NOTES

STATE CONSTITUTIONAL LAW AS EVIDENCE OF EVOLUTION: HOW STATE SUPREME COURT DECISIONS SHOULD INFLUENCE EIGHTH AMENDMENT DOCTRINE

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The Eighth Amendment to the U.S. Constitution bans "cruel and unusual" punishment. Historically, the Amendment's protection has limited the use of the death penalty, life without parole sentences for juveniles, and other extreme punishments. The Supreme Court's Eighth Amendment jurisprudence has been both controversial and unpredictable. Fortunately, every state constitution has an Eighth Amendment analog, and state supreme courts have independent authority to interpret those provisions as they see fit. State constitutions are therefore an alternative avenue for defining what constitutes unconstitutional punishment, and this area of law is a uniquely suitable context for state constitutional decisions to exert influence over the development of federal constitutional doctrine. While state supreme courts have typically followed the Supreme Court's say-so on cruel and unusual punishments, recent state constitutional decisions may indicate a shifting tide toward more robust development of state constitutional law in this area. This Note argues that the Supreme Court should strongly consider such state constitutional decisions in assessing "evolving standards of decency" under the Eighth Amendment.

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Introduction

On January 11, 2024, the Supreme Judicial Court of Massachusetts held in *Commonwealth v. Mattis* that life-without-parole (LWOP) sentences are unconstitutional under the Massachusetts Constitution for individuals between the ages of eighteen- and twenty-years old.[1] This holding is extraordinary for several reasons. It is the first state supreme court decision banning LWOP for a class of individuals over seventeen-years old,[2] and the ubiquity of LWOP sentences means this decision will impact many people who previously had no hope of life beyond prison walls.[3] This Note focuses on a third aspect of the *Mattis* decision that is

[1] Commonwealth v. Mattis, 224 N.E.3d 410, 415 (Mass. 2024).

[2] *See* Kris Olson, *Attorneys: 'Mattis' to Have Impact Beyond Those Newly Eligible for Parole*, Juv. L. Ctr. (Jan. 26, 2024), https://jlc.org/news/attorneys-mattis-have-impact-beyond-those-newly-eligible-parole [https://perma.cc/HHF8-HRFU] ("In *Mattis* . . . the SJC became the first state supreme court in the country to decide that sentencing an 'emerging adult' aged 18, 19 or 20 to life without parole is every bit a violation of the state constitution as when such a sentence is imposed on a juvenile . . . ." (emphasis added)).

[3] A 2017 report by The Sentencing Project identified Massachusetts as one of eight states with the highest rates of life and virtual life sentences among state prisoners. Ashley Nellis, The Sent'g Project, Still Life: America's Increasing Use of Life and Long-Term Sentences 7 (2017), https://www.sentencingproject.org/reports/still-life-americaos-increasing-use-of-life-and-long-term-sentences [https://perma.cc/8J72-KDZR]. At the time of reporting, 1,018 individuals in Massachusetts were serving LWOP sentences. *Id.* at 10. There is also good reason to believe that many of these individuals were sentenced based on convictions from when they were between the ages of eighteen and twenty. *See* Ashley Nellis & Niki Monazzam, The Sent'g Project, Left to Die in Prison: Emerging Adults 25 and Younger Sentenced to Life Without Parole 2 (2023), https://www.sentencingproject.org/reports/left-to-die-in-prison-emerging-adults-25-and-younger-sentenced-to-life-without-parole [https://

extraordinary: The Supreme Judicial Court of Massachusetts declined to follow the U.S. Supreme Court's lead on defining the meaning of cruel and unusual punishment under its state constitutional analog to the Eighth Amendment.[4]

Historically, most state supreme courts have looked to the U.S. Supreme Court's Eighth Amendment precedents to determine the meaning of the cruel and unusual punishment clauses in their state constitutions. Such "lockstepping" is not required as a matter of state constitutional interpretation, but it has nevertheless been the dominant practice of states.[5] However, recent state supreme court decisions striking down punishments as unconstitutional under state law may signal a shift in state supreme courts' willingness to engage in independent constitutional interpretation.[6] This trend in the cruel and unusual punishment context fits well within a renewed and growing call for more "state constitutionalism."[7] Broadly defined, state constitutionalism refers to state courts deciding cases based on state constitutional law, rather than deferring to the judgment of the federal courts on constitutional questions.[8]

If state supreme courts are signaling a willingness to engage in more independent constitutional analysis, a question arises as to what impact, if any, such state constitutional decisions should have on the larger federal system. This Note begins to answer this question by offering the Supreme Court's Eighth Amendment jurisprudence as a particularly ripe area in which state constitutional decisions can add value to federal constitutional jurisprudence. The Supreme Court has decided its most significant Eighth Amendment cases based on "evolving standards of decency."[9] This doctrine has been inconsistent

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perma.cc/V68N-ED3C] ("Two in five people—11,600 individuals—sentenced to LWOP between 1995 and 2017 were under 26 at the time of their sentence.").

4 *See infra* Section III.A.2.

5 *See, e.g.*, William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 Am. Crim. L. Rev. 1627, 1636–37 (2021) (citing William W. Berry III, *Cruel State Punishments*, 98 N.C. L. Rev. 1201, 1252–54 (2020)) ("The overwhelming majority of states—forty—follow the Supreme Court's approach . . . applying a gross disproportionality standard to determine constitutionality under the state constitution.").

6 *See, e.g.*, *infra* Section III.A.

7 The State Court Report, a project of the Brennan Center for Justice at NYU Law, describes the motivation behind the renewed interest in state constitutionalism on its website, noting that "[r]ecent federal rulings that have limited or eliminated rights under the U.S. Constitution have brought increased attention to state constitutions as important sources of rights." *See* State Ct. Rep., https://statecourtreport.org/about/state-court-report [https://perma.cc/4J3Y-KJ48]. Importantly, "[s]tate constitutional questions cut across issues and ideological lines, from curbing partisan gerrymandering to protecting property rights." *Id.*

8 *See generally id.* (reporting and analyzing ground-breaking state constitutional decisions).

