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I. INTRODUCTION

Should Congress be able to unilaterally determine the constitutionality of a criminal sentence under the Eighth Amendment? Moreover, should Congress be able to override the Supreme Court's judgment that a particular criminal punishment is unconstitutional *without* amending the Constitution?

Presumably, the Bill of Rights and the Fourteenth Amendment were adopted with the intention of imposing an outer limit on what kinds of actions legislatures may take against individuals. In particular, the Eighth Amendment limits legislative discretion by prohibiting the imposition of "cruel and unusual punishments" by state and federal legislatures.[1] However, as some scholars have argued, the U.S. Supreme Court may have already vested Congress and state legislatures with the power to independently dictate whether a particular punishment is permissible under the Eighth Amendment.[2]

Although the text of the Eighth Amendment provides little guidance as to which particular punishments are unconstitutional,[3] the Supreme Court has made clear that the Amendment prohibits (1) certain *modes* of punishment, such as torture,[4] and (2) punishments that are grossly *disproportionate* or excessive.[5] This latter category has comprised the majority of cases giving rise to the

1. U.S. CONST. amend. VIII. This Amendment now applies to the states through the Fourteenth Amendment's Due Process Clause. *See* Robinson v. California, 370 U.S. 660, 666–67 (1962).

2. *See infra* Part II.B.

3. *See* GREG ROZA, THE EIGHTH AMENDMENT: PREVENTING CRUEL AND UNUSUAL PUNISHMENT 26–27 (1st ed. 2011) (noting that the Amendment does not specify which particular punishments are prohibited and that some of the Founding Fathers perceived the Eighth Amendment as "too vague to be truly effective").

4. *See* Wilkerson v. Utah, 99 U.S. 130, 135–37 (1878).

5. Atkins v. Virginia, 536 U.S. 304, 311 n.7 (2002) (stating that the Eighth Amendment proscribes "all excessive punishments"); *see also* Graham v. Florida, 130 S. Ct. 2011, 2021 (2010).

Supreme Court's Eighth Amendment jurisprudence.[6] In determining which sentences are unconstitutionally excessive, the Court has adopted two approaches for reviewing disproportionality challenges.[7]

First, for the majority of noncapital crimes, the Court has utilized a "gross disproportionality" analysis.[8] Essentially, this approach consists of judges weighing the seriousness of an offense against the seriousness of the punishment, so as to determine whether the penalty is unconstitutionally excessive.[9]

Second, the Court has used a "categorical" approach that implements bright-line rules to prohibit certain sentencing practices.[10] This approach differs from the gross-disproportionality method because, rather than requiring judges to subjectively weigh the proportionality of a sentence, the Court simply creates black-letter rules that dictate the specific applications of the Eighth Amendment. While most cases implicating the categorical approach have dealt with capital punishment,[11] the Court has recently applied this method to a noncapital case,[12] suggesting that the categorical approach may now be utilized in both capital and noncapital cases.[13]

The categorical approach consists of a two-part analysis. First, the Court considers "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine

6. *Graham*, 130 S. Ct. at 2021 ("For the most part . . . the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime."). The prohibition on disproportionate punishments serves the fundamental "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *See also Robinson*, 370 U.S. at 666–67.

7. *See infra* Part II.B.

8. *Graham*, 130 S. Ct. at 2021–22 (quoting Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring)).

9. *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). If this initial weighing gives rise to an inference of "gross disproportionality," the Court will then compare the sentence with those imposed in the same and other jurisdictions for similar and other crimes. *Id*. Importantly, the Court has stated that this analysis "does not require strict proportionality between crime and sentence" but "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id*. at 1001 (quoting Solem v. Helm, 463 U.S. 277, 288 (1983)). *See also* LYNN S. BRANHAM, THE LAW AND POLICY OF SENTENCING AND CORRECTIONS IN A NUTSHELL 168, 177–78 (8th ed. 2010) (noting that there is no concrete method of applying gross-disproportionality review).

10. *Graham*, 130 S. Ct. at 2022.

11. *Id*.

12. *Id*. at 2022–23.

13. Interestingly, the Court's expansion of the categorical approach into the noncapital context suggests that the Court might combine the gross disproportionality and categorical modes of analysis.

whether there is a *national consensus* against the sentencing practice at issue."[14] In other words, the Court first considers state and federal legislation to determine if there is a national consensus against implementing a particular sentencing practice. Second, the Court considers "the *Court's own understanding and interpretation* of the Eighth Amendment's text, history, meaning, and purpose."[15] This second part of the analysis has been deemed the "independent judgment" analysis, and has historically complemented the national consensus rationale to help the Court determine whether a particular sentencing practice violates the Eighth Amendment.[16] Using these methodologies in complementary fashion, the Court has been able to determine whether particular sentencing practices violate the Eighth Amendment.[17]

Recently, however, the dual relationship between the national consensus and independent judgment rationales has become unclear,[18] prompting onlookers to wonder which of the two methods should predominate whenever they point to different outcomes. Some scholars have argued that in *Kennedy v. Louisiana*,[19] this issue was decided as the national consensus rationale became the primary basis for the Court's holding.[20] Because of this, scholars have argued that the holding in *Kennedy* should be subject to legislative override, since new legislation would indicate a different national consensus.[21] By implication, then, these scholars seem to suggest that if the Court utilizes the national consensus rationale as its *primary* methodology in future categorical Eighth Amendment cases, then such decisions

14. *Graham*, 130 S. Ct. at 2022 (emphasis added) (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)).

15. Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (emphasis added).

16. *See, e.g.*, *Graham*, 130 S. Ct. at 2022 (explaining that the Court has traditionally considered both the "national consensus" and "independent judgment" approaches in complementary fashion within the categorical review context).

17. *See infra* Part II.A.

18. *See infra* Part II.B–C.

19. *Kennedy*, 554 U.S. at 407.

20. *See* Richard M. Ré, *Can Congress Overturn* Kennedy v. Louisiana*?*, 33 HARV. J.L. & PUB. POL'Y 1031, 1036 (2010) (arguing that subsequent federal legislation should render *Kennedy* "at least partially subject to democratic override"); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 868 (2009) (suggesting that *Kennedy* could be overridden by an alliance of state legislation).

21. *See* Akhil Reed Amar, *Foreward: The Document and the Doctrine*, 114 HARV. L. REV. 26, 124 n.330 (2000) (arguing that large-scale adoption of new state legislation could prompt the Court to reconsider prior holdings); Ré, *supra* note 20, at 1036; Strauss, *supra* note 20, at 868.

would be vulnerable to federal or state legislative override. As yet, the Court has not officially encountered a case in which it was willing to openly recognize that the two rationales lead to blatantly different outcomes.[22] Consequently, it is currently unclear exactly what the Court's approach will be when this conflict occurs. Eventually, however, the Court will be forced to choose which of the two rationales should take primacy over the other.

This Comment argues that the Court should adopt its independent judgment rationale as the primary method for analysis in categorical Eighth Amendment review. This is because a national consensus-only approach would grant legislatures an impermissibly broad power to define the contours of the Constitution. More specifically, a national consensus-only approach would essentially undermine the policies that gave rise to adoption of the Eighth Amendment.[23] Part II reviews the history and development of the national consensus and independent judgment rationales, including a review of the breakdown of their complementary relationship in *Kennedy* and *Graham*. Part III discusses some major constitutional problems that would result if the national consensus rationale takes precedence in Eighth Amendment review. Part IV argues that the Court should utilize the independent judgment rationale as its ultimate analytical tool and demote the national consensus rationale to secondary status. Part V concludes.

II. HISTORY AND DEVELOPMENT OF THE NATIONAL CONSENSUS AND INDEPENDENT JUDGMENT RATIONALES

In an effort to give more specific meaning to the Eighth Amendment, the Court has stated that the meaning of "cruel and unusual punishment"[24] is to be determined by looking to contemporary norms.[25] More generally, courts determine the

22. However, in *Graham v. Florida*, the Court was willing to skew its national consensus analysis in order to make it coherent with its independent judgment analysis. *See infra* Part II.C; *see also* Richard M. Ré, *Can Congress Overturn* Graham v. Florida*?*, 34 HARV. J.L. & PUB. POL'Y 367, 370 (2011) (noting that the Court in *Graham* modified its traditional national consensus analysis because it seemed to be "motivated primarily by its independent judgment analysis").

23. *See infra* Part III.

24. U.S. CONST. amend. VIII.

25. Atkins v. Virginia, 536 U.S. 304, 311 (2002) (stating that the Eighth Amendment is to be understood "not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by those that currently prevail").

constitutionality of a punishment in part by looking to "evolving standards of decency that mark the progress of a maturing society."[26] This is because "[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change."[27] Implicit within this principle is the premise that society's moral judgment progresses with time. Therefore, by looking to contemporary norms, courts can better determine whether a particular sentencing practice constitutes "cruel and unusual punishment."[28]

However, the Court also noted early on that contemporary views on sentencing practices would not alone be determinative, because the Court should itself inquire into the limits of the Eighth Amendment.[29] Therefore, the Court has made clear that the constitutionality of a particular sentencing practice would have to be measured by current societal views *and* Court-implemented principles. Thus, even before the Court created the modern "national consensus" and "independent judgment" rationales, it applied precursors of these methods in earlier Eighth Amendment cases.[30]

As the dual approach to categorical Eighth Amendment review developed, however, the precursors to the national consensus and independent judgment rationales underwent serious change. Not only did the content of each rationale change over time, but the *relationship* between the two methods became muddled.[31] While the Court was able to use the two rationales in complementary fashion throughout the twentieth century,[32] eventually tensions arose between the two methods in *Kennedy* and *Graham*.[33]

A. The Early Complementary Nature of the National Consensus and

26. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

27. Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)).

28. U.S. CONST. amend. VIII.

29. *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (noting that in addition to considering societal views, "[a] penalty also must accord with 'the dignity of man'" (quoting *Trop*, 356 U.S. at 100 (plurality opinion))).

30. *See, e.g.*, *id.*

31. *See infra* Part II.B–C.

32. *See infra* Part II.A.

33. *See infra* Part II.B–C.

