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# HARVARD LAW & POLICY REVIEW

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# HARVARD LAW & POLICY REVIEW

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# The "Alito Hypothesis" in an Era of Emboldened One-Party State Rule

*Wayne A. Logan**

## Introduction

The Supreme Court has long relied upon state legislative preferences when establishing federal constitutional norms. With capital punishment, for instance, state laws figure centrally when deciding whether a particular practice satisfies Eighth Amendment "evolving standards of decency."[1] *Kennedy v. Louisiana*,[2] which relied on the paucity of states authorizing the execution of child rapists to bar the practice on Eighth Amendment proportionality grounds, exemplifies this reliance—but with a catch. In a forceful dissent, joined by three of his colleagues, Justice Samuel Alito hypothesized that the majority understated the actual extent of state support of the practice, reasoning that the Court's earlier decision in *Coker v. Georgia*,[3] which barred execution for rape of an adult, also on proportionality grounds, likely discouraged states from enacting capital child rape laws.[4] Echoing the view of the Louisiana Supreme Court in proceedings below[5] and scholars before him,[6] Justice Alito reasoned that when enacting a new law "is likely to be futile," because of Supreme Court precedent, the absence of legislation "cannot reasonably be interpreted as an expression of [legislators'] understanding of prevailing societal values. In that atmosphere, legislative inaction is more likely to evidence acquiescence."[7]

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* Steven M. Goldstein Professor, Florida State University College of Law. Thanks to Paolo Annino, Jacob Eisler, Brandon Garrett, David Logan, Michael O'Hear, Michael Perry, Richard Re, Meghan Ryan, Chris Slobogin, and Alex Tsesis, as well as editors of the *Harvard Law and Policy Review*, for their very helpful comments, and Kat Klepher and Kavita Samlal for their much-appreciated research assistance.

[1] Trop v. Dulles, 356 U.S. 86, 101 (1958); *see also* Atkins v. Virginia, 536 U.S. 304, 312 (2002) (stating that the "clearest and most reliable objective evidence of contemporary values is legislation enacted by the country's legislatures" (citation omitted)).

[2] 554 U.S. 407 (2008).

[3] 433 U.S. 584 (1977).

[4] *Kennedy*, 554 U.S. at 448 (Alito, J., dissenting).

[5] State v. Kennedy, 957 So. 2d 757, 788 (La. 2007), *rev'd*, Kennedy v. Louisiana, 554 U.S 407 (2008), *as modified* (Oct.1, 2008), *opinion modified on denial of reh'g*, 554 U.S. 945 (2008).

[6] *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, 1150 (2006); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 Mich. L. Rev. 245, 270 (1995); *see also* Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 21 (1962) (asserting that "[b]esides being a counter-majoritarian check on the legislature and the executive, judicial review may, in a larger sense, have a tendency over time seriously to weaken the democratic process"); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 155–56 (1893) (stating that judicial review "has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality").

[7] *Kennedy*, 554 U.S. at 454 (Alito, J., dissenting).

This essay questions the utility of Justice Alito's presumption of state legislative quiescence, what I term the "Alito Hypothesis,"[8] in a time when multiple states are governed by politically conservative one-party rule,[9] and the Supreme Court is dominated by conservative justices deferential to federalism concerns[10] and less wedded to stare decisis.[11] Florida provides a counter-example case in point. In Spring 2023, the Republican-supermajority Florida legislature passed, and Republican Governor Ron DeSantis signed into law, a provision adding child rape to the state's list of death-eligible offenses. In doing so, Florida made clear that it was not deterred from enacting a facially unconstitutional law, expressly proclaiming that *Kennedy* "was wrongly decided and an egregious infringement of the states' power to punish the most heinous of crimes."[12] Governor DeSantis, for his part, acknowledged that the new law was motivated by a desire to provide the current U.S. Supreme Court an opportunity to reconsider *Kennedy*.[13]

The discussion here proceeds as follows. Part I surveys the Court's reliance on state legislative preferences when gauging whether a national consensus exists regarding applications of the death penalty, focusing especially on the majority and dissenting opinions in *Kennedy.* Part II discusses recent developments in Florida, which cast doubt on Justice Alito's hypothesis. Rather than being deterred from enacting a law at odds with *Kennedy,* or evidencing uncertainty of uncertainty as to its applicability, the Sunshine State purposely enacted a facially unconstitutional law, providing the potential starting point for creation of a new national consensus, one permitting execution of child rapists.

Part III looks ahead, considering the impact if other states follow Florida's lead. Although legislators might limit their efforts to resuscitating capital child rape laws, they will more likely expand their focus to other constitutional domains defined by Court precedent with which they disagree. These not only include precedent prohibiting other punishment practices (capital and non-capital), but also those affording protections to criminal defendants and limiting other government practices imperiling civil liberties, such

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[8] Invoking the term "hypothesis" is intended to parallel Justice Marshall's hypothesis in an earlier capital case: that "American citizens know almost nothing about capital punishment" and that, if informed, they would find the death penalty morally unacceptable. Furman v. Georgia, 408 U.S. 238, 362–63 (1972) (Marshall, J., concurring).

[9] *See* Mitch Smith, *In Statehouses, New Laws Show a Deeper Divide*, N.Y. Times (June 4, 2023), https://www.nytimes.com/2023/06/04/us/state-legislatures-opposite-agendas.html [https://perma.cc/3JW6-A5R7] (noting that the 2022 election resulted in 22 states being subject to one-party Republican political rule, and that three more states may have the same composition before 2024).

[10] *See, e.g.,* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (stating that the "Constitution does not prohibit the citizens of each state from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.").

[11] *See generally* Morgan Johnson, *Conservative Stare Decisis on the Roberts Court: A Jurisprudence of Doubt*, 55 U.C. Davis L. Rev. 1953 (2022).

[12] Fla. Stat. § 921.1425(1) (West 2023). As discussed later, the legislature also disavowed *Buford v. State*, 403 So. 2d 943 (Fla. 1981), which relied on *Coker* to infer that the state's then-existing child rape capital law was unconstitutional, proclaiming that it "was wrongly decided." Fla. Stat. § 921.1425(1) (West 2023); *see* Part II *infra*.

[13] *See infra* note 49 and accompanying text.

as denying individuals the right to contraception.[14] In time, in short, rather than being dissuaded from enacting contrarian laws, as the Alito Hypothesis would dictate, emboldened states enacting facially unconstitutional laws could well spearhead a major overhaul of the nation's federal constitutional rights infrastructure.

## I. Discerning a "National Consensus" Regarding Death

Today, over fifty years after *Furman v. Georgia*[15] outlawed capital punishment nationwide, the analytic structure for determining whether a particular death penalty practice is constitutionally excessive under the Eighth Amendment is well established. The Court must assess whether the practice satisfies evolving standards of decency,[16] an inquiry that depends on whether a "national consensus" exists regarding a practice, based on "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions."[17] In addition to considering these criteria, the Court exercises its own independent judgement in deciding whether a practice is constitutional, based on its precedents and understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose.[18]

The Court's 1977 decision in *Coker v. Georgia*[19] was an early-modern day effort to assess national consensus. In *Coker*, a six-justice plurality held that imposing the death penalty for the rape of an adult woman, without the victim's death, violated the Eighth Amendment.[20] In assessing the history of capital rape, the Court noted that in 1925 eighteen states, the District of Columbia, and the federal government had statutes authorizing the death penalty for rape.[21] Yet after *Furman*, only six states enacted new laws authorizing the death penalty for rape,[22] and by 1977 only Georgia had a valid statute in effect.[23] The *Coker* plurality also noted that Georgia capital juries rarely imposed the death penalty for rape when they had the opportunity to do so.[24] On the basis of this "objective evidence," the Court concluded that imposition of the death penalty for the rape of an adult was excessive under the

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[14] *See infra* notes 112-20 and accompanying text.