9 *See infra* Part I.

and contentious,[10] but generally, the Court has applied the evolving standards of decency framework by first looking at "objective indicia of consensus"—in other words, evidence that society now rejects a punishment as cruel and unusual—and then applying the Court's "own independent judgment" regarding whether a punishment should therefore be deemed unconstitutional.[11]

However, the "objective indicia of consensus" that the Supreme Court has used are not necessarily objective, and this doctrine is more likely to endure in the modern era if it adapts to current conceptions of the judicial function. This Note suggests that state constitutional decisions are better indicia of evolving standards of decency than the categories the Court has relied upon in prior cases. Therefore, the Court's Eighth Amendment jurisprudence is a uniquely suitable context in which state constitutional law can (and should) exert influence over federal constitutional doctrine. While various scholars have identified the occasional tendency of the Supreme Court to look to state constitutional decisions[12]—and at least one has identified the Eighth Amendment context as a particularly good fit for this practice[13]—this Note is the first to engage in a thorough analysis of why this type of constitutional borrowing would not just fit comfortably within the Supreme Court's Eighth Amendment jurisprudence, but actually meaningfully improve it. The argument proceeds in three parts: Part I summarizes the Supreme Court's Eighth Amendment jurisprudence and analyzes prior applications of the evolving standards of decency framework; Part II explores state constitutions as a source of law and state supreme courts as independent interpretive authorities on constitutional issues; and Part III provides examples of recent state

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10 Corinna Barrett Lain, *The Power, Problems, and Potential of "Evolving Standards of Decency," in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 76, 76 (Meghan J. Ryan & William W. Berry III eds., 2020).

11 Roper v. Simmons, 543 U.S. 551, 564 (2005).

12 Robert Williams, Gerald Dickinson, and Joseph Blocher are three prominent examples. *See* Robert F. Williams, *The State of State Constitutional Law, the New Judicial Federalism and Beyond*, 72 RUTGERS U. L. REV. 949, 959 (2020) (discussing the Supreme Court's "top-down spotlights on state constitutional law" as emphasizing "the emerging importance of independent state constitutional rights adjudication"). *See generally* Gerald S. Dickinson, *A Theory of Federalization Doctrine*, 128 DICKINSON L. REV. 75 (2023) (discussing the doctrine of federalization, whereby the Supreme Court turns to state court doctrine to guide and inform federal constitutional law); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CALIF. L. REV. 323 (2011) (highlighting the Supreme Court's tendency to ignore state constitutional doctrines when making federal constitutional rules, but for few notable exceptions).

13 *See* Blocher, *supra* note 12, at 371, 379 (identifying the Eighth Amendment context as one of three areas "in which state constitutional law has had the most influence on modern federal doctrine," but noting that "the Court has generally looked to state legislatures, not state constitutions, as the most appropriate evidence of moral consensus").

constitutional decisions and argues that such decisions should weigh into the Supreme Court's future determinations of evolving standards of decency under the Eighth Amendment. A short conclusion follows.

I
The U.S. Supreme Court's Eighth Amendment Jurisprudence & "Evolving Standards of Decency"

This Part summarizes the U.S. Supreme Court's Eighth Amendment jurisprudence and focuses specifically on the contours of the Court's "evolving standards of decency" doctrine. Two recurring themes emerge from the relatively small collection of Eighth Amendment Supreme Court opinions finding certain punishments unconstitutionally cruel and unusual. Liberal-leaning Justices tend to limit particularly severe punishments as discordant with evolving standards of decency, and conservative-leaning Justices (often in dissent) accuse the Court of usurping Congress's legislative authority to define appropriate punishments. Other than these two constants, the jurisprudence, in the words of Justice Kennedy, "is still in search of a unifying principle."[14] I begin this Part with an originalist review of the Eighth Amendment because of the current Supreme Court's emphasis on originalism, but it is worth noting that originalist conceptions of cruel and unusual punishment have generally been less persuasive and less relevant to constitutional analysis than originalist arguments in other contexts.[15]

Turning first to the text itself, the Eighth Amendment is the shortest amendment in the Constitution. It decrees that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[16] The text of the Cruel and Unusual Punishments Clause borrows its text from the English Bill of Rights of 1689.[17] This part of the English Bill of Rights was a direct response to the "Bloody Assizes" of Judge George Jeffreys.[18] Punishments in

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[14] Kennedy v. Louisiana, 554 U.S. 407, 437 (2008).

[15] *See infra* notes 25–26 and accompanying text.

[16] U.S. Const. amend. VIII. In this Note, I leave the Excessive Bail Clause and the Excessive Fines Clause to the side and focus solely on the Cruel and Unusual Punishments Clause.

[17] *See* Eng. Bill of Rts. (1689) (banning excessive fines, excessive bail, and cruel and unusual punishments) (accessed from Yale Law School, The Avalon Project, https://avalon.law.yale.edu/17th_century/england.asp [https://perma.cc/M7CZ-JU68]).

[18] Akhil Reed Amar, Bill of Rights: Creation and Reconstruction 87 (1998). Justice Scalia provides a helpful overview of this history in his *Harmelin v. Michigan* opinion. 501 U.S. 957, 968 (1991) ("[Lord Chief Justice Jeffrey's of the King's Bench] is best known for presiding over the 'Bloody Assizes' following the Duke of Monmouth's abortive rebellion in 1685; a special commission led by Jeffreys tried, convicted, and executed hundreds of suspected insurgents.").

England at the time were gruesome by modern standards, including "public dissection" for the crime of murder and "burn[ing] alive" of women who committed treason.[19] These punishments were justified by Sir William Blackstone with ease, with no seeming reservations as to whether such punishments violated the cruel and unusual punishments clause in the English Bill of Rights.[20]

Another precursor to the Eighth Amendment's Cruel and Unusual Punishments Clause was the Virginia Declaration of Rights.[21] The Virginia Declaration similarly inspired other states that subsequently drafted their constitutions and declarations of rights.[22] Many states framed their own clauses barring cruel and unusual punishments, in some cases substituting the "and" for an "or."[23] The substances of these clauses—in other words, what was barred as cruel and/or unusual—was largely left to future interpretation. They were "often adopted without debate, indicat[ing] that the cruel and unusual punishments clause was considered constitutional 'boilerplate.'"[24]

While the typical originalist versus living-constitutionalist debate certainly plays out in the Eighth Amendment context,[25] some evolution of the Cruel and Unusual Punishment Clause's meaning may be uncontested, at least when it comes to truly extreme methods of punishment. Even Justice Scalia admitted that he "[could not] imagine [himself], any more than any other federal judge, upholding a statute that imposes the punishment of flogging."[26] If such concessions are possible, then perhaps the original meaning is less important—even to committed originalist justices—in interpreting the Eighth Amendment. However, if originalism is not the guiding principle in the Eighth Amendment context, a question arises regarding what, if any, principles

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19 JOHN D. BESSLER, CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 172 (2012) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *51, *221).