Independent Judgment Rationales

Although the inception of the modern national consensus and independent judgment rationales is fairly recent,[34] their roots were already laid by the mid-twentieth century.[35] At that time, the Court used a dual-methodology approach for categorical review, looking first to "evolving standards of decency" and then to Eighth Amendment purposes.[36] However, the Court initially applied this method by considering national or state legislation as only one factor among many in determining "evolving standards of decency."[37]

For example, in *Gregg v. Georgia,* the Court attempted to demonstrate society's "evolving standards of decency" regarding the permissibility of the death penalty.[38] The Court measured public attitudes by considering a variety of factors in addition to state legislation.[39] These various factors, among others, included the text of the Constitution, historical acceptance of capital punishment, and empirical data reflecting public opinion.[40] The Court used all of these indicia to demonstrate that imposition of the death penalty comported with society's evolving conceptions of morality.[41]

In addition, the Court in *Gregg* independently considered the purposes of the Eighth Amendment and whether they could be served by capital punishment.[42] In that case, the Court determined that the death penalty did not necessarily constitute the "unnecessary and wanton infliction of pain,"[43] as it often served important

34. *See* Ré, *supra* note 20, at 1039 (noting that it was only in the recent cases of "*Atkins*, *Roper*, and *Kennedy* . . . [that] a unique type of right with a distinct[] jurisprudential basis [was created]. 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.'").

35. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 101–04 (1958) (plurality opinion).

36. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (quoting *Trop*, 356 U.S. at 101) (noting that the Court looks to both "evolving standards of decency" and the limits implicit within the "the dignity of man," which limits formed the primary purpose behind the Eighth Amendment); *see also id.* at 176–87 (applying the two methods noted above).

37. *Id.* at 176–82.

38. *See id.* at 176–87.

39. *Id.* at 176–82; *see also* BRANHAM, *supra* note 9, at 144–45.

40. *Gregg*, 428 U.S. at 177–82.

41. *See id.*

42. *See id.* at 182–83 ("The Court also must ask whether [the death penalty] comports with the basic concept of human dignity at the core of the Amendment," and that a sanction "cannot be . . . totally without penological justification").

43. *Id.* at 173.

penological justifications.[44] The Court also determined that it was not excessively disproportionate *per se*, at least not for the crime of murder.[45] In the end, the Court emphasized that its upholding of the death penalty was based *both* on a measurement of public attitudes *and* on jurisprudential principles.[46]

However, with the advent of the twenty-first century, the Court modified its approach in *Atkins v. Virginia* and *Roper v. Simmons* by implementing the modern "national consensus" and "independent judgment" rationales for categorical review.[47] While the Court utilized the same basic dual-method of analysis, it modified the two rationales in significant ways. In *Atkins*, the Court first used the "national consensus" rationale by looking to state and federal legislative practices as the *sole* criterion for measuring public norms.[48] This was because the Court argued that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[49]

In addition, these cases also differed because the Court stated that recent legislative "trends" would also be relevant to the national consensus analysis, even when such trends do not involve a majority of jurisdictions.[50] In other words, recent legislation from multiple states is relevant, even if such legislation does not involve a majority of states. Last, the Court indicated that actual sentencing practices, and not just legislation itself, could inform the national consensus analysis.[51] In both *Atkins* and *Roper*, however, it seemed clear that the Court primarily focused on sentencing legislation as the primary indicator of a national consensus, with legislative trends and actual sentencing practices playing only a supplementary role.[52]

After finding a national consensus against the sentencing

44. *Id*. at 183–86.

45. *Id*. at 187.

46. *Id*. at 173.

47. *See* Ré, *supra* note 20, at 1039.

48. *See id*. at 1042–43 (noting that *Atkins* and *Roper* were the first cases to invoke the phrase "'national consensus'—a term that does not appear in other strands of Eighth Amendment doctrine").

49. Atkins v. Virginia, 536 U.S. 304, 312 (2002) (citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

50. *Id*. at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change.").

51. *Id*. at 316.

52. *See* Ré, *supra* note 22, at 368 (implying that legislation statistics were primary, and that *Graham*'s focus on "the deliberateness of legislation" constituted a "new focus").

practices at issue in both cases, the Court also noted that its own independent judgment would be brought to bear in determining the constitutionality of the sentences in question.[53] In performing this analysis, the Court relied on common-sense principles to draw distinctions between mentally challenged, juvenile, and other offenders.[54] Through this analysis, the Court identified reasons why juveniles and mentally challenged offenders were less culpable than typical adult offenders. The Court also assessed the permissibility of the death penalty for these kinds of offenders in light of the penological theories of retribution and deterrence.[55] Because these theories did not sufficiently support imposition of the death penalty, the Court found that the sentencing practices in both cases violated the Eighth Amendment.[56]

Importantly, while the Court had modernized the dual-rationale categorical approach in *Atkins* and *Roper*, it continued to use the two rationales in complementary fashion. At that point, no tension had yet become apparent between the separate methods, as they had both always supported similar outcomes.

B. Complementary No More—The Arguable Primacy of National Consensus in Kennedy v. Louisiana

In 2008, the Court arguably elevated the national consensus rationale to primary status in *Kennedy v. Louisiana*.[57] In that case, the Court held that the imposition of the death penalty for the crime of child rape violated the Eighth Amendment where the victim was not killed or intended to be killed.[58] While the *Kennedy* opinion seemed to give considerable weight to both the national consensus

53. Roper v. Simmons, 543 U.S. 551, 564 (2005); *Atkins*, 536 U.S. at 317.

54. *See Roper*, 543 U.S. at 569–70 (arguing that juvenile offenders have less culpability than typical adult offenders because of their youth and immaturity); *Atkins*, 536 U.S. at 318 (noting that mentally challenged offenders have less culpability than typical offenders because of their diminished capacities).

55. *Roper*, 543 U.S. at 571–72; *Atkins*, 536 U.S. at 318–19. The *Atkins* Court determined that the punishment did not serve the purposes of retribution, since it cannot be defended that the most serious and extreme criminal penalty can justly be applied to offenders with significantly diminished culpability. *Id.* at 319–20. Interestingly, the Court also considered the existence of an international consensus against imposing capital punishment on minors, noting that the United States "now stands alone in a world that has turned its face against the juvenile death penalty." *Roper*, 543 U.S. at 577.