[15] 408 U.S. 238 (1972).

[16] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[17] Roper v. Simmons, 543 U.S. 551, 563 (2005).

[18] *See* Enmund v. Florida, 458 U.S. 782, 797 (2002).

[19] 433 U.S. 584 (1977).

[20] *Id.* at 584. Justice White, joined by Justices Stewart, Blackmun, and Stevens, provided the main opinion for the Court; Justices Brennan and Marshall concurred based on their principled constitutional opposition to the death penalty; and Justice Powell also concurred, reasoning that death was disproportionate punishment for the crime of raping an adult woman where, as in Coker's case, the crime was not committed with excessive brutality and the victim did not sustain serious or lasting injury.

[21] *Id.* at 593.

[22] *See id.* at 594–95.

[23] *Id.* at 595–96.

[24] *Id.* at 597.

Eighth Amendment.[25] Applying its own independent judgment, the Court reasoned that the offense, while "without doubt deserving of serious punishment," did "not compare to murder, which does involve the unjustified taking of human life."[26]

In 1995, almost two decades after *Coker*, Louisiana enacted a law allowing the death penalty for non-fatal rape of an individual under the age of twelve.[27] Thereafter, five other states enacted capital child rape laws (Georgia, Montana, Oklahoma, South Carolina, and Texas),[28] each of which was narrower in scope (for instance, unlike Louisiana, requiring a prior rape conviction or other aggravating circumstance).[29] Florida previously made child rape punishable by death but the Florida Supreme Court's 1981 decision *Buford v. State* invalidated the law, stating that although *Coker* outlawed death for rape of an adult, it "compel[led] that a sentence of death [without the victim's death] is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[30]

In *Kennedy v. Louisiana*, the Supreme Court, by a 5-4 vote, held that Louisiana's capital child rape law was excessive, because the child victim was not killed, and therefore violated the Eight Amendment.[31] Noting the paucity of states with a capital child rape law of any kind, the Court stated that the

> evidence of a national consensus with respect to the death penalty for child rapists… shows divided opinion but, on balance, an opinion against it. Thirty-seven jurisdictions—36 States plus the Federal Government—have the death penalty…[O]nly six of those jurisdictions authorize the death penalty for rape of a child. Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in [44 states and D.C.], petitioner could not be executed for child rape of any kind.[32]

The Court acknowledged that had there been a consistent direction of change in favor of state capital child rape laws this might "counterbalance an otherwise weak demonstration of consensus," but no such showing existed in the record.[33] The Court attached importance to the fact that there had been no executions for rape of a child or an adult for over forty years,[34] and held

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[25] *Id.* at 592-93.
[26] *Id.* at 598.
[27] *Kennedy*, 554 U.S. at 423 (citing La. Stat. Ann. §14:42(A)(4) (1996)).
[28] *Id.*
[29] *Id.*
[30] 403 So. 2d 943, 951 (Fla. 1981).
[31] 554 U.S. 407 (2008).
[32] *Id.* at 426. When issued, the majority's decision failed to note that the U.S. military allowed the death penalty for child rape. Louisiana and the U.S. Solicitor General petitioned for a rehearing but were unsuccessful. Kennedy v. Louisiana, 554 U.S. 945, 945 (2008) (mem.).
[33] *Kennedy*, 554 U.S. at 431.
[34] *Id.* at 440-41.

that, as in *Coker,* use of the death penalty when the victim was not killed was constitutionally excessive based on its own independent judgment.[35]

Justice Alito, in a dissent joined by three other justices,[36] questioned the majority's conclusion that only a handful of states supported the execution of child rapists, stating that the paucity was a "highly unreliable indicator of the views of state lawmakers and their constituents."[37] He reasoned that *Coker v. Georgia* likely

> stunted legislative consideration of the question whether the death penalty for the targeted offense of raping a young child is consistent with prevailing standards of decency. The *Coker* dicta gave state legislators and others good reason to fear that any law permitting the imposition of the death penalty for this crime would meet precisely the fate that has now befallen the Louisiana statute that is currently before us, and this threat strongly discouraged state legislators—regardless of their own values and those of their constituents—from supporting the enactment of such legislation.[38]

In support, Justice Alito noted that several state courts had concluded that *Coker* logically extended to child rape,[39] and that legislators in several states thought enacting a child rape law would be "futile and costly."[40] "[C]onscientious state lawmakers, whatever their personal views about the morality of imposing the death penalty for child rape," he reasoned, might refrain from initiating contrarian legislation "either because they respect our authority and expertise in interpreting the Constitution or merely because they do not relish the prospect of being held to have violated the Constitution and contravened prevailing 'standards of decency.'[41] Ultimately, Justice Alito wrote, the majority's decision was problematic because it would short-circuit the democratic process: states enacting capital child rape laws "might have turned out to be an evolutionary dead end. But they might also have been the beginning of a strong new evolutionary line. We will never know because the Court today snuffs out the line in its incipient stage."[42]

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[35] *Id.* at 438 (quoting *Coker*, 433 U.S. at 598). The majority offered several other reasons in support of its independent judgment that imposing death was unconstitutional, including that availability of the death penalty would possibly encourage rapists to kill their victims and discourage family members from reporting child rape. *Id.* at 439-46.

[36] *See id.* at 447 (Alito, J., dissenting). Chief Justice Roberts and Justices Scalia and Thomas joined the dissent. *Id.*

[37] *Id.*

[38] *Id.* at 448.

[39] *See id.* at 449-51 (citing and discussing *inter alia* Buford v. State, 403 So. 2d 943, 951 (Fla. 1981)).

[40] *Id.* at 453 (noting legislative records in Oklahoma, South Carolina, and Texas).

[41] *Id.* at 452; *see also id.* at 460 ("State legislatures, for more than 30 years, have operated under the ominous shadow of the *Coker* dicta and thus have not been free to express their own understanding of our society's standards of decency.").

[42] *Id.* at 461. The dissent also critiqued various bases for the majority's independent judgement questioning the constitutionality of Louisiana's law, such as its speculation that the death penalty would encourage rapists to kill their victims. *Id.* at 462.

## II. Florida Blazes a Bold New Path

*Kennedy* met with a mixed reception. Although some lauded the decision,[43] others did not, including presidential candidates Barak Obama and John McCain.[44] Several legal scholars also condemned *Kennedy*,[45] with some reasoning, as Justice Alito did in dissent, that the majority's "consensus" analysis was unreliable because it failed to take into account the likely stunting effect of *Coker v. Georgia*.[46]

However valid Justice Alito's hypothesis might have been in 2008, when *Kennedy* was decided, recent experience in Florida casts doubt on its continued validity. In early March 2023, Republicans, holding super-majorities in the state house and senate, introduced legislation permitting the execution of any individual convicted of raping a child under age twelve when no death results.[47] The legislation ultimately passed and was signed into law by Republican Governor Ron DeSantis,[48] who before the legislative session began stated that "We believe that [*Kennedy*] was wrong. We do not believe the Supreme Court in its current iteration would uphold it."[49]

The text of the new law itself proclaims that *Kennedy v. Louisiana* "was wrongly decided and an egregious infringement of the states' power to punish the most heinous of crimes,"[50] and provides that a death sentence in state trial court "shall be imposed . . . notwithstanding existing caselaw which holds such a sentence is unconstitutional under the Florida Constitution and the United States Constitution."[51] The law also contains a proviso stating that if the Florida or U.S. Supreme Court "determines a sentence of death

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[43] *See* Warren Richey, *Supreme Court Sharply Limits Use of Death Penalty*, Christ. Sci. Monitor (June 26, 2008), https://www.csmonitor.com/USA/Justice/2008/0626/p01s10-usju.html [https://perma.cc/P24M-PF65] (noting support for the *Kennedy* outcome among civil rights advocates and death penalty opponents).