20 BLACKSTONE, *supra* note 19, at *222–23 ("[H]owever unlimited the power of the court may seem, it is far from being wholly arbitrary; but its discretion is regulated by law. For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted[.]").

21 *See* VA. DECL. OF RTS. § 9 (1776) ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

22 *See* BESSLER, *supra* note 19, at 177–80.

23 *Id.* at 181. John Bessler notes that "[t]oday, twenty-two states bar 'cruel and unusual' punishments, nineteen states prohibit 'cruel or unusual' punishments, and six states prohibit 'cruel' punishments and omit the 'unusual' element." *Id.*

24 Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969).

25 *See, e.g.*, Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 422–26 (1998) (summarizing the debate between Justice Scalia and Ronald Dworkin on the proper interpretation of the Eighth Amendment).

26 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

undergird the Supreme Court's Eighth Amendment decisions. A survey of the case law illuminates both its unpredictability and its consistent evocation of "evolving standards of decency" to justify expansions beyond founding era conceptions of cruel and unusual punishment.

A brief, chronological overview of the evolving standards of decency doctrine typically begins with *Weems v. United States* in 1910, in which the Court held that a punishment of fifteen years of hard labor for falsifying official documents was cruel and unusual punishment.[27] The Court candidly admitted in a dictum that "[w]hat constitutes a cruel and unusual punishment has not been exactly decided,"[28] but nonetheless held that the particular facts of the case fit the bill. The Court further articulated a living-constitutionalist vision for the Eighth Amendment, noting that "a principle, to be vital, must be capable of wider application than the mischief which gave it birth."[29] While the exact phrase of "evolving standards of decency" was not invoked until decades later, *Weems* marks the Court's first attempt to stretch the Eighth Amendment's protections beyond what was constitutionally prohibited in the founding era.

Nearly four decades later, the Court decided the landmark case of *Trop v. Dulles*.[30] In holding denationalization to be a cruel and unusual punishment for the crime of war desertion, Chief Justice Warren's majority opinion declared: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society."[31] As we will see, many subsequent cases enthusiastically adopted this phrase and ascribed broader significance to it. Similarly, a dissent penned by Justice Frankfurter in *Trop* provided inspiration for many subsequent dissents warning of the dangers of such a framework. Justice Frankfurter claimed that the majority's decision stretched the concept of cruel and unusual punishment "beyond the breaking point" and further cautioned that the Court's power to invalidate punishments as unconstitutional "must be exercised with the utmost restraint."[32]

Four years later, the Court incorporated the Eighth Amendment against the states in *Robinson v. California*.[33] A case often taught in criminal law classes, *Robinson* held unconstitutional a California statute

27 Weems v. United States, 217 U.S. 349, 359 (1910).
28 *Id.* at 368.
29 *Id.* at 373.
30 Trop v. Dulles, 356 U.S. 86 (1958).
31 *Id.* at 100–01 (emphasis added).
32 *Id.* at 125, 128 (Frankfurter, J., dissenting).
33 Robinson v. California, 370 U.S. 660 (1962).

that made it a criminal offense to be addicted to the use of narcotics.[34] Justice White's dissent in *Robinson*, much like Justice Frankfurter's dissent in *Trop*, offered a forceful critique of the evolving standards of decency framework as applied in the majority opinion. In his view, the Court used the doctrine merely as a cover to unilaterally impose "its own notions of ordered liberty" and ascribe constitutional significance to them.[35]

Despite Justice White's misgivings, the evolving standards of decency framework, if taken seriously, legitimately displaces founding era notions of "cruel and unusual punishment" and replaces them with "evolved" understandings. For example, in *Furman v. Georgia*, the Court struck down three applications of the death penalty as unconstitutional,[36] even though the death penalty as a general punishment would certainly not have been cruel or unusual to the framers of the Constitution. Still, in fairness to Justice White and other skeptics, the fractured and incoherent nature of the Court's Eighth Amendment jurisprudence is exemplified by the five concurrences and four dissents in *Furman*.[37] In other words, every member of the Court had something unique to say about the constitutional question. To name just a few, Justices Marshall and Brennan declared the death penalty categorically unconstitutional in their concurrences;[38] in his concurrence, Justice Douglas stated that discrimination was the core of the unconstitutionality of the specific applications of the death penalty at issue;[39] and Justice Blackmun, in

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[34] *Id.* at 667 ("We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.").

[35] *Id.* at 689 (White, J., dissenting).

[36] Furman v. Georgia, 408 U.S. 238 (1972) (per curiam). *Furman* struck down three death penalty sentences—two for murder and one for rape—because, in the Court's view, the punishment of death was being arbitrarily imposed, often in a racially biased manner against Black defendants. *Id.* at 252–53.

[37] *See id.* at 240.

[38] *See id.* at 370 (Marshall, J., concurring) ("[T]he death penalty violates the Eighth Amendment . . . ."); *see also id.* at 305 (Brennan, J., concurring) (determining that death violates human dignity).

[39] *Id.* at 256–57 (Douglas, J., concurring). All three of the defendants before the Court were Black, and significant evidence suggested that the death penalty was discriminately applied much more often against Black defendants. Of course, such racial disparities persist in the modern criminal legal system despite the Court's concerns in *Furman*. *See generally* Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Inst. of Just. (May 2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/CHA6-D76T].

dissent, wrote that while he "may rejoice at the Court's result," he could not justify such a result as a matter of law or precedent.[40]

This tug-of-war between those Justices who sought to continuously redefine the Eighth Amendment's meaning in light of "evolved" understandings and those Justices who decried the Court's "policymaking" persisted in subsequent decades. Each faction declared victory in a subset of cases, and some Justices moved between the two camps depending on the facts of each case. Four years after *Furman*, the Court decided *Gregg v. Georgia*[41] and *Woodson v. North Carolina*[42] on the same day. The former answered the question posed by Justices Brennan and Marshall's *Furman* concurrences and declared the death penalty constitutional for murder (at least in some cases),[43] but the latter held that North Carolina's *mandatory* death sentence for first-degree murder did violate the Eighth Amendment.[44] The next year, the Court declared the death penalty a "grossly disproportionate" punishment for rape of an adult woman, rendering the sentence unconstitutional.[45] Thus, in the 1970s, the Burger Court's most significant Eighth Amendment decisions were focused on the idea that "death is different."[46] Of course,

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[40] *Furman*, 408 U.S. at 414 (Blackmun, J., dissenting). Interestingly, Justice Blackmun would later change his view on the constitutionality of the death penalty. In a dissent from the denial of a writ of certiorari twenty-two years after *Furman*, Justice Blackmun wrote: "It seems that the decision whether a human being should live or die is so inherently subjective—rife with all of life's understandings, experiences, prejudices, and passions—that it inevitably defies the rationality and consistency required by the Constitution." Callins v. Collins, 510 U.S. 1141, 1153 (1994) (Blackmun, J., dissenting from denial of certiorari).