56. *Roper*, 543 U.S. at 578; *Atkins*, 536 U.S. at 321.

57. 554 U.S. 407 (2008).

58. *Id.* at 421.

and independent judgment rationales, post-decision events led some scholars to argue that the national consensus rationale was the primary basis for the Court's holding.[59]

In the *Kennedy* opinion, the Court surveyed legislation from around the country, finding that forty-four of the fifty states, as well as Congress, did not permit capital punishment for child rape.[60] Furthermore, the Court did not find sufficient evidence supporting a new trend in support of the sentencing practice.[61] The Court also found that Louisiana had been the only state since 1964 that had actually sentenced an offender to death for child rape.[62] Consequently, the Court easily concluded that a strong national consensus existed against Louisiana's sentencing practice.[63]

Afterward, the Court implemented its independent judgment rationale and again concluded that capital punishment for child rape was impermissible.[64] The Court first recognized its long-held policy of confining the death penalty to only the most serious crimes.[65] In keeping with this policy, the Court determined that the death penalty "should not be expanded to instances where the victim's life was not taken."[66] Additionally, the Court determined that capital punishment for child rape did not serve retribution or deterrence purposes sufficiently to warrant continuation of the practice.[67]

59. *See infra* notes 64–70 and accompanying text.

60. *Kennedy*, 554 U.S. at 423.

61. *Id.* at 431. Specifically, the Court refused to find a directional change in trend merely based on state legislation that had been proposed but not yet enacted. *See id.* at 431–32. In addition, it did not find that the six states that had enacted capital penalties for child rape constituted a change in direction sufficient to outweigh the countervailing state and national legislation statistics. *See id.* at 432–33.

62. *Id.* at 434.

63. *Id.*

64. *Id.* at 434–46.

65. *See id.* at 437, 446.

66. *Id.* In this, the Court drew a clear line of separation between the seriousness of a typical violent crime and those that result in the death of the victim. *Id.* at 438. However, the Court did leave open the possibility of capital punishment for special crimes against the State. *Id.* at 437.

67. *See id.* at 441–46. In this, the Court found that capital punishment did not adequately serve the purposes of retribution, as the sentence punished the offender more than what he deserved because he did not take the life of the victim and because evidentiary problems accompany child rape cases. *Id.* at 441–44. The Court also found that capital punishment in that context did not serve deterrence purposes because such crimes often involve family members who risk not reporting the conduct because the penalty for the offender is so great. The Court also supported this conclusion by noting that criminal offenders often do not behave rationally. *Id.* at 444–46.

Therefore, the opinion seemed to conclude on both national consensus and independent judgment grounds that capital punishment for child rape violated the Eighth Amendment.[68]

After hearing the case, however, the respondents discovered that they had overlooked a 2006 amendment to the Uniform Code of Military Justice, which permitted capital punishment for child rape.[69] Upon discovering this, the State of Louisiana and the U.S. Solicitor General asked the Court to rehear the case, "arguing that the 'national consensus' that the Court had relied on did not in fact exist."[70] The Court denied the request for rehearing, with a majority of the justices arguing that the federal statute did not actually indicate a lack of national consensus within the civilian context:

> 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 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.[71]

As a result, the Court seemed to suggest that had there been evidence of a federal civilian statute authorizing the death penalty for child rape, the outcome in *Kennedy* might have been different.[72]

Due to the Court's denial of the petition for rehearing, Richard M. Ré and others have argued that the *Kennedy* holding was grounded primarily on a national consensus rationale.[73] Because of

68. *Id*. at 421.

69. 10 U.S.C. § 856 (2006).

70. *See* Petition for Rehearing, Kennedy v. Louisiana, 128 S. Ct. 2641 (No. 07-343), 2008 WL 2847069; *see also* Ré, *supra* note 20, at 1034 n.8.

71. Kennedy v. Louisiana, 554 U.S. 945, 948 (2008) (Kennedy, J., statement concerning the denial of rehearing).

72. Ré, *supra* note 20, at 1035 ("The *Kennedy* rehearing decision thus acknowledged that newly discovered evidence of a preexisting civilian statute might have prompted the Court to reconsider its decision . . . .").

73. *See id.* at 1034–36. In addition, another scholar has also argued that "the Court's analysis [in *Kennedy*] 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." Strauss,

this, these scholars have argued that *Kennedy* is and should be susceptible to federal legislative override, since its rationale was contingent upon national legislative practices.[74] More specifically, Ré argues that *Kennedy* should be subject to nonamendment federal legislative override, since new federal legislation would indicate an alternative national consensus from the one that the Court originally found.[75]

While Ré's argument focuses only on the susceptibility of *Kennedy* to legislative override, his argument has broader significance. Ré's argument suggests one way that the Court might approach a case in which its national consensus and independent judgment analyses diverge. While the two rationales in the *Kennedy* opinion supported the same outcome, this will not be true in every case. Ré suggests that if the Court chooses to adopt a national consensus rationale as its primary method of analysis, perhaps when that rationale differs from the independent judgment-based analysis, then subsequent Eighth Amendment cases would indeed become susceptible to nonamendment legislative override. After all, because the Court has determined that legislation is the most reliable indicator of public attitudes,[76] new federal legislative sentencing practices would seem to indicate a change in national consensus.[77]As a result, Ré and others have pointed out that *Kennedy* represents a case where the national consensus rationale actually took primacy over the Court's independent judgment.