[44] Linda Greenhouse, *Supreme Court Rejects Death Penalty for Child Rape*, N.Y. Times (June 26, 2008), www.nytimes.com/2008/06/26/washington/26scotuscnd.html [https://perma.cc/JR3A-5NLC].

[45] *See, e.g.,* Douglas A. Berman, *What Will (or Should) SCOTUS Do on the* Kennedy *Rehearing Petition?*, Sent'g L. & Pol'y (Sept. 22, 2008), http://sentencing.typepad.com/sentencing_law_and_policy/2008/09/what-will-or-sh.html [https://perma.cc/JK68-N7RZ]; Lawrence H. Tribe, Opinion, *The Supreme Court Is Wrong on the Death Penalty*, Wall St. J. (July 31, 2008), https://www.wsj.com/articles/SB121746018426398797 [https://perma.cc/72HC-2SXX].

[46] *See, e.g.,* Richard Broughton, Kennedy *and the Tail of Minos*, 69 La. L. Rev. 593, 600-01 (2009); Heidi M. Hurd, *Death to Rapists: A Comment on Kennedy v. Louisiana*, 6 Ohio St. J. Crim. L. 351, 353-54 (2008).

[47] *Death Penalty Proposed in Child Rape Cases*, Daytona Times (Mar. 3, 2023), https://www.daytonatimes.com/news/death-penalty-proposed-in-child-rape-cases/article_eec9f010-b97a-11ed-8d6c-939454fcd5ba.html [https://perma.cc/268C-BAA8].

[48] Douglas Soule, *DeSantis Signs Law Allowing Death Penalty for Child Rape, Defying US Supreme Court Ruling*, USA Today (May 1, 2023), https://www.nytimes.com/2023/04/20/us/desantis-death-penalty-florida.html [https://perma.cc/8NX3-MV2H].

[49] Michael Moline, *DeSantis' "Law and Order' Agenda: Execute Child Rapists, Target Rainbow Fentanyl, Ban No-Cash Bail*, Fla. Phoenix (Jan. 26, 2023), https://floridaphoenix.com/2023/01/26/desantis-law-and-order-agenda-execute-child-rapists-target-rainbow-fentanyl-ban-no-cash-bail/ [https://perma.cc/TL2E-SPM2].

[50] Fla. Stat. § 921.1425(1)(a) (West 2023). The new law also proclaims that the Florida Supreme Court's prior decision in *Buford v. State,* 403 So. 2d 943 (Fla. 1981), deeming the state's then-existing capital child rape law unconstitutional based on *Coker*, "was wrongly decided." *Id.*

[51] *Id.* § 921.1425 (10).

remains unconstitutional" the condemned individual will be sentenced to life imprisonment.[52]

Ultimately, of course, if Florida's capital child rape law is to be something more than mere political theater[53], it must somehow serve as a basis for a viable judicial challenge. How would such a claim come before the Florida or U.S. Supreme Court? Under one view, it could not. Professor Jonathan Mitchell, for instance, maintained that vertical stare decisis would preclude state legislative renunciation of *Kennedy*, a U.S. Supreme Court constitutional precedent:

> Even if a large number of legislatures defied the Court and enacted statutes authorizing the death penalty for…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…at trial, there would never be an Article III "case" that would enable the Supreme Court to reconsider [its prior precedent].[54]

The Florida legislature, however, anticipated this concern. As noted, the new law provides that state courts have a duty to uphold its constitutionality and rebuff any challenge a defendant might bring.[55] Moreover, during its spring 2023 session the legislature also amended an existing law to expressly

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[52] *Id.*

[53] In mid-December 2023, a grand jury in Lake County Florida made first use of the new law, indicting a defendant for capital child rape. Staff Report, *Florida Prosecutor Announces First Death Case Under New Child Rape Law*, Tallahassee Dem. (Dec. 15, 2023), https://www.tallahassee.com/story/news/local/state/2023/12/15/florida-man-first-death-penalty-indicted-child-rape-test-case-new-law/71930977007/ [https://perma.cc/G3YG-HWHR]. On social media, Governor DeSantis posted that it "will be the first case to challenge SCOTUS (the U.S. Supreme Court) since I signed legislation to make pedophiles eligible for the death penalty. [State Attorney Gladson] has my full support." *Id.* The case was resolved by the defendant pleading guilty resulting in a sentence of life without parole. Romy Ellenbogen, *Florida Drops Death Penalty Pursuit for Man Accused of Child Sex Abuse*, Tampa Bay Times (Feb. 2, 2024), https://www.tampabay.com/news/crime/2024/02/02/florida-death-penalty-child-rape-law-lake-county/ [https://perma.cc/7LVK-SD2W].

[54] Jonathan F. Mitchell, *Modernization, Moderation, and Political Minorities: A Response to Professor Strauss*, U. Chi. L. Rev. Legal Workshop 4 (last revised May 17, 2017).

[55] *See supra* note 51 and accompanying text. Whether the provision withstands a state separation of powers challenge remains to be seen. The Florida Constitution, unlike its federal counterpart, contains an express separation of powers provision, and is among the nation's most robust and demanding. *See* Corcoran v. Geffen, 250 So. 3d 779, 783 (Fla. Ct. App. 2018) (noting that "[i]t would be hard to compose a more demanding requirement in organic law than Florida's separation of powers."); *see also generally* Daniel E. Waters, *Decoding Nondelegation After* Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 Emory L.J. 417, 444-49 (2022) (noting that Florida's constitution is one of eighteen states characterized as having a "strict" or "strong" nondelegation provision).

The newly enacted provision barring federal constitutional relief in state court might provide a basis for federal court intervention for declaratory or injunctive relief based on *Younger v. Harris*, 401 U.S. 37 (1971), inasmuch as the state proceeding might not "afford the plaintiff an adequate opportunity to raise his constitutional claims." Kelm v. Hyatt, 44 F.3d 415, 419 (6th Cir. 1995). *See also Younger*, 401 U.S. at 46 (noting that extraordinary circumstances barring abstention include "great and immediate" irreparable injury and state law that is "flagrantly and patently violative of express constitutional prohibitions").

allow the state to appeal from any trial court's prohibition of a capital child rape prosecution,[56] providing a potential path to the U.S. Supreme Court.[57]

## III. Looking Ahead

It could be that Florida's new capital child rape law will be of no national moment,[58] reflective of a governor with national political ambitions and a legislature eager to assist.[59] There is good reason to think, however, that other states also will not be deterred, in Justice Alito's words, from feeling "free to express their own understanding of our society's standard of decency."[60] Given what we know about the political popularity of tough-on-crime policy,[61] contrarian state death penalty laws will likely proliferate.[62] This is perhaps especially so in the twenty-two states where Republicans, traditionally the party most predisposed to enact punitive laws, and inclined toward defiance of federal mandates more generally (especially when imposed by Democratic administrations),[63]

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[56] *Id.* § 924.07(1)(n) (West 2023).

