The foregoing conclusions can be summarized in a way that parallels the treatment of *Kennedy* in Parts I and II. To begin with, *Lawrence* does not rely on the existence of a national consensus in the way that *Kennedy* apparently does. Thus, a countervailing federal statute would not in itself disprove a key factual predicate on which *Lawrence* depends. Moreover, the independent judgment portion of *Lawrence* is highly resilient to congressional second-guessing: Even if Congress expressed a moral sentiment opposite the one underlying *Lawrence*, a mere statute would not call into question the deep and broad traditions on which *Lawrence* relies. Whether enacted at once or after a lengthy delay, such a law would succeed only in transgressing the nation's aspirational values and not in debunking them.

Finally, *Lawrence* rests on no questionable empirical statements, either within or outside the judicial competence. Thus, there is no discernible room for congressional fact finding. For these reasons, *Lawrence* is not subject to democratic correction—even though it shares *Kennedy*'s methodological structure.

IV. DOES *KENNEDY* STAND UP TO CRITICISM?

The most fundamental question raised by *Kennedy* is whether democratically reversible Eighth Amendment jurisprudence is legitimate and desirable. This Part attempts to reframe the debate over how to answer that question. To be clear, this Part does not offer a first-principles defense of recent Eighth Amendment jurisprudence, whether read as democratically reversible or not. Rather, this Part's goal is to show how some of the typical debates regarding recent Eighth Amendment case law are cast in a different light when one considers that jurisprudence's susceptibility to federal legislative correction. Put another way, this Part hopes to reframe, but not definitively resolve, the debate over *Kennedy*'s legitimacy and desirability. To that end, this Part considers four objections that might be leveled against an Eighth Amendment jurisprudence reversible by federal legislation.

A. *State-based Efforts to Overturn Kennedy*

Congressional legislation may not be the best way to correct erroneous judicial findings of national consensus. Consider the most auspicious challenger—namely, the possibility recently proposed by Professor David A. Strauss that an alliance of separate states could overturn *Kennedy*.²⁵⁶ To exercise this power, the alliance members might each enact statutes, perhaps versions of a “Uniform Act to Overturn *Kennedy*,” pur-

256. See David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 863, 868 (2009) (“[I]f there were to be a large-scale movement toward executing juveniles or the insane, the Court, if it were faithful to the approach it took in *Roper* and *Atkins*, would have to acquiesce—not, to repeat, as a matter of abandoning principle in the face of irresistible popular pressure, but because the Court’s own principle would require such a retreat.”); see also Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 124 n.330 (2000) (noting that widespread adoption of new state laws “might properly trigger Supreme Court reconsideration of [a prior holding], resulting in an openly dialogic and experimental model of unenumerated-rights adjudication”).

porting to impose the death penalty for child rape in the event that *Kennedy* is overturned. Although Strauss does not say so (he believes *Kennedy* depended on its national consensus finding²⁵⁷), these state laws might also provide defendants new procedural protections that address the Court's independent judgment—as discussed above in Part II.C. If enough states joined the alliance, then the Court's consensus finding might be disproved and subsequent capital prosecutions might be upheld. Something like this process occurred in the aftermath of *Furman v. Georgia*.²⁵⁸ After the Court constitutionally invalidated then-existing death penalty procedures, at least thirty-five states legislatively adopted new death penalty procedures designed to address the Court's concerns.²⁵⁹ When *Gregg v. Georgia* approved these new procedures, the lead plurality relied in large part on the states' manifest determination to preserve capital punishment.²⁶⁰

Yet a state-based effort to overturn *Kennedy* encounters special difficulties that a federal law approach avoids. The key problem is that the state-based approach is piecemeal, such that early-enacting states must move without knowing whether other states will follow suit. Thus, early-enacted state statutes would not be efficacious in themselves. Rather, they would do nothing more than endorse proposed policies subject to later, speculative events. In that key respect, anti-*Kennedy* legislation would resemble existing state laws that purport to regulate abortion in the event that *Roe* or other abortion precedents are

257. See Strauss, *supra* note 256, at 867 (“[T]he Court’s analysis leaves no doubt that it would not have invalidated the death penalty in these cases without the ‘indicia of consensus’ and evidence of the trends in opinion.”). But see *supra* note 74; *supra* Parts I.E & II.A.

258. 408 U.S. 238 (1972).