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supra note 20, at 867.

74. Ré, *supra* note 20, at 1035–36; *see also* Ré, *supra* note 22, at 367. More precisely however, Ré argues that federal legislation is a better indicator of national attitudes on sentencing practices than other sources of legislation. Ré, *supra* note 20, at 1046–50.

75. Ré, *supra* note 20, at 1038–39. It is at least doubtful that the Court's sole or primary reasoning for declining a rehearing for its holding in *Kennedy* was the national consensus analysis. Instead, it is more likely that the Court was simply attempting to dispose of the petition for rehearing in the most efficient way possible, by directly negating the argument put forth by the petitioners. By directly negating the petitioners' claims and arguing that a national consensus did not exist, the Court was simply responding to the argument in the most efficient way possible. Ré seems to read too much into the *Kennedy* majority's failure to mention its independent judgment rationale, as that omission in no way suggests that the Court was retreating from the plain language of its opinion. That opinion clearly grounded the *Kennedy* holding on *both* national consensus and independent judgment reasoning.

76. Atkins v. Virginia, 536 U.S. 304, 312 (2002).

77. Ré, *supra* note 20, at 1046–50. *See also Atkins*, 536 U.S. at 312 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)) ("We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'").

C. Tensions Continue: The Arguable Primacy of the Independent Judgment Rationale in Graham v. Florida

In 2010, the Court arguably reversed the national consensus-based approach it took in denying the rehearing for *Kennedy* by favoring the independent judgment approach.[78] In *Graham v. Florida*, the Court first applied the categorical approach to a noncapital case. In that case, a juvenile defendant had been given a life sentence without the possibility of parole for committing nonhomicidal crimes.[79] The Court held that such a sentence is prohibited by the Eighth Amendment.[80] More importantly, the Court seemed to "tweak" the national consensus analysis in light of its independent judgment rationale, as the two rationales had pointed in seemingly different directions.

In applying its independent judgment analysis, the Court considered a variety of factors, including: (1) the culpability of juvenile offenders, (2) the nature of the offense committed, (3) the severity of the punishment at issue, and (4) whether the practice "serves legitimate penological goals."[81] In considering these factors, the Court argued that its independent judgment weighed against permitting Florida to sentence nonhomicidal juvenile offenders to life imprisonment without a meaningful chance for parole.[82] This was mostly because the immaturity and youth of juvenile offenders cause them to have less culpability than the average offender and because nonhomicidal crimes do not warrant the most severe noncapital penalty.[83]

78. This is arguable, however, since the Court formally, although perhaps not substantively, grounded its decision on both a national consensus and independent judgment rationale. *See* Graham v. Florida, 130 S. Ct. 2011, 2022–34 (2010).

79. *Id.* at 2020.

80. *Id.* at 2034.

81. *Id.* at 2026.

82. *See id.* at 2026–30.

83. *See id.* First, the Court found that juveniles have less culpability because of their immaturity and youth. *Id.* at 2026–27. Second, the Court found that offenders who do not commit or intend to commit homicide are "less deserving of the most serious forms of punishment than are murderers." *Id.* at 2027. Third, the Court recognized that a life sentence without parole is the "second most severe penalty permitted by law" and therefore is only proper in the most serious of circumstances. *Id.* (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991)). Last, the Court found that because nonhomicide juvenile offenders have diminished culpability due to their youth and nonhomicidal offenses, penological theories of punishment do not support giving them such a severe sentence. *See id.* at 2028–30. The Court essentially argued that because juveniles are less mature, less rational, and do not commit crimes involving homicide, none of the four traditional penological theories support

In applying the national consensus analysis, however, the Court modified its conventional approach, seemingly in an effort to make its results consistent with its independent judgment analysis. The Court found that thirty-seven states, the District of Columbia, and the federal government all permitted sentencing juveniles to life imprisonment for nonhomicide offenses.[84] By contrast, only thirteen states did not permit these practices.[85]

Remarkably, the Court seemed to dismiss these statistics, and instead shifted its focus to the country's *actual* sentencing practices.[86] Whereas actual sentencing practices had previously served only a supplementary role in the national consensus approach,[87] the Court utilized this factor in *Graham* as the primary basis for its national consensus finding. Specifically, the Court found that only 123 juvenile offenders around the country were serving life sentences without parole for nonhomicide crimes.[88] Importantly, all of those offenders were convicted in only eleven states, with well over half of them being sentenced in Florida alone.[89] Thus, the Court determined that because only eleven jurisdictions *actually* imposed life sentences without parole on nonhomicidal juvenile offenders,[90] a national consensus existed against the practice, despite the overwhelming amount of legislation that authorized it.[91]

Overall, then, the *Graham* Court had difficulty in reaching a single and consistent outcome utilizing two separate rationales. While the Court in *Graham* did not explicitly find that its national consensus and independent judgment rationales led to different results, *Graham* did demonstrate the potential conflict that can arise between using two separate rationales to determine a single holding.

incarcerating them for life. *See id*. at 2028–30.

84. *Id*. at 2023.

85. *Id*.

86. *See id*.

87. *See supra* Part II.A.

88. *Graham*, 130 S. Ct. at 2024.

89. *Id*.

90. *Id*.