[57] Unlike Florida, some state constitutions expressly require that state courts invalidate unconstitutional state laws. *See, e.g.,* Ga. Const. art I, para. 5(a) ("Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them.").

[58] Florida, it is worth noting, was the first state to enact a post-*Furman* revamped death penalty law. *See* Charles W. Ehrhardt & L. Harold Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 55 J. Crim. L. & Criminology 10, 15 (1973). The law was upheld against constitutional attack several years later in *Proffitt v. Florida*, 428 U.S. 242 (1976).

[59] Gary Fineout, *Florida Legislature: We Delivered for DeSantis This Session*, Politico (May 1, 2023), https://www.politico.com/news/2023/05/01/florida-republicans-gave-desantis-most-of-his-legislative-wishlist-00094600 [https://perma.cc/M9FM-3RAJ].

[60] *Kennedy*, 554 U.S. at 460 (Alito, J., dissenting).

[61] *See* Atkins v. Virginia, 536 U.S. 304, 315 (2002) (noting "the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime"); *See generally* Stephen Rushin & Zoe Robinson, *The Law Enforcement Lobby*, 107 Minn. L. Rev. 1965 (2023). Contrary to accounts of legislative motivations in the political process more generally, the cost-benefit analysis of political actors backing a clearly unconstitutional punitive criminal law has considerable upside in a tough-on-crime atmosphere. *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."). Moreover, Florida's law can serve as the template for laws enacted in other jurisdictions, lessening drafting costs much as other copycat laws do. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. Legal Stud. 593, 610-11 (1980).

[62] Evidence supporting this likelihood is found in the child rape legislation proposed in multiple states, pre-*Kennedy*, spurred by heated political rhetoric and broad grassroots public support for the execution of child rapists. *See* Monica C. Bell, *Grassroots Death Sentences?: The Social Movement for Capital Child Rape Laws*, 98 J. Crim. L. & Criminology 1, 7 (2007) (noting that at least eight states were considering child rape capital laws).

[63] With state resistance to the Affordable Care Act ("Obamacare") being an obvious recent example. Lauren Moxley Beatty, *The Resurrection of State Nullification—and the Degradation of Constitutional Rights: SB8 and the Blueprint for State Copycat Laws*, 111 Geo. L.J. Online 18, 32 (2022). *See also* Christian G. Fritz, Monitoring American Federalism: The History of State Legislative Resistance 301-04 (2023) (citing and discussing other recent instances of state legislative resistance to federal laws and policies); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256, 1256-57 (2009) (coining concept of "uncooperative federalism" to describe state resistance to federal programs depending on state cooperation for implementation and enforcement); Austin Raynor, *The New State Sovereignty Movement*, 90 Ind. L.J. 613, 614-58 (2015) (surveying "state sovereignty movement," whereby states have enacted laws prohibiting state officials from assisting in the enforcement of federal

control all three branches of government.[64] In such a climate, state legislators, rather than being cowed by the prospect of having their laws invalidated on federal constitutional grounds,[65] will see major political benefit,[66] emboldening them to enact laws at odds with Supreme Court precedent,[67] engaging in an especially aggressive form of "constitutional hardball."[68] Indeed, as this essay was headed for publication, news outlets reported that Tennessee, which like Florida has a Republican-dominated legislature, passed a child rape law by overwhelming majorities, which Republican Governor Bill Lee signed into law, with Tennessee legislators voicing much the same constitutional contrarianism as their Florida counterparts.[69]

Beyond political gain, advocates of contrarian laws will point to their several upsides. One, especially pertinent in the death penalty context, is that the shift can liberate doctrine from its oft-criticized "one-way ratchet"

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laws, at times purporting to nullify particular federal regulations). *Cf.* David Firestone, *Alabama Cherishes Its History of Defying the Federal Courts*, N.Y. Times (Sept. 6, 2003), https://www.nytimes.com/2023/09/06/opinion/alabama-congressional-district-ruling.html [https://perma.cc/Y7EZ-P7T8] (discussing recent Eleventh Circuit Court of Appeals decision invalidating an Alabama congressional redistricting proposal, with the panel (consisting of two Trump appointees) stating that it was "deeply troubled" and "disturbed" that the state legislature did not comply with the court's prior directive to create a second majority-Black district). On the constitutional difference between state resistance to (a.k.a. interposition) and state nullification of federal laws, both statutory and constitutional (with Florida's child rape law fairly characterized as the latter), *see* Fritz, *supra* note 63, at 294-304.

[64] *See* Smith, *supra* note 9. A contrarianism of sorts could also emerge in the 17 states where Democrats hold the reins of majority rule, with legislators prohibiting capital practices condoned by the Supreme Court. *Roper v. Simmons*, 543 U.S. 551 (2005) and *Atkins v. Virginia*, 536 U.S. 304 (2002) are two examples where state policies eschewing use of the death penalty fostered a shift in Court doctrine, prohibiting the execution of juveniles and of individuals with intellectual disabilities, respectively, previously condoned by the Court. *See also* Meghan Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. Rev. 847, 884 (2007) ("If lower courts instead blindly apply stale Supreme Court outcomes, there is a good chance that particular individuals will continue to be executed even though the evolving standards of decency have reached a point such that the particular practice is no longer constitutional.").

[65] *See, e.g.*, Eric Posner, *The Eighth Amendment Ratchet Puzzle in* Kennedy v. Louisiana, Slate (June 25, 2008), http://www.slate.com/blogs/convictions/2008/06/25/the_eighth_amendment_ratchet_puzzle_in_kennedy_v_louisiana.html [https://perma.cc/67UF-JZLM] (reasoning after *Kennedy* that "[i]f people in the various states change their mind and come to believe that [death penalty for child rape] is justified, legislatures will not be able to enact the punishment without violating the Constitution. It seems likely that they will therefore not bother, and so a new consensus in the other direction cannot get started.").

[66] A likelihood fueled, on a personal level, by the fact that lawmakers enjoy qualified immunity regarding laws they enact, preventing lawsuits for monetary damages. *See* Tenney v. Brandhove, 341 U.S. 367, 372-76 (1951).

[67] As reflected in the words of a Mississippi state senator, as recounted by the *Dobbs* dissenters, who when championing a pre-viability abortion ban "said the obvious out loud: 'finally, we have' a conservative Court 'and so now would be a good time to start testing the limits of *Roe*.'" Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2349 (2022) (Breyer, J., dissenting) (footnote and citation omitted).

[68] Use of the descriptive modifier "especially aggressive" is intended to distinguish Florida's outright constitutional contrarianism from the definition of constitutional hardball recognized by Professor Mark Tushnet: "political claims and practices—legislative and executive initiatives—that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings." Mark Tushnet, *Constitutional Hardball*, 37 J. Marshall L. Rev. 523, 523 (2004).