259. See *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976).

260. *Id.* (“The most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person.” (footnote omitted)); see also *id.* at 176. The Court also pointed out that a federal law had been enacted in 1974 “providing the death penalty for aircraft piracy that results in death.” *Id.* at 180. Later, the lead four-Justice plurality in *Coker v. Georgia* underscored the role that state practice had played in *Gregg*. 433 U.S. 584, 593–94 (1977) (plurality opinion). *Coker* then invoked the same post-*Furman* evidence of popular views in striking a capital sentence for the rape of an adult. *Id.* at 492.

reversed.²⁶¹ By contrast, post-*Furman* capital punishment laws did not conflict with on-point Supreme Court precedent and so were efficacious. Also efficacious were pre-*Atkins* and pre-*Roper* state laws respectively abolishing capital punishment for the mentally retarded and for juveniles within those states. Because the merely symbolic passage of presently unenforceable death penalty legislation could be viewed as nothing more than low-cost political posturing unlikely to rouse the political opposition,²⁶² it is not clear that such statutes either would or should count in the Supreme Court's analysis of national consensus.

The piecemeal problem is especially acute because nobody knows how many states are required to overturn a judicially identified national consensus. In this respect, anti-*Kennedy* legislation would be unlike the ratification of a constitutional amendment. When an amendment is proposed, each state knows exactly when the critical portion of states is attained.²⁶³ Thus, the participating states know the legal consequences of their decisions and when they have run out of time to change their minds. By contrast, opposition groups in states engaged in a coordinated effort to overturn *Kennedy* might rest on the assumption either that an insufficient number of additional states would follow suit or that their own state might subsequently revise its "vote" in light of later decisions by other states. Early-passed state laws might therefore be less reflective of actually held public views than late-passed states laws.

To illustrate these points, imagine that twenty-five states have passed anti-*Kennedy* laws, such that state jurisdictions are in equipoise. Some states might then assume that the contest is over and enact pile-on statutes; other states might assume that

261. Cf. CTR. FOR REPRODUCTIVE RIGHTS, WHAT IF ROE FELL? 11 (2007) ("Because these bans don't take effect immediately, they are perceived as less urgent and don't inspire the same public dialogue or outrage often needed to demand their defeat."); Matthew Berns, Note, *Trigger Laws*, 97 GEO. L.J. 1639, 1659–64 (2009) (arguing that a South Dakota law purporting to regulate abortion if *Roe* were overruled did not receive significant attention from legislators or interest groups and would have lacked majority support if it were immediately efficacious); Teresa L. Scott, Note, *Burying the Dead: The Case Against Revival of Pre-Roe and Pre-Casey Abortion Statutes in a Post-Casey World*, 19 N.Y.U. REV. L. & SOC. CHANGE 355, 388 (1992).

262. See CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 261, at 11; Berns, *supra* note 261, at 1659–64.

263. See U.S. CONST. art. V.

the contest is over and enact nothing. In yet other states, opposition might finally start to take seriously the possibility of Supreme Court reconsideration and start agitating for the reversal of early-enacted anti-*Kennedy* statutes. If the Supreme Court were to reconsider its *Kennedy* decision at such a juncture on the basis of these changes in state legislation, the Court would have to evaluate all of these possibilities. The heightened risk of misinterpreting the state law evidence might discourage the Court from revising its consensus finding.

By contrast, federal anti-*Kennedy* legislation should, and almost certainly would, carry great weight with the Court. The reason is that a single countervailing federal statute could undermine the Court's national consensus finding while simultaneously displacing the Court's independent judgment. All participants in the federal legislative process therefore would understand that the key moment for democratic input would be the time of enactment: Before federal anti-*Kennedy* legislation is enacted, the Court's national consensus and independent judgment findings would be intact; afterward, those findings would be cast into serious doubt. Thus, the federal law could contain—and warrant the application of—a jurisdictionally limited capital federal child rape statute. And the federal law would at once open the door to capital state prosecutions for child rape. The federal law's supporters would therefore have strong grounds to believe that their votes would have an actual and not merely symbolic effect on punishments. And the opposition would have every reason to mobilize fully and promptly in order to thwart such a law's enactment.