91. *Id*. at 2026. The Court noted that although the number of juveniles serving such sentences is not small, "the comparison suggests that in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual." *Id*. at 2025. Interestingly, the Court also considered the fact that there was an international consensus against the sentencing practice. *Id*. at 2033. In this, the Court noted that only eleven nations permitted imposition of a life sentence without parole for a juvenile offender, and only two of those nations, including the United States, ever imposed such a sentence. *Id*.

In order to arrive at a coherent result, the *Graham* Court was forced to "tweak" its traditional national-consensus approach to harmonize it with the independent-judgment analysis. As a result, both *Kennedy* and *Graham* illustrate that the Court's categorical approach for Eighth Amendment proportionality review is currently in a state of tension.[92] While previous cases demonstrated that the national-consensus and independent-judgment rationales can often be utilized in complementary fashion, *Kennedy* and *Graham* demonstrate that tension between the two rationales is inevitable at some point. Indeed, it is likely that the Court will eventually encounter a case in which the two rationales will lead to such different results that no amount of "tweaking" will be able to reconcile the two methodologies.

As a result, the Court will eventually be forced to choose which one of the two rationales should take primacy in Eighth Amendment categorical review. While Richard Ré and other scholars have implied that adopting a national-consensus-only approach is a legitimate and perhaps desirable option,[93] this Comment argues that such an approach is highly problematic.

III. A PRIMARILY-NATIONAL-CONSENSUS APPROACH UNDERMINES THE EIGHTH AMENDMENT POLICY OF LIMITING LEGISLATIVE ACTION

A primarily-national-consensus approach for Eighth Amendment categorical review would undermine major policies embedded within the Eighth Amendment and the Constitution generally. Primarily, this approach would undermine the Eighth Amendment's general purpose of imposing limits on legislative action.[94] This is because, were the Court to adopt a national consensus-only approach, the Eighth Amendment would fail to limit legislative action as it would become a *grant* of legislative authority. This would undermine the more fundamental policy of protecting politically weak minorities from unbridled majority action, a central purpose underlying the Eighth Amendment and the Bill of Rights generally.[95]

As the Court has noted numerous times, the primary intent

92. *See* Ré, *supra* note 22, at 371 (noting that "*Graham* demonstrates that the Supreme Court's Eighth Amendment jurisprudence is in a state of flux").

93. Ré, *supra* note 20, at 1036; Strauss, *supra* note 20, at 868.

94. *See* U.S. CONST. amend. VIII.

95. *See infra* Part III.B.

behind constitutionalizing the prohibitions in the Eighth Amendment was to place an absolute limit on what kinds of sentencing practices legislatures can authorize.[96] In other words, the role of the Eighth Amendment is to act as an outer limit on what kinds of punishments legislatures can impose on criminal offenders.

> [W]hile the opinions of legislatures [may] be given great weight when assessing the constitutionality of a penalty, their opinions [will] not, and [can] not, be conclusive. Otherwise, the Cruel and Unusual Punishment Clause would have no meaning, because its very purpose is to guard *against* the penchant of legislatures to overreact sometimes to the problem of crime . . . .[97]

Thus, because "the Eighth Amendment is a restraint upon the exercise of legislative power[,] . . . there are punishments that the Amendment would bar whether legislatively approved or not."[98]

Consequently, if a national consensus rationale is utilized as the sole or primary basis for determining the content of the Eighth Amendment, then the role of that constitutional provision as a *limit* on legislative power is undermined. As Ré and other scholars have pointed out, if a national consensus approach were utilized as the primary rationale in Eighth Amendment categorical review, then Eighth Amendment rights could be dictated by the sentencing practices of federal or state legislators.[99] This would mean that the Eighth Amendment could not limit the discretion of legislatures in any meaningful way, and the provision would constitute an empty promise. Instead, all that would limit the power of legislatures is whether the sentencing practice is adopted nationally. As Ré argues, this would mean that *any* sentencing practice passed by Congress would by definition satisfy Eighth Amendment review.[100] As a result, a national consensus-based approach would render the Eighth Amendment's "limits" without substantive meaning, as it would deprive the provision of its binding power on legislative action.

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96. *See, e.g.*, Ewing v. California, 538 U.S. 11, 33 (2003) (Stevens, J., dissenting) (stating that the Eighth Amendment imposes "outer limits" on the sentencing authority of legislatures).

97. BRANHAM, *supra* note 9, at 146 (emphasis added) (describing the Court's analysis in Gregg v. Georgia, 428 U.S. 153 (1976)).

98. *Gregg*, 428 U.S. at 174 (quoting Furman v. Georgia, 408 U.S. 238, 313–14 (1972) (White, J., concurring)).

99. Ré, *supra* note 20, at 1036; Strauss, *supra* note 20, at 868.

100. Ré, *supra* note 20, at 1036.

Interestingly, if a national-consensus-only approach were adopted, rather than acting as a limit on legislative authority, the amendment would seemingly constitute a *grant* of authority to legislatures. As stated, so long as a particular legislative practice could garner widespread use, legislatures could engage in whatever sentencing practices they deem appropriate. This result would not only controvert the original intent behind the Eighth Amendment, but also the dual nature of the categorical analysis approach. It was because the Court could not trust the political process to treat criminal offenders fairly that it insisted on implementing an independent-judgment rationale in the first place. [101] By utilizing that analysis, the Court could determine "whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[102]