[41] Gregg v. Georgia, 428 U.S. 153 (1976).

[42] Woodson v. North Carolina, 428 U.S. 280 (1976).

[43] *Gregg*, 428 U.S. at 206–07 (noting that Georgia's sentencing procedures "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant" and holding that such procedures therefore do not violate the Constitution).

[44] *Woodson*, 428 U.S. at 304 ("[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.").

[45] Coker v. Georgia, 433 U.S. 584, 592 (1977).

[46] "Death is different" refers to capital punishment as compared to other forms of punishment. However, I do not mean to suggest that death penalty cases are the only or even the most significant Eighth Amendment precedents. For example, the Court entertained a variety of both death penalty and non-death penalty Eighth Amendment cases in the 1980s. In the first half of the decade alone, the Court held a mandatory life sentence under a recidivist statute constitutional as punishment for a non-violent crime, *Rummel v. Estelle*, 445 U.S. 263 (1980); held the death penalty unconstitutional as a punishment for vicarious felony murder, *Enmund v. Florida*, 458 U.S. 782 (1982); and, perhaps most interestingly, held that the Eighth Amendment prohibits not only inhumane punishments, but also sentences that are disproportionate to the crime committed, *Solem v. Helm*, 463 U.S. 277 (1983). Note that this inclusion of proportionality in the constitutional analysis may contradict founding era understandings of the Eighth Amendment's meaning. *See* Granucci, *supra* note 24,

the notion that "death is different" has no legitimate roots in the Eighth Amendment as a matter of original understanding,[47] but it is now firmly entrenched in the Court's precedents as part of the evolving standards of decency doctrine.

Indeed, the Court determined over subsequent decades that death is not just different, but rather, that death is uniquely "different"—and thus unconstitutional as a form of punishment—for certain categories of offenders. For example, the Court's long line of juvenile cases, explored in greater detail below, began in the late 1980s with a pair of cases considering the death penalty as applied to juvenile offenders.[48] The Court also considered the death penalty as applied to individuals with intellectual disabilities in *Atkins v. Virginia*.[49]

In *Atkins*, Justice Stevens's majority opinion declared that "[a] claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail."[50] In defining what standards "currently prevail[ed]" regarding the execution of intellectually disabled individuals, Justice Stevens considered state legislative enactments,[51] state patterns and practices,[52] public opinion polls,[53] and the purposes served by the death penalty as defined by prior precedents.[54] In light of these factors, the Court concluded that the punishment of execution for intellectually disabled individuals violated the Eighth Amendment "in the light of our 'evolving standards of decency.'"[55]

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at 842 (noting that "[e]xpressions in the first congress confirm that the view that the cruel and unusual punishments clause was directed at prohibiting certain *methods* of punishment" as opposed to *disproportionate* punishments).

47 *See supra* notes 19–20 and accompanying text.

48 *See* Thompson v. Oklahoma, 487 U.S. 815 (1988) (rendering unconstitutional a juvenile's capital sentence for a crime committed under the age of sixteen). *But see* Stanford v. Kentucky, 492 U.S. 361 (1989) (holding that a capital sentence for a defendant who committed his crime at sixteen or seventeen did not violate the Eighth Amendment).

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

50 *Id.* at 311.

51 *See id.* at 313–15 ("It is not so much the number of these States that is significant, but the consistency of the direction of change.").

52 *See id.* at 316 ("The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.").

53 *See id.* at 316 n.21 ("[P]olling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong.").

54 *See id.* at 318–19 (citing Gregg v. Georgia, 428 U.S. 153, 183 (1976)) (noting retribution and deterrence as the "social purposes served by the death penalty" and questioning "whether either justification that we have recognized as a basis for the death penalty applies to [individuals with intellectual disabilities]").

55 *Id.* at 321 (referring to Trop v. Dulles, 356 U.S. 86 (1958)).

The juvenile line of cases likewise provides a helpful context in which to analyze the Court's use of evolving standards of decency in its decision-making. The juvenile cases employ the same categorical logic that the Court applied in *Atkins*. For instance, in *Roper v. Simmons*, the Court reversed its previous decision in *Stanford v. Kentucky* and banned the death penalty for juvenile offenders.[56] In so holding, Justice Kennedy's majority opinion relied on the same factors as *Atkins*: state legislative enactments;[57] state patterns, practices, and revealed preferences;[58] and the purposes of the death penalty as recognized by precedents (namely retribution and deterrence).[59] The *Roper* opinion added international custom as another factor in its analysis.[60]

In *Roper*, Justice Stevens wrote a concurrence seemingly for the sole purpose of emphasizing just how important he viewed "evolving standards of decency" to be in Eighth Amendment cases:

> Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. . . . [T]hat our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text.[61]

The *Roper* dissents were not as complimentary towards the living-constitutional nature of the Court's Eighth Amendment jurisprudence. Justice O'Connor echoed earlier Eighth Amendment dissents by decrying the Court's lack of deference to the legislatures.[62] In a dissent

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[56] Roper v. Simmons, 542 U.S. 551, 568 (2005) ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.").

[57] *Id.* at 566 (noting that the level of legislative change was lesser than that observed in *Atkins* but concluding that "[a]ny difference between this case and *Atkins* with respect to the pace of abolition is . . . counterbalanced by the consistent direction of the change").

[58] *Id.* at 567 (noting "the infrequency of [the juvenile death penalty's] use even where it remains on the books").

[59] *See id.* at 571–72.

[60] *Id.* at 575 ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."). Justice Kennedy further noted that international authorities have been considered in Eighth Amendment decisions since *Trop v. Dulles*. *See id.* (citing Trop v. Dulles, 356 U.S. 86, 102–03 (1958)).

[61] *Id.* at 587 (Stevens, J., concurring).