A state-based alliance might try to address the deficiencies of its piecemeal approach by replicating the ratification cutoff for amendments. In particular, states might style the Uniform Act as an interstate compact dictating that the state laws become effective upon the participation of a majority or supermajority of states, at which point any national consensus would presumably have been disproved.²⁶⁴ This approach is plausible

264. Such an approach might find inspiration in the National Popular Vote Interstate Compact, whereby participating states pledge to commit their Electoral College delegates to the winner of the national popular vote. The Compact activates only when a majority of Electoral College delegates are drawn from states bound by the Compact, at which point the popular vote would effectively dis-

and would rival federal legislation. Still, disadvantages would remain. For example, the compact approach avoids the appearance of mere symbolism by requiring participating states to promise to change their own punitive practices. Yet many states may not presently want to impose capital punishment on child rapists, even if they believe that such punishment is not unconstitutionally cruel in all cases and should be constitutionally available for potential future use, by themselves and other states.²⁶⁵ A federal legislative approach acknowledges this possibility by simultaneously eliminating *Kennedy's* per se constitutional rule and leaving to individual states the option to enact new capital child rape statutes. The federal approach thus offers a more nuanced gauge of national consensus, as well as increased respect for state sovereignty and broader room for state experimentation.

Moreover, there are strong practical reasons why national policy is set through federal legislation and not interstate compacts. Organizing parallel legislation in a majority of states would be a challenging undertaking, particularly given the wide range of potential responses to the Court's independent judgment analysis. Absent federal leadership, it is not clear what authority would be able to propose a widely acceptable model bill. Further, adoption of a ratification cutoff would ensure a significant delay before the effectuation of any compact.²⁶⁶ The longer that process takes, the more courts might suspect that the alliance does not reflect genuine national consensus, despite the ex ante participation threshold—much as some commentators doubt the legitimacy of the Twenty-Seventh Amendment,²⁶⁷ whose congressional endorsement and ultimate ratification were separated by more than two hundred years.²⁶⁸ A federal legislative approach would help avoid these potential problems.

nate the president. See JOHN R. KOZA ET AL., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* (2008).

265. See *infra* text accompanying note 292.

266. For example, despite the salience of the Electoral College after the 2000 presidential election, the National Popular Vote Compact has (at the time of this writing) attracted only five member states. See KOZA ET AL., *supra* note 264, at 380.

267. U.S. CONST. amend. XXVII.

268. See Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 503 (1994).

B. *Identifying Mechanisms for Reconsideration*

Reading *Kennedy* as democratically reversible necessitates identifying a mechanism for such reversal to occur. In criticizing Professor Strauss's state-based approach, described above, Professor Jonathan F. Mitchell has suggested that Supreme Court reconsideration of *Kennedy* could never occur. Professor Mitchell's main concern has to do with vertical stare decisis:

Even if a large number of legislatures defied the Court and enacted statutes authorizing the death penalty for juveniles and child rapists, every trial court judge, bound to follow the Supreme Court's rulings, would bar prosecutors from seeking capital punishment in those cases. Without the ability to secure a death sentence against a juvenile or a child rapist at trial, there would never be an Article III "case" that would enable the Supreme Court to reconsider *Roper* or *Kennedy*.²⁶⁹

In response, Professor Strauss has suggested potential avenues of Supreme Court review, such as interlocutory appeal via state court process.²⁷⁰ A federal statute could do even better by creating a special interlocutory appeal process for federal capital cases, even including (as, for example, in the campaign finance context) expedited Supreme Court review.²⁷¹

269. See Jonathan F. Mitchell, *Modernization, Moderation, and Political Minorities: A Response to Professor Strauss*, LEGAL WORKSHOP, May 3, 2009, <http://legalworkshop.org/2009/05/03/>; see also *Roper v. Simmons*, 543 U.S. 551, 594 (2005) (O'Connor, J., dissenting); *Agostini v. Felton*, 521 U.S. 203, 237–38 (1997).

270. David A. Strauss, *Modernization and Lawlessness: A Reply to Professor Mitchell*, LEGAL WORKSHOP, Sept. 28, 2009, <http://legalworkshop.org/2009/09/28/1619>.

271. It is also worth noting that trial-court judges might permit a capital sentence to issue in a child rape case, despite vertical stare decisis arguments to the contrary. Indeed, unsuccessful lower court efforts to distinguish Supreme Court precedent have in the past prompted the Court to reconsider its own holdings. See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991). Such an outcome is especially likely in connection with *Kennedy* because a trial judge might conclude that new trends in state or federal law have undermined *Kennedy's* contingent reasoning and, therefore, the precedential force of *Kennedy's* holding. Such an analysis would find precedent in *Roper*, which arose because the Missouri Supreme Court decided not to follow the U.S. Supreme Court's earlier holding in *Stanford v. Kentucky*, 492 U.S. 361 (1989). The Missouri Supreme Court had explained its decision not to follow *Stanford* by pointing to new developments in state legislation regarding the juvenile death penalty. Instead of reversing the lower court, the U.S. Supreme Court reversed itself. See Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847 (2006) (arguing that the highly fact-dependent nature of recent Eighth Amendment rules justifies relaxed vertical stare decisis in this area).