[69] Kimberlee Kruesi, *Tennessee Governor OKs Bill Allowing Death Penalty for Child Rape Convictions,* AP News (May 14, 2024), https://apnews.com/article/child-rape-death-penalty-tennessee-6edde756a71b0ae26eea703d1f69b572 [https://perma.cc/WQS7-PDDE].

for determining whether "objective indicia" exist regarding a particular death penalty practice.[70] To date, as in *Kennedy*, counting state law preferences has militated in favor of invalidating state death penalty practices,[71] in theory preventing states from enacting new laws resurrecting the prohibited practice.[72] By going against the grain and disavowing deference to Supreme Court precedent, Florida challenged the conventional ratchet construct, reinstating a death penalty practice prohibited by the Court.[73] Moreover, if Florida's new law spurs enactment of similar laws nationally it will lend support to the Court's prioritization of "the consistency of the direction of [legislative] change,"[74] such that eventually the national consensus identified and relied upon in *Kennedy* is "no longer controlling."[75]

A second argument favoring the shift is that state legislative defiance might lead to the strengthening of the Court's modality of counting states when assessing Eighth Amendment evolving standards of decency, as well as in other constitutional contexts (see *infra*).[76] If Florida's strategy catches on nationally, *pace* Justice Alito's stunting hypothesis, the reliability of the modality will be bolstered.[77]

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[70] Jeffrey O. Usman, *State Legislatures and Solving the Eighth Amendment Ratchet Puzzle*, 20 Univ. Pa. J. Const. L. 677, 678-680, 695 (2018).

[71] Jacobi, *supra* note 6, at 1119-23.

[72] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 176 (1976) (Stewart, J., plurality opinion) (stating that "[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.").

[73] A motivation clearly evidenced by a sponsor of the capital child rape bill in the Florida House of Representatives Criminal Justice Committee, who maintained in subcommittee debate that

> [*Kennedy*] was not based on any law. Rather, the Court was exercising its own independent judgment on "evolving standards." So, the reasoning [in *Kennedy*] doesn't point to any statutory or constitutional provisions. I think [*Kennedy*] can be subject to reconsideration as standards evolve one way or another. And I believe in Florida that our standard is that we protect children….Florida's standard has evolved and our standard is to protect our kids…We welcome a constitutional challenge [to *Kennedy*]. That is the point of the bill.

Statement of Representative Jessica Baker (Republican-District 17) before the Florida House Criminal Justice Subcommittee (Mar. 21, 2023), https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=8673 [https://perma.cc/U7DQ-DAMR].

[74] *See Atkins*, 536 U.S. at 315 (noting that when assessing national consensus "[i]t is not so much the number of [] states [adopting a position] that is significant, but the consistency of the direction of change").

[75] *Roper*, 543 U.S. at 574. Consistent with research showing vertical (as opposed to state-state horizontal) policy diffusion, we should not be surprised to see members of Congress act in accord. *See* Alex Garlick, *Laboratories of Politics: There is Bottom-up Diffusion of Policy Attention in the American Federal System*, 76 Pol. Rsch. Q. 29, 39 (2023) (noting a "partisan flavor to the policies that diffuse from the states to Congress…Republican members of Congress in particular mirror changes in the Republican state legislative policy agenda"); *see also id.* (noting that state influence can include "messaging legislation, where a legislator introduces a bill without the intention of producing policy, but rather contributing to the party brand").

[76] *See infra* notes 112-20 and accompanying text.

[77] State counting itself, it is worth noting, has been criticized on numerous grounds, including that it is subject to numerical manipulation by the justices and improperly equates morality with majoritarian political preferences. *See* Kathryn E. Miller, *No Sense of Decency*, 98 Wash. L. Rev. 115, 127–38 (2023). *Cf.* Darrell A. H. Miller & Joseph Blocher, *Manufacturing Outliers*,

Finally, advocates will point to the federalism and democratic experimentalism benefits associated with the enactment of contrarian laws.[78] The *Kennedy* majority, for instance, posited that Louisiana's capital child rape law might discourage reporting of child sexual assault because family members or others would possibly not want to be responsible for initiation of a capital prosecution.[79] Whether this is correct is at least theoretically susceptible of investigation and proof, which laws like Florida's might illuminate. Moreover, contrarian state laws might be thought part of what Alexander Bickel called the Court's "continuing colloquy with the political institutions and with society at large," a dialogue in which constitutional meaning "evolve[s] conversationally," rather than by unilateral declaration by the Court.[80] In modern parlance, the laws can be regarded as an embodiment of "conservative popular constitutionalism."[81]

Other, stronger arguments, however, militate against endorsement of what Professor Richard Re has referred to as a "democratically reversible Eighth Amendment jurisprudence."[82] One might argue, as Professor Re does in advancing a claim that Congress should enact a child rape capital law after *Kennedy,* that doing so "would not be countermanding a constitutional right so much as disrupting the factual premises [i.e., the national consensus against child rape identified in *Kennedy*] that gave rise to the right."[83] Yet, even if one accepts that laws conflicting with *Kennedy* merely "disrupt[] the factual premises" of a constitutional holding by the Court, as Re maintains, and that state laws actually reflect majoritarian sentiment,[84] this overlooks the reality that

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2022 S. Ct. Rev. 49, 64–78 (critiquing Court's methodology for identifying "outlier" laws in assessing constitutional norms, using as its centerpiece *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), which invalidated on Second Amendment grounds New York's "may issue" regulation regarding issuance of concealed public carry firearm permits).

[78] *See, e.g.,* Jacobi, *supra* note 6, at 1093–94 (arguing that the ratchet methodology "hamstrings the legislative capacity of states on the basis of the action of other states. The practice imposes uniformity on states that are meant to be free to pursue diverse policies…."). *See generally* Roderick M. Hills, Jr., *Counting States*, 32 Harv. J.L. & Pub. Pol'y 17, 25 (2009) (explaining that state experimentation "provides information to national decision makers about how the 'maverick' norms will operate on the ground, allowing them to decide whether to nationalize the norms after they have proven themselves to be sound policies.").

[79] Kennedy v. Louisiana, 554 U.S. 407, 445 (2008).

[80] Bickel, *supra* note 6, at 240, 244. *See generally* Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 Brook. L. Rev. 1109 (2014).

[81] Aziz Z. Huq, *The Private Suppression of Constitutional Rights*, 101 Tex. L. Rev. 1259, 1311–12, 1331 (2023) (discussing literature on "conservative popular constitutionalism" and offering as an example the recent Texas law, pre-*Dobbs*, banning abortions six weeks after conception absent a medical emergency).

[82] Richard M. Re, *Can Congress Overturn Kennedy v. Louisiana?*, 33 Harv. J.L. & Pub. Pol'y 1031, 1089 (2010); *see also id.* at 1042 ("Because the concept of national consensus is empirically grounded, these cases suggest that the Eighth Amendment's meaning is contingent on [legislative] facts."). According to Re, "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." *Id.* at 1098. In his article, Re mounts an argument favoring Congress enacting a federal law at odds with *Kennedy*, not that state legislatures do so (which he considers unenforceable). *Id.* at 1090-92.

[83] *Id.* at 1063.

[84] As an empirical matter, some question also exists regarding whether state legislation actually results from a majoritarian democratic process. *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 Colum. L. Rev. 1733, 1734–35 (2021) (noting that despite the "democratic

the Supreme Court alone can overrule its precedents, "even where," as Justice O'Connor put it, "subsequent…factual developments may appear to have 'significantly undermined' the rationale for [the Court's earlier holding]."[85]

If condoned, state defiance would take the nation back to a time of nullification,[86] such as existed before *Cooper v. Aaron*[87] when southern states, invoking states' rights, overtly resisted the Court's constitutional prohibition of racial segregation in public schools,[88] and earlier when states, as Justice William Johnson wrote in 1823, asserted their right "to throw off the federal constitution at [their] will and pleasure" and transform "the Union [into] a mere rope of sand."[89] Indeed, the notion that federal constitutional prohibitions should differ based on individual state legislative preference would likely come as a surprise to most Americans,[90] who believe—as John Jay put it in the *Federalist Papers*—that "we have uniformly been one people; each individual

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romanticism" depicting "state legislatures as the heart of American democracy," "state legislatures are typically a state's least majoritarian branch" due to gerrymandering and other problematic realities).