[62] *Id.* at 607 (O'Connor, J., dissenting) ("[T]his Court should not substitute its own 'inevitably subjective judgment' on how best to resolve this difficult moral question for

joined by Justice Thomas and Chief Justice Rehnquist, Justice Scalia described the Court's evolving standards of decency doctrine as both "a mirror of the passing and changing sentiment of American society regarding penology" and "no way to run a legal system."[63] Despite these misgivings, the Court expanded upon *Atkins* and *Roper* in subsequent years, using the evolving standards of decency framework to strike down the death penalty for the rape of a child in *Kennedy v. Louisiana*;[64] juvenile life without parole for non-homicide crimes in *Graham v. Florida*;[65] and mandatory juvenile life without parole for homicide offenses in *Miller v. Alabama*.[66] Four years later, the Court in *Montgomery v. Alabama* concluded that the holding in *Miller* applied retroactively.[67]

Most recently, Justice Kavanaugh's majority opinion in *Jones v. Mississippi*—joined by Chief Justice Roberts, Justice Alito, Justice Gorsuch, and Justice Barrett—provides insight into the current Court's attitude toward the Eighth Amendment, but it is silent on the enduring influence of evolving standards of decency. The majority rejected Brett Jones's argument that, in order to comply with *Miller* and *Montgomery*, a judge sentencing a juvenile offender to life without parole must make

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the judgments of the Nation's democratically elected legislatures.") (quoting Thompson v. Oklahoma, 487 U.S. 815, 853 (1988)).

63 *Id.* at 629 (Scalia, J., dissenting).

64 Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) ("Based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments.").

65 Graham v. Florida, 560 U.S. 48, 48 (2010). In a *Graham* concurrence, Justice Stevens once again voiced his unwavering support for the evolving standards framework. *See id.* at 85 ("While Justice Thomas would apparently not rule out a death sentence for a $50 theft by a 7-year-old, the Court wisely rejects his static approach to the law. Standards of decency have evolved since 1980. They will never stop doing so." (citations omitted)).

66 Miller v. Alabama, 567 U.S. 460, 489 (2012) ("By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory-sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.").

67 Montgomery v. Louisiana, 577 U.S. 190, 212 (2016) ("The Court now holds that *Miller* announced a substantive rule of constitutional law. . . . *Miller*'s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution."). *Montgomery* generated impassioned debate among the Justices about whether *Miller* had created a procedural rule or a substantive rule. While *Montgomery* declared it a substantive rule, the Court construed *Montgomery*'s holding much more narrowly in *Jones v. Mississippi*. *See* 141 S. Ct. 1307, 1313 (2021) ("*Montgomery* . . . held that *Miller* applied retroactively on collateral review."). *But see id.* at 1335 (Sotomayor, J., dissenting) ("Rather than read *Miller* and *Montgomery* fairly, the Court reprises Justice Scalia's dissenting view in *Montgomery* that *Miller* requires only a 'youth-protective procedure.'").

a factual finding that the defendant is permanently incorrigible.[68] While purporting to "carefully follow" both *Miller* and *Montgomery*, the majority opinion was clearly unwilling to expand upon or enforce any protections beyond the cases' most rudimentary holdings.[69]

Beyond the immediate holding in *Jones*, two aspects of the majority opinion are worth noting. First, the Court did not reference the evolving standards of decency framework. This is likely because the case only required the court to apply *Miller* and *Montgomery*, rather than assess a new alleged Eighth Amendment violation. Thus, it is an open question whether the current Court would be receptive to an argument that tracks the traditional evolving standards of decency analysis. Second, Justice Kavanaugh devotes a decent amount of space to reiterating the power of individual states to define their criminal justice policies:

> States may categorically prohibit life without parole for all offenders under 18. Or States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole. Or States may direct sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth. States may also establish rigorous proportionality or other substantive appellate review of life-without-parole sentences. All of those options, and others, remain available to the States. . . . But the U. S. Constitution, as this Court's precedents have interpreted it, does not demand those particular policy approaches.[70]

It is hardly unusual for the U.S. Supreme Court—and the current Court in particular—to emphasize both the importance of states' rights and its own deference to states' policy choices.[71] For purposes of this Note, the emphasis highlights one reason why state constitutionalism may be a promising path for litigants seeking to curb excessive punishment. The *Jones* opinion even cites the Honorable Jeffrey S. Sutton,

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[68] *Jones*, 141 S. Ct. at 1311 (rejecting Jones's argument that a judge imposing such a sentence must "make a separate factual finding that the defendant is permanently incorrigible, or at least provide an on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible").

[69] *See id.* at 1321 ("Because *Montgomery* directs us to 'avoid intruding more than necessary' upon States, and because a discretionary sentencing procedure suffices to ensure individualized consideration of a defendant's youth, we should not now add still more procedural requirements." (citation omitted)). Justice Thomas's concurrence points out the majority's covert undermining of *Montgomery* and invites the majority to "just acknowledge that *Montgomery* had no basis in law or the Constitution." *Id.* at 1327. For a brief summary of Justice Sotomayor's dissent (joined by Justices Breyer and Kagan), see *supra* note 67.

[70] *Jones*, 141 S. Ct. at 1323.

[71] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring) ("After today's decision, all of the States may evaluate the competing interests and decide how to address this consequential issue.").

Chief Judge of the U.S. Court of Appeals for the Sixth Circuit,[72] a strong advocate of state constitutionalism.[73]

However, Justice Kavanaugh's *Jones* opinion seems to imply that constitutional review of criminal justice policies begins and ends in the states. On the contrary, this Note contends that, under the Court's Eighth Amendment precedents, state constitutional law can and should play a critical role in the Supreme Court's own exposition of what is unconstitutional under the Cruel and Unusual Punishments Clause. As Professor Scott Sundby described it in the death penalty context, the Supreme Court in Eighth Amendment cases "has resembled more of an overwhelmed constitutional triage unit than a solemn body of judgment as it has rushed to each newly identified constitutional breach and erected a new rule."[74] The remainder of this Note explores state cruel and unusual punishment clauses and the state constitutional decisions interpreting them as opportunities to better define the scope of the Eighth Amendment and bring much-needed clarity to the Supreme Court's Eighth Amendment jurisprudence.