The exchange between Professors Mitchell and Strauss also points out another potential obstacle to judicial reconsideration of *Kennedy*—namely, that any child rape that occurred after *Kennedy* might not be punishable by execution due to the Ex Post Facto Clause.²⁷² One way to frame this issue is to ask whether, after enactment of a federal statute designed to overturn *Kennedy*, someone planning to commit child rape would have fair warning that the Supreme Court might reverse itself and, therefore, that he might ultimately be executed for his crime.²⁷³ The answer might well be yes. Indeed, precedent indicates that even an unconstitutional law can provide criminals adequate notice of potential punishments.²⁷⁴ In any event, ex post facto concerns would not apply to child rapes committed before *Kennedy*.²⁷⁵ Such concerns are thus best understood not as reasons why judicial reconsideration might be impossible, but rather as reasons why any federal legislative correction should occur promptly, while authorities can still effectively prosecute pre-*Kennedy* child rapes in states where that offense constituted a capital crime. Further, Strauss has suggested a solution that might apply even in cases where the ex post facto problem does arise. In particular, Strauss proposes that courts might immunize early-prosecuted defendants from capital punishment while using their cases as an opportunity to reconsider *Kennedy* going forward.²⁷⁶ Such an approach would find an analogue in qualified immunity jurisprudence.

In sum, *Kennedy* could be reconsidered through several possible mechanisms. On the narrowest view, post-*Kennedy* legislation would allow state prosecutors in the six states that enacted capital child rape statutes before *Kennedy* to bring capital cases against child rapists who committed their crimes within those

272. See Strauss, *supra* note 270.

273. See *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964) (“[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law . . .” (emphasis added)).

274. See *Dobbert v. Florida*, 432 U.S. 282, 297 (1977) (finding that a state capital statute enacted before *Furman*, though ultimately shown to be unconstitutional, nonetheless provided notice of potential capital sentence, “[w]hether or not [it] would in the future[] withstand constitutional attack, [because] it clearly indicated Florida’s view of the severity of murder and of the degree of punishment which the legislature wished to impose”).

275. See *Carmell v. Texas*, 529 U.S. 513, 521–22 (2000).

276. Strauss, *supra* note 270.

states and while those statutes were still enforceable. Broader views are also quite plausible. Federal legislation attempting to reverse *Kennedy* could easily create an interlocutory appeal procedure in federal capital cases, thus allowing the statute's constitutionality to be appealed to the Supreme Court the first time the law is applied in federal court. Moreover, such a statute would at least arguably supply adequate notice to overcome ex post facto concerns, thus making the statute applicable to any subsequent child rape in the United States. And even if the Court ultimately ruled that such a statute did not in fact supply adequate notice for ex post facto purposes, state and federal prosecutors could raise such an argument in good faith, thus allowing the Court to reject that argument while using the case as an opportunity to reconsider *Kennedy*. In no event would reconsideration be impossible—and it would at least arguably be guaranteed.

C. *Chilling and Limbering Eighth Amendment Jurisprudence*

Reversible Eighth Amendment jurisprudence requires the Court to declare a national consensus with full knowledge that Congress might prove that bold declaration incorrect. Just as trial courts do not like being overruled by appellate courts, the Supreme Court presumably does not relish congressional supersession. As a result, the Court's statutory interpretation decisions may be influenced by the perceived likelihood of congressional override.²⁷⁷ The Court might be especially averse to exposing itself to legislative correction in the Eighth Amendment context. Instead of channeling the stale and often obscure intent of past congresses, as in most statutory interpretation cases, *Kennedy* declares present and fundamental national values. If Congress and the President instantly disagreed with the Court's assessment, the Court might look out of touch. Fearing the resulting loss of public esteem, the Court might be more reluctant to make legislatively reversible Eighth Amendment rules.²⁷⁸ After all, constitutional

277. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 398 (1991) ("The Court will not overrule a statutory precedent that seems to enjoy support in the current Congress, but will consider overruling a statutory precedent that the Court has reason to believe the current Congress would not protect with an override.").

278. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (plurality opinion) (stating that overruling *Roe* "would address error, if error there was,

rules immune to legislative reversal invite speeches and grandstanding, but offer no realistic avenue for action either by the federal political branches or by state governments.