[85] Roper v. Simmons, 543 U.S. 551, 594 (2005) (O'Connor, J., dissenting) (citations omitted).

[86] For discussion of early state judicial and legislative efforts to resist the Court's rulings on the federal constitutionality of state laws, which like Florida's capital child rape law were quite defiant in tone, see generally Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judicial Act*, 47 Am. L. Rev. 1 (1913).

[87] 358 U.S. 1 (1958).

[88] *See id.* at 17 ("[T]he *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation . . . ."). In all, six southern states passed resolutions asserting the unconstitutionality of *Brown v. Board of Education,* 347 U.S. 483 (1954). William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 Buff. L. Rev. 483, 493-94 (2002). *See generally* John Kyle Day, The Southern Manifesto: Massive Resistance and the Fight to Preserve Segregation (2014). Shortly after *Cooper v. Aaron*, in *Bush v. Orleans Parish School Bd.*, 364 U. S. 500 (1961), the Court in a brief per curiam decision invalidated Louisiana's interposition statute that averred that *Brown* constituted a usurpation of state power, and interposed its state sovereignty against enforcement of *Brown,* quoting the lower court:

> The scope of these enactments and the basis on which they were found in conflict with the Constitution of the United States are not matters of doubt. The nub of the decision of the three-judge court is this:
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>> 'The conclusion is clear that interposition is not a constitutional doctrine. If taken seriously, it is illegal defiance of constitutional authority.' Bush v. Orleans Parish School Board (United States v. State of Louisiana), D.C., 188 F. Supp. 916, 926.
>
> The main basis for challenging this ruling is that the State of Louisiana 'has interposed itself in the field of public education over which it has exclusive control.' This objection is without substance, as we held, upon full consideration, in *Cooper v. Aaron* [citation omitted]. The others are likewise without merit.

*Id.* at 500-01.

[89] Elkison v. Deliesseline, 8 F. Cas. 493, 496 (C.C.D.S.C. 1823) (No. 4,366) (Johnson, J.). *See also* Whole Woman's Health v. Jackson, 595 U.S. 30, 62 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part) (quoting United States v. Peters, 5 Cranch 115, 136 (1809)) ("[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.'").

[90] *See* James A. Gardner, Interpreting State Constitutions 23 (2005) ("When Americans speak of 'constitutional law,' they invariably mean the U.S. Constitution and the substantial body of federal judicial decisions construing it.").

citizen everywhere enjoying the same national rights, privileges, protection."[91] It will also create a situation where state legislators violate the pledge they take to uphold the U.S. Constitution,[92] not to mention betray what Professor Paul Brest called their institutional duty to "determine, as best they can, the constitutionality of proposed legislation."[93]

States can of course enact laws before the Supreme Court has addressed their constitutionality. They can also, in the wake of a Court decision invalidating a particular practice, enact a new law that materially differs from that invalidated, such as occurred in the wake of *Furman Georgia*[94] in *Gregg v. Georgia*.[95] Or, as Madison put it in January 1800, they can adopt "resolutions" opposing federal law, which while without legal effect, can constitute "expressions of opinion" that can "excite[] reflection."[96] More controversially, states can enact "trigger" laws that take effect if and when the Court reverses

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[91] The Federalist No. 2, at 38-39 (John Jay) (Clinton Rossiter ed., 1961); *see also, e.g.*, Danforth v. Minnesota, 552 U.S. 264, 301-02 (2008) (Roberts, C.J., dissenting) (citation omitted) ("[T]he 'fundamental principle' of our Constitution . . . is 'that a single sovereign's laws should be applied equally to all.'"); Cohens v. Virginia, 19 U.S. 264, 416 (1821) (Marshall, C.J.) (positing the "necessity of uniformity" on federal constitutional matters).

[92] *See, e.g.*, Fla. Stat. § 876.05(1) ("I…do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida."); *see also Cooper*, 358 U.S. at 18 ("No state legislator or executive or judicial officer can wage war against the constitution without violating his oath to support it."). Of course, one might argue that legislators are not defying the Constitution itself, but rather are disagreeing with a judicial interpretation of it; that broader debate will be left to others. *See* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 Harv. L. Rev. 869, 877 & n.33 (2011) (noting that "[m]ost scholars" conclude that Supreme Court decisions are part of the "'supreme' federal law under the Supremacy Clause," while noting that a minority adopt a view of stare decisis that distinguishes the text of the U.S. Constitution and Court precedent providing an interpretation of it).

[93] Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 Stan. L. Rev. 585, 587 (1975). *See also* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1227 (1978) ("At a minimum, the obligation of public officials . . . is one of 'best efforts' to avoid unconstitutional conduct."). When the Florida House was considering the proposed capital child rape law, one Democratic member, a criminal defense attorney, said the bill put her in an "untenable situation: If I vote down on it, the message will be from the other side that I support child rape," she said. "If I vote up on it, the message will be as a lawyer I no longer respect the preeminence of the Supreme Court." Mitch Perry, *GOP Lawmakers Want to Challenge U.S Supreme Court on the Death Penalty for Child Rape*, Fla. Phoenix (Mar. 21, 2023), https://floridaphoenix.com/2023/03/21/gop-lawmakers-want-to-challenge-u-s-supreme-court-on-the-death-penalty-for-child-rape/ [https://perma.cc/R9TM-8RW7].

[94] 408 U.S. 238 (1972).

[95] 428 U.S. 153, 179 n. 23, 179-80 n. 24 (1976). *See generally* Rebecca Aviel, *Second-Bite Lawmaking*, 100 N.C. L. Rev. 947, 947 (2022) (discussing how states, in the wake of a law being invalidated on constitutional grounds, at times "go back to the drawing board" and enact a new provision modified in such a way as to possibly avoid invalidation).

[96] James Madison, *Report on the Resolutions* (1800), reprinted in 6 The Writings of James Madison 341, 402 (Gaillard Hunt ed., 1906). Madison added that, unlike "such [state] expressions of opinion," the "expositions of the judiciary . . . are carried into immediate effect by force. The former may lead to a change in the legislative expression of the general will-possibly, to a change in the opinion of the judiciary; the latter enforces the general will, whilst that will and that opinion continue unchanged." *Id. Cf.* Dominic Ferrante, *Addressing the Supreme Court's Half-Baked Eighth Amendment Majoritarianism: How States Can Use Advisory Ballot Questions to Give More Legitimacy to the Court's Death Penalty Decisions*, 100 Wash. L. Rev. 859, 859 (2023) (advocating use of "advisory ballot questions that allow Americans to declare their personal views about the morality of punishing particular crimes with death"). On the historic role of public opinion in constitutional decision-making more generally see James A. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 B.Y.U. L. Rev. 1037.

constitutional course on a matter, as some thirteen states did in anticipation of the Court's overruling of *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*.[97]

However, it is another matter altogether for them to enact a law that plainly flouts a constitutional holding of the Court,[98] in defiance of the Supremacy Clause,[99] engendering what Chief Justice John Marshall termed "contradiction and confusion" in federal constitutional law.[100] Such variability is especially problematic in the death penalty context, where "clear, predictable, and uniform constitutional standards are especially desirable,"[101] even though the Court can later reverse a death sentence on constitutional grounds (as Florida's new law contemplates).[102] The litigation path to the Supreme Court takes considerable time,[103] with delay aggravated by the massive volume of certiorari petitions the Court receives annually and its proclivity to hear and decide only a few dozen cases a term.[104] Meanwhile, not only will individuals targeted by the law be subject to the Damoclean existence of death row, but taxpayer funds and valuable judicial time will be consumed, only for the Supreme Court to possibly reassert its initial view that the state capital practice is unconstitutional. In sum, rather than being an empty act of political theater,

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[97] *See* Elizabeth Wolfe, *13 States Have Passed So-Called 'Trigger Laws,' Bans Designed to Go into Effect If Roe v. Wade Is Overturned*, CNN (May 3, 2022), https://www.cnn.com/2022/05/03/us/state-abortion-trigger-laws-roe-v-wade-overturned/index.html [https://perma.cc/X7SB-P8M2].