II
State Supreme Courts as Alternative Constitutional Arbiters

Since the current Court was silent about its attitude toward the evolving standards of decency doctrine in *Jones v. Mississippi*, it is apt to assess how the doctrine could be reimagined to better accord with both the current Court's approach to federalism and the underlying purpose of the Eighth Amendment's prohibition on cruel and unusual punishments. This Part offers state constitutionalism as an alternative approach to defining which punishments are cruel and unusual. In the long term, state constitutional development of cruel and unusual punishment clauses could have a highly persuasive, and perhaps even determinative, impact on the Supreme Court's definition of evolving standards of decency. To fully appreciate this suggested approach, this Part summarizes the New Judicial Federalism (NJF) movement of the late twentieth century, considers the unique features of state constitutions and state supreme courts, and concludes by exploring the different

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72 *See Jones*, 141 S. Ct. at 1323.

73 *See generally* Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018).

74 Scott E. Sundby, *The True Legacy of* Atkins *and* Roper*: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 Wm. & Mary Bill Rts. J. 487, 489 (2014).

interpretive methods used by state supreme courts in discerning the meanings of their state constitutions.

A. What's Old Is New Again: The State Constitutional Movement of the Twentieth Century

Empirically, the historical development of state constitutional law has been significantly affected by the extent to which the Supreme Court protects individual rights under the U.S. Constitution. For example, during the Warren Court era, the Supreme Court issued many decisions that were uniquely expansive and protective of individual rights, rendering state constitutional interpretation a largely "academic" exercise.[75] This makes logical sense because the U.S. Constitution's protection of individual rights is a floor rather than a ceiling.[76] If the Supreme Court sets the floor for individual rights protection relatively close to a state's preferred ceiling, then the state's constitution will be interpreted more or less identically to the federal constitution (if it is interpreted at all).

However, the year 1969 signaled the end of the Warren Court and the beginning of the Burger Court, and this markedly changed the Supreme Court's approach toward individual rights and civil liberties. The Warren Court's perceived "activism" became a key issue in the 1968 presidential campaign, and President Nixon subsequently nominated four justices to the Court, including Chief Justice Warren Burger.[77] The shift from the Warren Court to the Burger Court made pro-individual liberties opinions less likely: An empirical study in 1975 found that the

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75 Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 842 (2011).

76 *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986) ("I believe that the Fourteenth Amendment fully applied the provisions of the Federal Bill of Rights to the states, thereby creating a federal floor of protection and that the Constitution and the Fourteenth Amendment allow diversity only *above and beyond* this federal constitutional floor."); *see also* Ilya Somin, *A Floor, Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in* Danforth v. Minnesota, 102 NW. U. L. REV. COLLOQUY 365 (2008) (explaining the Court's opinion in *Danforth* which allows states to expand the scope of federally created rights). *But see* Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227 (2008) (arguing that the "floor" concept does not comport with modern understandings of the constraints of language or the ability of states to work around federal requirements through funding and administrative rules).

77 *See* Alpheus Thomas Mason, *The Burger Court in Historical Perspective*, 89 POL. SCI. Q. 27, 35 (1974) ("[T]he Warren Court's activism in support of civil rights . . . heated up the 1968 presidential campaign. . . . The 1968 GOP candidate committed himself to the appointment of 'strict constructionists'—presumably those who would call a halt to the Warren Court's activism.").

Burger Court's rate of rulings favorable to criminal defendants was about 21 percent below that of the Warren Court.[78]

As the Supreme Court transitioned, state supreme courts became more active in interpreting their own constitutions,[79] and the "New Judicial Federalism" was born.[80] By most accounts, the catalyst of the NJF movement was Justice William Brennan's famous article in the *Harvard Law Review* urging states to interpret their own constitutions to afford greater protections to individual rights.[81] Justice Brennan's main argument was that Supreme Court decisions, as a matter of federalism, "are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[82] The NJF movement received an additional boost when the Supreme Court decided *PruneYard Shopping Center v. Robins* in 1980, where the Court affirmed a state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[83]

While certainly a significant chapter in the story of state constitutional law development, the impact of NJF is disputed. Robert Williams, who has been a pioneer in the field of state constitutional law for several decades, calls it a success. In a 2020 lecture, he noted that "thousands of people and their lawyers in the states have won cases over [the past 50 years] that would have failed under the Federal Constitution. Major systemic reforms in state public education . . . criminal justice systems, [and] tort systems . . . have resulted from the NJF."[84] Others deem it a failure. For example, James Gardner analyzed state constitutional decisions following the NJF movement and concluded that "state courts by and large have little interest in

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78 S. Sidney Ulmer & John A. Stookey, *Nixon's Legacy to the Supreme Court: A Statistical Analysis of Judicial Behavior*, 3 Fl. St. U. L. Rev. 331, 336 (1975) (reporting the data but noting that "[t]he figures may be somewhat misleading, however, given the far-reaching decisions in the criminal justice area in the 1953–69 period").

79 *See* Robert F. Williams, *The State of State Constitutional Law, the New Judicial Federalism and Beyond*, 72 Rutgers U. L. Rev. 949, 951 (2020) (noting that this trend began in the 1970s and crediting the NJF movement as "[t]he signature development in state constitutional law over the past several generations").

80 *See* G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 Publius 63, 63–79 (1994) (describing NJF as a truly novel development in the 1970s, as opposed to a resurgence of an already robust tradition of state constitutional interpretation).

81 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). In 2012, Justice Brennan's article was the ninth most-cited law review article of all time, Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 Mich. L. Rev. 1483, 1489 tbl.1 (2012), showcasing widespread attention given to the NJF movement.

82 Brennan, *supra* note 81, at 502.

83 PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

84 Williams, *supra* note 79, at 964.

creating the kind of state constitutional discourse necessary to build an independent body of state constitutional law."[85]

NJF has also been criticized for lacking intellectual rigor and being purely motivated by liberal political goals.[86] However, this "problem of legitimacy" may be more theoretical than real.[87] Justice Goodwin Liu of the California Supreme Court posits that "[s]tate constitutionalism is properly understood as a mechanism by which ongoing disagreement over fundamental principles is acknowledged and channeled in our democracy."[88] A state constitutional decision departing from the federal constitutional floor set by the Supreme Court need not—and perhaps should not—be viewed as a political or results-driven enterprise. This is our system of federalism operating as it should, allowing discourse between the state and federal systems about shared values and principles.[89]

In other words, regardless of the motives behind NJF, there are principled, apolitical reasons to advocate for the robust development of state constitutional law. Perhaps that is why there is more political and ideological diversity among state constitutionalism advocates today than there was in the 1970s, which may make the current movement "less fragile."[90] The next Section explores the distinct qualities of state supreme courts and state constitutions in light of this renewed interest in state constitutionalism.