In addition, a national-consensus-only approach would have the secondary effect of circumventing the amendment process as set forth in Article V of the Constitution. The Court has noted that the Eighth Amendment is intended to "shut off" the people's ability "to express their preference through the normal democratic processes."[103] In other words, the Eighth Amendment prevents legislatures or political majorities from adopting certain sentencing practices *regardless* of whether they could be approved by normal legislative procedures. This is grounded in a mistrust of the political process to adequately protect criminal offenders.[104] However, a national-consensus-only approach would undermine this policy, because Congress could undercut previously recognized Eighth Amendment rights by a simple majority vote rather than through a vote of two-thirds in both houses and by three-fourths of the states, as required by Article V.[105]

"[T]he Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society."[106] It also requires that a punishment be consistent with the original purposes behind the amendment itself.[107] This is true not merely because of concerns for stare decisis, but because the core

101. *See* Atkins v. Virginia, 536 U.S. 304, 313 (2002).
102. *Id.*
103. *Gregg*, 428 U.S. at 176.
104. *See id.*
105. U.S. CONST. art. V.
106. *Gregg*, 428 U.S. at 182.
107. *Id.*

constitutional policies and purposes that ground the Eighth Amendment demand that a nonpolitical limit be placed on what state or federal legislatures may do to criminal offenders. Because the Eighth Amendment is intended to constitute an outer limit on the sentencing authority of legislatures, a national-consensus-only approach would undermine the Eighth Amendment itself.

Because of this, a national consensus-based approach would fail to account for the more fundamental policy of adequately protecting a politically weak minority from unbridled majority rule. The protection of politically weak minorities is implicit not only in the Eighth Amendment's language relating to criminal offenders, but also in the Bill of Rights and Constitution generally.[108] It is clear that the reasoning requiring certain protections for criminals under the Eighth Amendment stemmed from the recognition that criminal offenders constitute a minority class of citizens that will rarely, if ever, be able to garner enough political support to sufficiently check the actions of legislatures that affect them. Indeed, because convicted criminals are a particularly unsympathetic minority, they are highly vulnerable to the whims of outraged majorities. As stated by the Court, it is a "well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime."[109] No doubt this is because popular opinion has been, and likely will continue to be, unsympathetic to convicted criminals.

While some antagonism towards these offenders is warranted, the potential for outraged political majorities to *excessively* punish them was anticipated by the Framers.[110] As a result, the Eighth Amendment was included as an indicator of the founders' mistrust of political majorities to deal fairly with criminal offenders.[111] Indeed, this point was implicit in *Roper*, in which the Court acknowledged that society is often willing to overlook just punishment in order to

108. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991) (noting that one of the several purposes of the Bill of Rights was to "vest individuals and minorities with substantive rights against popular majorities"). *See also* THE FEDERALIST NO. 51, at 357–58 (James Madison) (Clinton Rossiter ed., 1961) (stating that the Constitution was not only to "guard the society against the oppression of its rulers, but [also] to guard one part of the society against the injustice of the other part").

109. Atkins v. Virginia, 536 U.S. 304, 315 (2002).

110. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3125 (2010) (Breyer, J., dissenting) (noting that the Eighth Amendment seeks "to protect individuals who might otherwise suffer unfair or inhumane treatment at the hands of a majority").

111. *See id.*

satisfy outraged majorities.[112]

As a result, it can be argued that the Eighth Amendment was included in the Bill of Rights specifically because criminal offenders were a particularly vulnerable political minority that could not be adequately protected by the normal political process. Consequently, if a national-consensus-based approach is used to construe the limits of the Eighth Amendment, there would be no mechanism that could effectively limit majority action aimed at excessive punishments. Protection for this minority would ironically be sacrificed by the very Amendment intended to protect that group.

Furthermore, use of the national-consensus rationale is itself based upon questionable reasoning. Historically, the rationale for using a national consensus or "evolving standards of decency" approach has been based upon the assumption that American society is "progressive" in regards to its moral development.[113] As stated, the Court declared early on that the "evolving standards of decency" by which the Eighth Amendment is measured are rooted in "the progress of a maturing society."[114] In other words, the Eighth Amendment "acquire[s] meaning as public opinion becomes enlightened by a humane justice."[115]

Unfortunately, the assumption that society's sense of fairness progresses with time, at least with regards to the punishment of criminal offenders, is not entirely accurate. As the Court itself has more recently recognized, legislatures are often overeager to harshly punish criminal offenders because that is often more attractive to political majorities.[116] Likewise, as the Court implied in *Roper*, because society is often more concerned with punishment than fairness, it often tends to forget about ensuring that criminal offenders are not *excessively* punished.[117] As a result, it is rather questionable that society's sense of fairness with regards to criminal offenders can be understood as truly "progressive." A national

112. *See* Roper v. Simmons, 543 U.S. 551, 573 (2005) (stating that the public would likely react impulsively to brutal criminal conduct in a way that overlooks important mitigating factors, such as an offender's youth, immaturity, and overall lessened culpability).

113. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

114. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (quoting *Trop*, 356 U.S. at 101).

115. *Id*. at 171 (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).

116. *See* Atkins v. Virginia, 536 U.S. 304, 315 (2002) ("[It is a] well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime.").

117. *See Roper*, 543 U.S. at 573.

consensus-only approach would therefore be a difficult one to justify in light of the Eighth Amendment's policy of imposing an outer limit on acceptable punishments.

Overall, these criticisms do not necessarily mean that a national consensus analysis can never be relevant to Eighth Amendment review. Indeed, the Court has consistently and legitimately interpreted the Amendment through "evolving standards of decency."[118] All this Comment argues against is a type of Eighth Amendment review that utilizes national consensus as the *sole* or primary methodology. If this occurs, the Amendment loses its limiting character on legislative action therefore fails to protect the politically weak minority that the Amendment explicitly anticipates protecting.