Yet the foregoing argument overlooks both the risks of making erroneous constitutional holdings and the benefits of democratically reversible constitutional holdings. To the extent that the Court declares constitutional rules based on non-existent national consensuses, its decisions become the object of scorn. And irreversible constitutional rules magnify the risk of backlash *even when the Court's consensus analysis is correct* because they make it impossible to know what the democratic process would have produced. Critics are thus free to assert that their view is dominant, even if it is actually representative of only a vocal minority. Democratically reversible constitutional holdings alleviate these tensions. If the Court makes a controversial consensus holding while admitting the possibility of correction, then the absence of correction would vindicate the Court's decision.²⁷⁹ On the other hand, any corrective action would calm social resentment by giving voice to popular will. Instead of being an embarrassment to the Court, a democratic response would promote constructive dialogue between the branches.²⁸⁰ This dialogic characterization would be especially apt if the Court's independent judgment analysis prodded Congress to take steps to address the Court's expert concerns, with the likely effect of enhancing the Court's stature.²⁸¹

at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law"). This Article takes for granted that *Kennedy* did not "resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases" in which "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division." *Id.* at 866–67.

279. See Dan T. Coenen, *The Pros and Cons of Politically Reversible "Semisubstantive" Constitutional Rules*, 77 *FORDHAM L. REV.* 2835, 2883–84 (2009) ("[T]he availability of semisubstantive rules [subject to legislative override] may well cause courts to vindicate constitutional norms by way of a second-look approach when those norms would otherwise go wholly unprotected.").

280. See Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 *BROOK. L. REV.* 1109, 1109 (2006); Dorf & Friedman, *supra* note 151, at 104.

281. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997); Carter, *supra* note 216, at 856–57 (arguing that the enforcement power is "Congress's most effective tool for expressing its strong disapproval of a judicial decision accepting or rejecting a claim of fundamental right without risking the Court's legitimacy, hence the Constitution's, hence ultimately its own.").

It is impossible given the state of empirical knowledge regarding judicial behavior to know whether the possibility of democratic reversal best balances the competing goals at stake. Similar uncertainty surrounds statutory and constitutional interpretation as a general matter. Is the Court so awed by its own power to fashion irreversible constitutional rules that it is restrained in doing so? Or is the Court more restrained in statutory interpretation cases where chastisement by Congress might prompt greater caution? Without better evidence, we cannot reliably know whether the possibility of democratic correction would be an inducement to activism, a chilling deterrent, or simply a source of responsible jurisprudence.

D. Originalism versus Reversible Eighth Amendment Doctrine

Finally, one might ask whether it is legitimate for the Court to construe the Eighth Amendment dynamically based on contingent arguments from consensus. This question shifts the baseline typically assumed during debates over Eighth Amendment jurisprudence. Normally, the relevant choice is between dynamic constitutional interpretation yielding rules that are unsusceptible to democratic correction and creating no rule at all. Advocates of judicial restraint might prefer the second option. Given current Eighth Amendment jurisprudence, however, the real choice is not between irreversible rules and inaction but rather between irreversible rules and reversible rules. Because *Kennedy* is conventionally read as having created an irreversible rule, advocates of judicial restraint should celebrate any reading of *Kennedy* that renders the decision subject to democratic correction. Such a move would be entirely in the direction of democratic empowerment and judicial modesty.

Of course, some critics will insist that the Eighth Amendment is not at all susceptible to dynamic interpretation and that *Kennedy* and its ilk should be rejected as bad constitutional law. To resist this critique, *Kennedy's* defenders must be prepared to justify the decision not simply as an improvement over the conventional understanding of existing precedent but also as correct in the first instance. Many readers will find this task quite simple. The Eighth Amendment's reference to "unusual" punishments can be read to invite an inquiry into national practices, and its reference to "cruel" punishments might authorize the Court's use of its independent judgment to mine Eighth

Amendment values.²⁸² Based on such well-worn arguments, many commentators conclude that it is appropriate to interpret the Eighth Amendment in a dynamic fashion.²⁸³

Yet *Kennedy's* staunchest critics will likely find the familiar retorts inadequate. An originalist, for example, would insist that the phrase “cruel and unusual punishment” had a generally accepted public meaning at the time of the Eighth Amendment’s ratification,²⁸⁴ and that the only legitimate means of expanding that constitutional proscription is through the Article V amendment process.²⁸⁵ At a minimum, an originalist might insist that the Court require a level of national consensus comparable to that required under Article V,²⁸⁶ which demands the concordance of the federal government as well as three-quarters of the various states.

There is no way to persuade an originalist that *Kennedy* is legitimate, whether or not the decision is read as democratically reversible. After all, the originalist’s quarrel is with dynamic constitutionalism in all its guises and not just with the specific arguments set out in *Kennedy*.