B. Unique Features of State Supreme Courts and State Constitutions

A number of attributes make state supreme courts and state constitutions distinct from their federal equivalents, and several of these unique features make state constitutional decisions particularly good evidence of "evolving standards of decency" under

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[85] James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 804 (1992).

[86] *See, e.g.*, Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 Hastings Const. L.Q. 429, 429 (1988) (labeling Justice Brennan's argument for state constitutionalism as "unsound and perhaps disingenuous").

[87] *See* Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1313 (2017).

[88] *Id.* at 1336.

[89] *See id.* at 1338 (arguing that the purpose of federalism is to disperse power so as to prevent one court from unilaterally imposing "its version of constitutional truth").

[90] *See* Robert J. Smith, Zoë Robinson & Emily Hughes, *State Constitutionalism and the Crisis of Excessive Punishment*, 108 Iowa L. Rev. 537, 570 (2023) (comparing the current NJF movement's ideologically neutral arguments for the structural benefits of state constitutionalism with Brennan's original argument that state constitutional protection of individual rights was a second-best approach to federal Supreme Court decisions).

the Eighth Amendment.[91] Because "evolving standards of decency" have traditionally been defined by majoritarian indicators,[92] much of this Section will focus on the majoritarian influences that shape state constitutions and state supreme courts. This Section will also explore factors that limit the ability of state constitutional law to define what constitutes cruel and unusual punishment, namely the limited scope of state court power, the infrequent invocation of state constitutional arguments by advocates, and the role of state courts in our federalist system.

State constitutions are unique in that their main interpreters—state supreme court justices—may be more responsive to the will of the people than federal judges. In twenty-four states, state supreme court justices are elected.[93] The election of state supreme courts may be considered a relative strength because it removes a main source of criticism regarding the power of judicial review.[94] In other words, the "countermajoritarian difficulty"—the idea that judges have immense power to expand or restrict rights without any democratic accountability—is made largely irrelevant.[95]

On the other hand, twenty-six states select supreme court justices by a gubernatorial appointment process or through a nominating commission, and in these states, the majoritarian influence on state supreme courts may be less overt.[96] Still, even under commission systems, governors often choose candidates affiliated with their own political party.[97] This suggests that democratic accountability may still play a significant role in states with appointment processes. Every state supreme court is therefore subject to a majoritarian check on its power;

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91 *See infra* Section III.C.

92 *See supra* Part I.

93 *How State Supreme Court Justices Are Selected*, Dem. Docket (Mar. 21, 2023), https://www.democracydocket.com/analysis/how-state-supreme-court-justices-are-selected [https://perma.cc/47D5-K84Q] (reporting that eight states elect state supreme court justices by partisan election, fourteen do so by nonpartisan election, and two do so by legislature election).

94 *See* Landau, *supra* note 75, at 849 (arguing that the legitimacy debate does not apply to elected judges).

95 *See id.*; *see also* Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16 (2d ed. 1986) (considering the countermajoritarian difficulty as applied to the Supreme Court).

96 Dem. Docket, *supra* note 93.

97 *See* Aman McLeod, *The Party on the Bench: Partisanship, Judicial Selection Commissions, and State High-Court Appointments*, 33 Just. Sys. J. 262, 263 (2012) (noting that partisan nominations are "not surprising, given the fact that judicial appointments are an important opportunity for them to place individuals with similar policy preferences in influential positions within another branch of government and to dispense political patronage" (citations omitted)).

if justices stray too far from the will of the people in interpreting their state constitutions, they may be removed.[98]

Of course, the democratic accountability of state supreme courts may be a weakness as much as it is a strength. The "countermajoritarian difficulty" is replaced by a "majoritarian difficulty."[99] In other words, an elected—and therefore democratically accountable—judiciary may provide insufficient protection of constitutional rights, particularly for unpopular minorities.[100] The public may perceive elected judges as unfair or partial because judicial elections "betray[] the concept of the law as impersonal, independent, and objective."[101] However, the impacts of elections are not always straightforwardly majoritarian,[102] and countless state supreme court decisions show a willingness on the part of state supreme court justices to overcome majoritarian impulses.[103] In this sense, state supreme courts are both influenced by majoritarian preferences and also relatively insulated compared to the political branches of state government. They exist in a middle ground between political government actors (such as legislators and elected executives) and the life-tenured judges in the federal judiciary.

The structures of state constitutions also allow for greater democratic influence on constitutional law development than the U.S. Constitution.[104] State constitutions are generally newer or more recently

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98 All states but one (Rhode Island) do not give judges life tenure. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 899 (2021) ("[S]tate constitutions have no equivalent of the Senate or the Electoral College, and all but one have rejected life tenure for judges."); *see* R.I. Const. art. X, § 5 (granting life tenure to judges).

99 Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689, 713–14 (1995).

100 *See id.* at 727 ("Unscrupulous judges seeking reelection would have an incentive to compromise the constitutional rights of subsets of their judicial electorate who are unpopular, unorganized, or otherwise outvoted. Scrupulous judges, who refuse to respond to majoritarian pressures, may as a result be removed from office . . . .").

101 Richard Lorren Jolly, *Judges as Politicians: The Enduring Tension of Judicial Elections in the Twenty-First Century*, 92 Notre Dame L. Rev. Online 71, 83 (2016).

102 *See* William B. Rubenstein, *The Myth of Superiority*, 16 Const. Comment. 599, 619 (1999) ("For those running for office, voters, not 'public opinion,' is what counts. In areas where a minority group has some political presence, a judge might need to solicit support (or at least ensure against the opposition) of that minority, even though it is only a minority.").

103 *See, e.g.*, Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 Yale L.J. 227, 249 (1972) ("In California, the Supreme Court . . . invalidated the most bitterly debated popular initiative of modern times, began a revolution in the historic assumptions of local school financing, and decreed an end to the death penalty which for decades had been a subject of political debate.").