IV. RESOLVING THE CATEGORICAL REVIEW DILEMMA: THE PRIMACY OF INDEPENDENT JUDGMENT

As demonstrated, there are significant problems that accompany a national-consensus-based rationale for Eighth Amendment categorical review. This Comment proposes that the Court can resolve this dilemma by utilizing the independent-judgment rationale as the primary methodology for Eighth Amendment categorical review. In this, the national-consensus rationale, while relevant, should be secondary to the Court's independent-judgment analysis.

This proposed solution would require focusing primarily on the common sense principles and penological theories inherent in the Court's Eighth Amendment precedents.[119] For example, in order to formulate bright-line rules that determine a particular sentence's constitutionality, the Court could use the criteria specified in *Graham*. This would involve the Court evaluating (1) the culpability of the offender, (2) the nature of the offense committed, (3) the severity of the punishment at issue, and (4) whether the practice "serves legitimate penological goals."[120] For this last criterion, the Court could assess the legitimacy of the sentencing practice by considering how well the sentence rationally serves the penological

118. *See, e.g.*, *Trop*, 356 U.S. at 101.

119. For example, in *Atkins*, *Roper*, *Kennedy*, and *Graham*, the Court was able to identify common-sense principles from which they could derive bright-line rules that would inform the limits of the Eighth Amendment. *See supra* Part II.A–C.

120. *See* Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).

theories of retribution, deterrence, and rehabilitation, just as it did in *Graham*. While use of these factors involves a subjective judgment, this problem arises with any judicial test not grounded in statistical data. By looking to these criteria, however, the Court would be able to formulate the bright-line rules that inform the limits of the Eighth Amendment.

Furthermore, this methodology would render the national-consensus inquiry a relevant, but ultimately less important, inquiry. The role of the national-consensus analysis in Eighth Amendment review would merely serve as a "trigger" to prompt the Court to look for common-sense principles that support the widely held views embodied in legislative sentencing schemes. This adjustment would place the national-consensus analysis in its most fitting position because it indicates only what practices are widely used, not *why* they should be permissible. All statistics can demonstrate is that a majority of people support or oppose a particular sentencing practice. As a result, while use of a national-consensus-only approach could demonstrate that a particular punishment is or is not "unusual," it could not explain whether or why it is or is not "cruel."

An independent-judgment analysis, however, *does* give reasons as to why a particular sentencing practice is or is not constitutional, because that approach is made up of common sense principles that are aimed at explaining why a sentence is permissible or not. Indeed, this is why the Court has previously intimated that the independent-judgment approach is the superior approach, because it helps determine whether "there is reason to disagree with the judgment reached by the citizenry and its legislators."[121] Furthermore, because the Court is more insulated from the pressure of outraged majorities than the legislators who are elected by them, the Court can more adequately serve the policies underlying the Eighth Amendment, as discussed in the previous section.

Thus, the Court should combine the national-consensus and independent-judgment analyses into a single approach in which the Court's own independent judgment analysis would form the *primary* basis of Eighth Amendment review. This would consist of the Court taking into consideration all of the *Graham* factors in order to formulate bright-line rules that inform the limits of the Eighth Amendment. In addition, the function of the national-consensus rationale would be of only *secondary* importance, as it could merely

121. *Atkins*, 536 U.S. at 313.

prompt the Court to look at the fairness underlying a widely used sentencing practice. This approach would not only prevent legislative determination of the content of the Eighth Amendment, but it would make the Court's analysis more internally coherent, as well as more consistent with the major constitutional policies noted above.

V. CONCLUSION

The categorical approach to Eighth Amendment review is currently in a state of tension. In previous cases, the Court has construed the outer limits of sentencing authority embodied in the Eighth Amendment by utilizing a dual-analytical approach that sees the national-consensus and independent-judgment rationales as coequal.[122] While the Court has been able to utilize these two methodologies in complementary fashion throughout the twentieth century, this will not always be true. At some point, using two separate rationales will inevitably lead to divergent results, prompting the Court to modify its approach.

Some scholars have suggested that a national-consensus-only approach that leaves Eighth Amendment rules susceptible to legislative override is a legitimate solution to this dilemma.[123] By using an Eighth Amendment review that is grounded primarily in a national consensus approach, the test for constitutional muster of any sentence would be merely whether it is nationally used or consented to. In this way, Congress could determine for itself whether a particular criminal sentence is constitutional or not. In other words, Congress could change the rules of Eighth Amendment jurisprudence without even having to pass an amendment to the Constitution.

This Comment argues that a national-consensus-only approach is problematic. Such an approach cuts against the major Eighth Amendment policy of imposing limits on legislative authority, which derives from the recognition that political majorities cannot always be trusted to deal fairly with criminal offenders. Instead, the Court should adopt an independent-judgment-based rationale that would render the national-consensus inquiry of secondary importance. This approach would consist of the Court utilizing the basic principles and criteria inherent in its precedents, including *Graham*, in order to

122. *See supra* Part II.

123. *See supra* Part II.B.

formulate the bright-line rules for its categorical approach. This method would not only avoid the constitutional problems noted above, but it would best serve the core policies underlying the Eighth Amendment's prohibition against "cruel and unusual punishments."[124]

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124. U.S. CONST. amend. VIII.

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