Still, *Kennedy's* brand of dynamic constitutional interpretation is unique in that it mitigates the underlying concerns that motivate many originalists. When an originalist rejects the possibility that the plain text of the Eighth Amendment invites judicial inquiry into the contemporary unusualness and perceived cruelty of punishments, her underlying fear is that the Constitution might be unconstitutionally amended by judicial

282. See *supra* Parts I.D, II.A.

283. See, e.g., Calabresi, *supra* note 60, at 144.

284. See *Harmelin v. Michigan*, 501 U.S. 957, 975–90 (1991) (Scalia, J.) (opinion for two Justices).

285. See *infra* note 287; THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act.”).

286. See Steven G. Calabresi, *Lawrence, the Fourteenth Amendment, and the Supreme Court’s Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1128 (2004) (“I think the Court’s analysis in *Atkins v. Virginia* is essentially sound, *but* that the Court ought not to have invalidated the death penalty for the retarded until at least thirty-eight out of fifty states had rejected it—a three quarters majority.”).

fiat.²⁸⁷ Yet arguments from consensus are at least attentive to Article V's function, if not to its precise form. True, under Article V, constitutional amendments require supermajorities of both houses of Congress to pass on a specific amendment text, which must then obtain the concurrence of three-quarters of state legislatures. But that daunting set of procedural hurdles is there for a reason: to ensure that constitutional amendments spring from national consensus.²⁸⁸ *Kennedy* attempts to achieve that same goal by different means. When states or the federal government turn away from a previously employed mode of punishment, they make specific decisions of actual legal consequence.²⁸⁹ In these respects, state legislatures' decisions regarding capital punishment are analogous to their decisions regarding constitutional amendments. When a distinct majority of states make the same decision regarding capital punishment,

287. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 551 (1994) ("The central premise of originalism (and of Marshall's opinion in *Marbury*) is that the text of the Constitution is *law* that binds each and every one of us until and unless it is changed through the procedures set out in Article V."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) ("The purpose of constitutional guarantees [is] to require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside."). Of course, not all originalists believe that the Article V amendment process is exclusive. See, e.g., Amar, *supra* note 57, at 1044 (noting that a majoritarian national referendum may amend the Constitution). Nor do all self-identified originalists oppose dynamic readings of the Eighth Amendment. See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–96 (2007).

288. See *Dillon v. Gloss*, 256 U.S. 368, 374–75 (1921) (defending a present consensus requirement on the grounds that the point of Article V is to "reflect the will of the people in all sections at relatively the same period"). But see Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 722–23 (1993) ("Article V thus requires *not contemporaneous consensus*, but the existence of concurrent enactments." (emphasis added)).

289. The *Kennedy* dissent argued that state and federal legislative decisions not to reenact capital rape statutes reflected nothing more than respect for dicta in the Court's *Coker* decision. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2666–69 (2008) (Alito, J., dissenting). The *Kennedy* majority disagreed. *Id.* at 2655 (majority opinion). Notably, a constitutionally significant trend away from capital rape statutes may have existed even before *Furman*: By 1971, only sixteen states and the federal government authorized the death penalty for rape of an adult woman, see *Coker v. Georgia*, 433 U.S. 584, 593 (1977) (plurality opinion), and those provisions were last enforced against a child rapist in a 1964 Missouri execution, see *Kennedy*, 128 S. Ct. at 2651. By contrast, rape at the Founding was a capital crime in all jurisdictions. See STUART BANNER: THE DEATH PENALTY: AN AMERICAN HISTORY 5 (2002).

consistent with federal government practice, something like the ratification of a constitutional amendment has taken place.²⁹⁰

Of course, a judicial finding of national consensus cannot be equated with the passage of an actual constitutional amendment, for many reasons. The Court has been willing to find a consensus based on the practice of thirty states, compared with the thirty-eight required under Article V.²⁹¹ Moreover, the Court does not—and cannot—replicate Article V’s requirement of concurrence by two-thirds of both houses of Congress. Further, trends in federal and state punishment are typically unaccompanied by an awareness that constitutional law will change based on the decisions of individual states. These decisions consequently lack the public deliberation and salience usually associated with constitutional lawmaking. And many decision makers who support the trend as a matter of state (or even federal) law might not support a constitutional rule foreclosing geographic diversity and future experimentation.²⁹² For example, state legislators might simply want to eliminate a particular punishment within their own state as a matter of policy, perhaps only on an experimental basis, without also declaring

290. The leading critics of the Court’s state-counting methodology reject any comparison with the Article V process. *See, e.g.,* 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, 1092–93, 1113 n.111 (2006). By contrast, at least one originalist who considered *Atkins* in the context of Article V has concluded that recent Eighth Amendment jurisprudence is methodologically legitimate, or close to it. *See* Calabresi, *supra* note 286, at 1128–29 (“Article V clearly says that three-quarters of the states is the consensus required to adopt a constitutional amendment, and it makes sense to me to use at least this same number for figuring out when evolving standards of decency have changed for purposes of the Eighth Amendment.”).