[98] Suffice it to say, not all constitutional holdings of the Court are deserving of deference, as the *Brown* Court's rejection of *Plessy v. Ferguson's* condonation of "separate but equal" attests. However, rights derived from *limits* on governmental power, including those protected by the Eighth Amendment, should be accorded very significant precedential weight and protection; likewise, precedents denying or abrogating individual rights should be accorded less judicial deference than those identifying or protecting individual rights. *See* Nina Varasava, *Pretendent, Reliance, and Dobbs*, 136 Harv. L. Rev. 1845, 1857-63 (2023). *See also generally* Joseph Landau, *Rescinding Rights*, 106 Minn. L. Rev. 1681 (2022).

[99] *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ."). *See also* United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (averring that the Court alone is "supreme in the exposition of the law of the Constitution"); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 Harv. L. Rev. 4, 61 (2001) ("[T]he Framers clearly decided to adopt judicial review as a device for controlling state laws."); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 Stan. L. Rev. 1031, 1047 (1997) ("Undisputably, judicial review, conceived as a mechanism of federalism, was palpably and unequivocally a fundamental element of the original intention of the Constitution with the Supremacy Clause as its trumpet.") (footnote omitted).

[100] Cohens v. Virginia, 19 U.S. 264, 415-16 (1821) (Marshall, C.J.). *See also, e.g.,* Martin v. Hunter's Lessee, 14 U.S. 304, 347-48 (1816) (Story, J.) (noting "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution" and condemning disuniformity as "truly deplorable"). *Cf.* Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

[101] *See* Roper v. Simmons, 543 U.S. 551, 594 (2005) (O'Connor, J., dissenting).

[102] *See supra* note 52 and accompanying text.

[103] *See, e.g.,* United States v. Johnson, 457 U.S. 537, 560 (1982) (recognizing that "years may pass before the Court finally invalidates a [] practice of dubious constitutionality.").

[104] Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 Vand. L. Rev. 1137, 1185 (2012).

destined to go unenforced,[105] Florida's new child rape capital law, and similar laws possibly enacted in other states, will have very significant real-world impacts, affecting life-or-death criminal justice system outcomes.[106]

Finally, and critically important, because state legislative preferences can influence doctrine in other federal constitutional domains,[107] state defiance has implications beyond the context of capital child rape. If endorsed in principle, there is no reason that states would not enact laws allowing other capital punishment practices outlawed by the Court, including execution of mentally disabled individuals[108] and those under age eighteen at the time of their offense,[109] as well as those convicted of the sexual assault of an adult[110] and those involved in felony murder when lacking a culpable state of mind.[111] The same can be said for non-capital forms of punishment, such as imposition of life without parole sentences on juvenile offenders.[112] It requires little imagination to foresee that other states will, like Florida, invoke state sovereignty and fealty to their own "law and order" policy,[113] proceed down that path.

Moreover, state defiance could well manifest in other, more socially contentious areas. It is not hard to imagine, for instance, that state political actors, often fueled by advocacy groups,[114] believing that *Lawrence v. Texas*[115] erred in outlawing the criminalization of adult consensual homosexual sodomy in

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[105] An example is 18 U.S.C. § 3501, enacted in 1968 by Congress in the immediate wake of *Miranda v. Arizona*, 384 U.S. 436 (1966), which made failure to provide *Miranda* warnings one of several "factors to be taken into consideration by the judge" and provided that failure to provide *Miranda* warnings "need not be conclusive on the issue of voluntariness of the confession." 18 U.S.C. § 3501(b) (2012). Ignored for decades by the U.S. Department of Justice, the provision was eventually invoked in a criminal case and invalidated in *Dickerson v. United States*, 530 U.S. 428, 437 (2000).

[106] These impacts are significant not only in terms of death sentences but also the increased plea-bargaining leverage of prosecutors, who can now threaten death as a potential sentencing outcome. The strategic advantage is augmented by another key change to Florida capital law: one renouncing the traditional requirement that jurors must be unanimous in their determination that death is warranted. As a result of new legislation in the 2023 legislative session, the same session enacting the child rape law, capital jury decisions to impose death need not be unanimous; only eight jurors need decide in favor of death. *See* Fla. Stat. §§ 934.1425(3) (c) (capital child rape); 921.141(1)(c) (capital law). Such seems to explain the relatively speedy resolution, by guilty plea (and imposition of a life without parole sentence), of the first application of Florida's new capital child rape law. *See* Ellenbogen, *supra* note 53.

[107] *See generally* Corinna Lain, *The Unexceptionalism of "Evolving Standards*," 57 UCLA L. Rev. 365 (2009); Dru Stevenson, *Judicial Deference to Legislatures in Constitutional Analysis*, 90 N.C. L. Rev. 2083 (2012).

[108] Atkins v. Virginia, 536 U.S. 304 (2002).

[109] Roper v. Simmons, 543 U.S. 551 (2005).

[110] Coker v. Georgia, 433 U.S. 584 (1977).

[111] Enmund v. Florida, 458 U.S. 782 (1982).

[112] Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010).

[113] *See supra* note 73.

[114] *See* Jon D. Michaels & David L. Knoll, *Vigilante Federalism*, 108 Cornell L. Rev. 1187, 1218 (2023) (recognizing that "national organizations have turned to state legislatures as a point of least resistance for engaging and intervening in national partisan battles"); Jessica Bulman-Pozen, *Partisan Federalism,* 127 Harv. L. Rev. 1077, 1124-30 (2014) (stating that partisan politics transforms states into "laboratories of partisan politics"); Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 Colum. L. Rev. 2187, 2223 (2023) (noting that in recent years "[interest] groups associated with Republican lawmakers have been far more successful at diffusing their preferred policies than those associated with Democratic lawmakers").

[115] 539 U.S. 558 (2003).

private, would enact laws reinstating the policy, which in time could form the basis for a new national consensus allowing for its constitutional resuscitation.[116] The same can be said for any of the many other rights on which state legislative preferences influence constitutional outcomes, including protections afforded criminal defendants[117] and other civil liberty protections, such as the right to contraception[118] and the prohibition of electoral poll taxes.[119] Indeed, in his concurring opinion in *Dobbs v. Jackson Women's Health Organization*,[120]

[116] If and when this occurs, now-moribund unconstitutional laws criminalizing private consensual same-sex sodomy that remain in state codebooks will spring back to life. *See* Amanda Holpuch, *The Supreme Court Struck Down Sodomy Laws 20 Years Ago. Some Still Remain*, N.Y. Times (July 21, 2023) (noting that such laws reman in twelve states), https://www.nytimes.com/2023/07/21/us/politics/state-anti-sodomy-laws.html#:~:text=It%20has%20been%2020%20years,in%20place%20across%20the%20country [https://perma.cc/8QX4-55BK].