291. *See* Calabresi, *supra* note 286, at 1128–29; *see also* Jacobi, *supra* note 290, at 1113 n.111; Krotoszynski, *supra* note 167, at 1001–02.

292. For an example of the Court rejecting such a possibility, consider *Roper*. As the Court recognized, in 1992 the Senate ratified a treaty, the International Covenant on Civil and Political Rights, subject to the President’s proposed reservation concerning the continued legality of executing juveniles. By contrast, in the Federal Death Penalty Act of 1994, Congress deliberately eliminated the federal death penalty for juveniles. One could interpret these dueling decisions to mean that the federal government believed that executing juveniles was bad policy at the federal level but an appropriate area for state diversity and experimentation. *Roper* rejected this argument based on evidence suggesting that national consensus had solidified only after the treaty’s ratification, thus effectively discounting the treaty evidence as obsolete. *See Roper v. Simmons*, 543 U.S. 551, 567 (2005). This analysis leaves open the question of what the Court would have done if the treaty had been the more recent data point.

that the punishment is cruel or that it should be permanently unconstitutional on a national scale. Thus, the fundamental conceptual leap in *Atkins*, *Roper*, and *Kennedy*—the judicial inference that efficacious state policy decisions regarding punishments shed light on national norms of what is cruel and unusual—may not always hold true.

Still, one should not make too much of the discrepancies between Article V amendments and *Kennedy's* dynamic method of interpreting the Eighth Amendment. The difference between seventy-five and sixty percent of states is more a matter of degree than of kind. The same can be said of requiring three-quarter votes in Congress as opposed to requiring either two-thirds of Congress or majorities in Congress as well as presidential approval. Furthermore, *Atkins*, *Roper*, and *Kennedy* have put state and federal lawmakers on notice that their decisions regarding the scope of capital punishment crucially influence judicial constructions of the Eighth Amendment. Although these decisions do not normally spring from national public consensus or enhanced civic deliberation, the same can be true of amendments. Take the Fifteenth and Eighteenth Amendments, which may actually have been opposed by a majority of Americans,²⁹³ or the Twenty-Seventh Amendment, whose ratification process spanned more than two centuries.²⁹⁴

Equally important, reading *Kennedy* as democratically reversible should assuage originalists' concerns regarding anti-democratic constitutional dynamism. Admittedly, it is easier to generate a national consensus under *Kennedy* than to enact an Article V amendment. But if *Kennedy* is democratically reversible, then it is also much easier to correct than a constitutional amendment. The procedural differences between amendment-making and Eighth Amendment decisions such as *Kennedy* are thus associated with correspondingly distinct legal conse-

293. See Amar, *supra* note 57, at 1099 (“[T]here is some evidence that prohibition was in fact opposed by a majority of voters even at the time of [the Eighteenth Amendment’s] adoption.”); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1923–24 (1995) (“[I]n clear contravention of the wishes of a majority of citizens in most Northern states, Republicans rammed the Fifteenth Amendment through Congress and the requisite number of state legislatures So much for the notion of congressional agents accurately reflecting the preferences of We the People.”).

294. See *supra* note 268.

quences. Normal legislation made *Kennedy*, and normal legislation can unmake it, too.

In sum, *Kennedy* addresses originalist concerns in two important and interrelated ways. First, *Kennedy* looks to the same basic metrics of democratic will that both originalism and Article V direct courts to examine: federal and state legislative decisions. Second, to the extent that *Kennedy* evaluates those metrics more leniently than Article V, *Kennedy* also allows for a correspondingly more accessible means of democratic correction in the form of countervailing federal legislation. These are major concessions to the democratic values underlying originalism that are absent from most instances of dynamic constitutional interpretation.

E. Conclusion

On balance, *Kennedy* is a stronger, more defensible decision when read as having instantiated a democratically reversible holding. The most auspicious way for democratic processes to revise *Kennedy* is through decisive federal action. In comparison, a piecemeal state-based effort such as the one proposed by Professor Strauss is more difficult and less likely to be viewed as a reliable indicator of national attitudes. Moreover, there is no compelling reason to conclude that Eighth Amendment interpretation, subject to democratic correction, would yield judicial under-enforcement. Indeed, a dynamic Eighth Amendment that does not admit of democratic correction may be more likely to threaten the Court's public esteem and deter the Court from vigorously defending criminal defendants' rights. Finally, reading *Kennedy* as democratically reversible substantially mitigates originalist objections based on Article V. In comparison with other forms of dynamic constitutional interpretation, *Kennedy* is especially, and perhaps uniquely, resistant to originalist criticism.