[117] *See, e.g.,* Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (outlawing on Sixth Amendment grounds non-unanimous criminal jury convictions, noting that only two states permitted the practice, with one having recently abandoned it); Ring v. Arizona, 536 U.S. 584 (2002) (holding that Sixth Amendment requires that a jury determine the existence of aggravating factors in capital trials, relying on paucity of states eschewing the requirement); Ake v. Oklahoma, 470 U.S. 69 (1985) (invalidating on due process grounds state refusal to provide psychiatric evaluative assistance to indigent capital defendants, noting that fewer than ten states had similar policy); Baldwin v. New York, 399 U.S. 66 (1970) (relying on paucity of state laws denying use of jury trials in cases threatening more than six months incarceration to require that Sixth Amendment requires the same); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that Sixth Amendment guarantees to indigent accused felons publicly paid counsel, noting that only five states denied the right). *See also* Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 Tex. L. Rev. 1869, 1916 (2006) (noting that "the wholesale criminal procedure revolution wrought by the Warren Court in the 1960s was in large part an attempt to bring outliers—again, mostly southern states—up to a national standard of due process in criminal cases.").

Notably, in the same legislative session making child rape a capital offense, Florida adopted another outlier death penalty provision—becoming the only state to allow for non-unanimous jury sentencing decisions in capital trials. Patricia Mazzei, *DeSantis Signs Law Lowering Death Penalty Threshold in Florida*, N.Y. Times (Apr. 20, 2023) https://www.nytimes.com/2023/04/20/us/desantis-death-penalty-florida.html [https://perma.cc/TCH3-EVZ7]. The provision could well inspire similar laws in other states, in time informing the state counting analysis in a future U.S. Supreme Court decision addressing a challenge to the practice.

[118] *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating state law prohibiting marital access to contraceptives on right to privacy grounds, a prohibition backed by only one other state); Brief for Appellants, Griswold v. Connecticut, Docket No 496, at *24 (filed Feb. 11, 1965) (available on Westlaw at 1965 WL 92619). Notably, while the Court's decision in *Dobbs* was pending, legislators in Idaho and Missouri called for restrictions on some forms of contraception. *See* Ivan M. Stevenson, *After* Roe *Decision, Idaho Lawmakers May Consider Restricting Some Contraception*, Idaho Statesman (May 10, 2022), https://www.idahostatesman.com/news/politics-government/state-politics/article261207007.html [https://perma.cc/QZC7-TUJF]; Tessa Weinberg, *"Anything's on the Table": Missouri Legislature May Revisit Contraceptive Limits Post-*Roe, Mo. Independent (May 20, 2022), https://missouriindependent.com/2022/05/20/anythings-on-the-table-missouri-legislature-may-revisit-contraceptive-limits-post-roe [https://perma.cc/M7U9-X6SJ].

[119] *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (invalidating state poll tax on equal protection grounds because only a "handful" of states preserved the practice). *See also, e.g.,* Plyler v. Doe, 457 U.S. 202 (1982) (invalidating state law permitting local school districts to exclude unauthorized immigrants from attending school, when no other state enacted similar provision); For discussion of when a policy or practice should qualify as a constitutional "outlier," sufficient for the Cour to invalidate (and suppress) it, see Justin Driver, *Constitutional Outliers*. 81 U. Chi. L. Rev. 929 (2014).

[120] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2349 (2022) (Thomas, J., concurring).

which overturned the constitutional right to an abortion ensured by *Roe v. Wade*,[121] Justice Thomas envisioned just such a constitutional overhaul.[122]

It remains to be seen how the justices will respond if and when instances of state legislative defiance come before the Court. Although in the past the Court has unequivocally condemned state defiance of its precedents,[123] Florida and perhaps other state legislatures are betting that the currently siting justices are not so dedicated to defending their tribunal's institutional turf. Time will tell if the bet succeeds, but if it does, the nation will be in for a period of major federal constitutional uncertainty and, very possibly, retrenchment.[124]

## Conclusion

For better or worse, the Supreme Court has long relied upon state legislative preferences as a lodestar in its constitutional decision making. In *Kennedy v. Louisiana*,[125] the majority, relying on its assessment that only a few states permitted the execution of child rapists, held that the Eighth Amendment prohibited the practice. Justice Alito, in dissent, maintained that the majority likely erred in its tally of states favoring the practice, hypothesizing that the actual number was stunted because *Coker v. Georgia,*[126] which earlier outlawed the death penalty for rape of an adult woman, discouraged states from enacting capital child rape laws.

As the foregoing discussion makes clear, state legislative timidity, if indeed operative in the wake of *Coker,* consistent with the Alito Hypothesis,[127] is considerably less evident today, as recent experience in Florida attests.[128] Whether other states, follow Florida's lead remains to be seen. Already, one has—Tennessee.[129] However, Florida's overt and purposeful assertion of its own

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[121] Roe v. Wade, 410 U.S. 113 (1973).

[122] *See Dobbs*, 142 S. Ct. at 2301-02 (Thomas, J., concurring) (urging reconsideration of *Lawrence*, as well as other civil liberty precedents predicated on substantive due process, such as the right to contraception (*Griswold*, 381 U.S. 479 at 481–485)). This notwithstanding the Court's recent insistence that "the reliance the American people place in their constitutionally protected liberties" is a crucial interest for the Court to consider in its constitutional decision making. Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020) (plurality opinion) (Gorsuch, J.).

[123] *See supra* note 100 and accompanying text. *Cf.* Ark. v. Sullivan, 532 U.S. 769, 121 S. Ct. 1876, 149 L. Ed. 2d 994 (2001) (per curiam) (summarily reversing because "the Arkansas Supreme Court's decision . . . is flatly contrary to this Court's controlling precedent" in *Whren v. United States*, 517 U. S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), holding that the subjective motivation of police when seizing an individual is irrelevant for Fourth Amendment purposes).

[124] A retrenchment—it is worth noting—aggravated by state laws recently enacted empowering citizens to file suits allowing for what has been termed the "private suppression of constitutional rights," such as Texas's CB8 that deputized citizens to enforce the state's anti-abortion law (*contra Roe v. Wade*). *See* Huq, *supra* note 81.

[125] 554 U.S. at 419.

[126] 433 U. S. at 592.

[127] *See supra* notes 37-42 and accompanying text.

[128] *See supra* notes 47-57 and accompanying text.

[129] *See supra* note 69 and accompanying text.

independent interpretation of the U.S. Constitution,[130] in defiance of that of the Supreme Court, marks a potentially very important development, not only in Eighth Amendment death penalty jurisprudence,[131] but also in many other federal constitutional law domains also informed by state legislative preferences.

[130] In contrast to the political landscape envisioned by Roderick Hills, who in criticizing the modality of counting state preferences when identifying federal constitutional norms, worried that it likely errs in "attributing to legislators' votes some constitutional significance of which they were unaware and might, indeed, vociferously reject." Hills, *supra* note 78, at 21.

[131] Of the nine justices on the Court when *Kennedy* was decided, only three now remain: Justice Alito, Chief Justice Roberts, and Justice Thomas, all of whom were in the *Kennedy* dissent.