CONCLUSION: FIVE WAYS OF READING *KENNEDY*

This Article has delineated five possible ways of understanding *Kennedy* and its susceptibility to legislative correction:

First reading: A supportive national consensus is *always* necessary to find an Eighth Amendment violation, including in *Kennedy* itself.

Second reading: Supportive national consensus and the Court's independent judgment are fungible factors, such that

a strong showing with regard to one factor can sometimes compensate for a weak showing with regard to the other. Thus, a supportive national consensus is only *sometimes* required to find an Eighth Amendment violation. Further, in *Kennedy* the independent judgment question was close, and *Kennedy* therefore hinged on the existence of a supporting national consensus.

Third reading: A supportive national consensus is only *sometimes* required to find an Eighth Amendment violation, as on the second reading. However, the independent judgment question in *Kennedy* was clear enough to justify the Court's holding even without a supportive national consensus.

Fourth reading: A supportive national consensus is *never* required to find an Eighth Amendment violation, including in *Kennedy* itself. The Court's independent judgment therefore constituted an independently sufficient justification for *Kennedy's* holding.

Fifth reading: *Kennedy* considered evidence of national consensus only to make sure that there was no narrowly drawn *countervailing* national consensus. Having established the absence of any such consensus, the Court employed its independent judgment to discern deep national traditions unsusceptible to legislative revision.

The foregoing five readings ascribe increasing weight to the Court's independent judgment and, therefore, diminishing corrective power to Congress. On either the first or second approaches, a federal civilian law designed to reinstate the punishment proscribed in *Kennedy* would disprove the Court's supportive consensus determination and thus undermine *Kennedy's* holding. On either the third or fourth approaches, *Kennedy's* independent judgment alone warranted the Court's determination that Louisiana's statute violated the Eighth Amendment. The Court's blanket prohibition on capital punishment for child rape, however, would still have rested on factual contingencies. So although Congress's mere say-so would not overturn *Kennedy* under the third and fourth readings, Congress could create constitutionally adequate legislative remedies that address the concerns raised by the Court's independent judgment and thereby permit the formerly forbidden punishment to be imposed in some circumstances. Finally, on

the fifth reading, *Kennedy* is really just like post-*Lawrence* substantive due process jurisprudence, such that *Kennedy* crafted a constitutional rule with deep foundations in tradition entirely beyond congressional influence.

Although this Article has argued against the fifth reading and tentatively endorsed the second,²⁹⁵ existing Eighth Amendment case law makes it difficult to know which of the first four readings is most consistent with the Court's jurisprudence. Indeed, it is most likely that the Court itself has not definitively chosen which of these approaches is correct for the sensible reason that it has not yet had to do so.

Given his public opposition to the Supreme Court's holding in *Kennedy*,²⁹⁶ President Obama should consider proposing legislation that would overturn the decision. To maximize its chance of survival in court, the President's proposed legislation should conservatively assume that the fourth reading outlined above is correct. Accordingly, the proposed bill should declare that the rape of a child is, at least under some circumstances, as morally heinous as murder;²⁹⁷ include factual findings evaluating available empirical evidence on whether imposing capital punishment for child rape yields social benefits, such as deterrence;²⁹⁸ create a jurisdictionally limited federal capital crime for child rape;²⁹⁹ provide an expedited interlocutory appellate process in federal capital cases;³⁰⁰ and, perhaps most importantly, invoke the Fourteenth Amendment's Section 5 enforcement power to address the Supreme Court's concerns regarding the arbitrary imposition of capital punishment. In particular, the bill should limit the use of child victim testimony, especially when uncorroborated, and specify mandatory aggravating and mitigating factors so as to structure and curb capital juries' sentencing discretion.³⁰¹ This Article has argued from the current state of Eighth Amendment jurisprudence that courts should uphold such a statute and, more immediately, that Congress may in good faith enact it.

295. See *supra* Part I.E.

296. See *supra* note 19.

297. See *supra* Part II.C.3.

298. See *supra* Part II.C.2.

299. See *supra* text accompanying notes 108–10.

300. See *supra* Part IV.B.

301. See *supra* Part II.C.1.