104 *Cf.* Bulman-Pozen & Seifter, *supra* note 98, at 864 (describing "interrelated state constitutional commitments to popular sovereignty, majority rule, and political equality as the *democracy principle*").

revised than the federal constitution,[105] so they are more likely to reflect the current will of the people. They are also easier to amend; it is much easier to mobilize the voters of a single state than it is to complete the arduous process for federal constitutional amendments.[106]

Setting the strengths and weaknesses of majoritarian influences aside, litigants pursuing claims under state constitutions who hope to affect broader change beyond their own case must accept that state constitutional decisions are necessarily limited in scope and impact. State courts have plenary jurisdiction,[107] but they cannot bind other states. State constitutional decisions also cannot override contrary federal constitutional decisions, and it is unlikely that the same right will be vindicated in all or most states.[108] While state supreme courts may be more willing to make impactful rulings than the U.S. Supreme Court precisely because of the smaller scale of their influence,[109] a state constitutional strategy will leave people behind in states where such a ruling is not possible for political or practical reasons. Furthermore, state benches are also less diverse than the federal bench,[110] so to the extent that the race and gender of judges can affect the outcomes of certain types of cases, litigants may still prefer federal court.[111]

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105 *See id.* at 865 (noting that "state constitutions have been drafted, replaced, and amended in response to national historical developments"); *see also* Landau, *supra* note 75, at 858 ("Quite a few [state constitutions] have been completely revised three, four, as many as ten times and as recently as the last few decades."). Landau also points readers to a database of every state constitution throughout U.S. history to further illustrate this point. *See* John Joseph Wallis, NBER/Md. State Consts. Project, http://www.stateconstitutions.umd.edu/index.aspx [https://perma.cc/9G4W-JKZL].

106 *See* U.S. Const. art. V.

107 *See* The Federalist No. 82 (Alexander Hamilton) (explaining that, under the U.S. Constitution, state courts would "retain the jurisdiction they now have," which was plenary, unless jurisdiction over a specific subject matter was expressly and exclusively given to the federal government).

108 Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 Stan. L. Rev. 1695, 1699 (2010) (noting that state constitutions have "no ability to overcome [Supreme Court] decisions that restrict what governments can do" and arguing that state constitutions "never will provide more than partial success in advancing liberties and equalities because the chance of succeeding in all states, or even most states, is small").

109 *See* Jeffrey S. Sutton, *Why Teach—And Why Study—State Constitutional Law*, 34 Okla. City U. L. Rev. 165, 173 (2009) ("Because the Supreme Court must announce rights and remedies for fifty States, one National Government and over 300 million people, it is far more constrained than a state supreme court addressing a difficult problem for one State and, say, fifteen-millions people.").

110 *See* Janna Adelstein & Alicia Bannon, *State Courts' Stark Lack of Diversity Demands Action*, Brennan Ctr. for Just. (July 6, 2021), https://www.brennancenter.org/our-work/analysis-opinion/state-courts-stark-lack-diversity-demands-action [https://perma.cc/45QS-RS5X].

111 *See, e.g.*, Sylvia R. Lazos, *Does a Diverse Judiciary Attain a Rule of Law That is Inclusive? What* Grutter v. Bollinger *Has to Say About Diversity on the Bench*, 10 Mich. J. Race & L. 101, 133–37 (2004) (concluding that while studies suggest that there is an impact

Another current reality is that state constitutions are not frequently invoked by advocates. Litigants often ignore or insufficiently address state constitutional claims, making it difficult or impossible for state courts to expound on state constitutional provisions in opinions.[112] Fortunately, this relative weakness of state constitutional law is contingent rather than structural; litigants have the power to change this status quo by raising more state constitutional arguments.[113] The actions, incentives, and perceptions of litigants are critical factors in fostering or hindering state constitutional development, as most state supreme court judges can only issue state constitutional decisions if they have a case on which to rule.[114]

Despite these limitations, state supreme courts and state constitutions have an important advantage over their federal counterparts which is particularly salient in the context of cruel and unusual punishment.[115] For state judiciaries, the all-important concern of honoring our system of federalism takes a drastically different shape than it does in the eyes of the federal judiciary. When interpreting its state constitution, a state supreme court binds only the citizens of its own state; while no small thing, this is far less consequential than the U.S. Supreme Court binding the nation. States can therefore function as "laboratories," an idea famously put forth

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of the race and gender of judges on judging, the hypothesis is yet to be adequately tested); *see also* Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. Rev. 1206, 1244, 1246 (2006) (arguing that "our judicial system is premised on producing a great variety of answers to legal questions" and "[i]ntroducing greater diversity into the judiciary may increase the likelihood that judges will adopt alternative conceptions of political morality").

112 Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 Alb. L. Rev. 1353, 1354 (2019).

113 Of course, not everyone agrees that advocates *should* do this. James Gardner, for instance, notes that a state charting its own course on a constitutional issue because the state has "actual differences in character between the people of the state and the people of the nation" is not "impossible as a factual matter," but should be avoided because it is potentially dangerous to the nation. Gardner, *supra* note 85, at 827. He uses the example of the Civil War to argue that it can "be dangerous for the people of a state to say too vehemently and too often, 'We are fundamentally different from the rest of the nation.'" *Id.* While it is important to consider the very real possibility that state constitutions could be used to constrain individual liberties rather than expand them, there is comfort in the fact that federal constitutional rights will always set the "floor" of minimum protections. *See supra* note 76 and accompanying text.

114 *But cf.* Lucas Moench, Note, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 B.U. L. Rev. 2243 (2017) (discussing the ability of some state supreme courts to issue advisory opinions).

115 *See infra* Section III.C.

by Justice Brandeis in his *New State Ice Co. v. Liebmann* dissent.[116] The Supreme Court has embraced this view of the states throughout its history.[117] Specifically in the Eighth Amendment context, "[s]evered from the federalism concerns animating the U.S. Supreme Court while it develops and applies Eighth Amendment doctrine, state courts have the potential to craft a truly local jurisprudence that reflects societal consensus within each unique jurisdiction."[118] Importantly, this localized experimentation is still in the form of *jurisprudence*,[119] making state constitutional decisions a particularly good indicator for the Supreme Court to consider in its own development of cruel and unusual punishment jurisprudence.

C. Interpretive Methods of State Constitutional Decision-Making

Following Justice Brennan's 1977 watershed article and the advent of NJF,[120] state court justices and commentators have attempted to define the proper interpretive methods for the development of state constitutional law over the last several decades.[121] Such debates remain unresolved.[122] Thus, in order to contextualize how state supreme courts may interpret their cruel and unusual punishments clauses to afford either the same or greater protection than the federal constitution, a brief summary of the various interpretive methods is necessary.

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116 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). *But see* Charles M. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2192 (2022) ("[P]olicy innovations are often devised and then propagated by third-party organizations connected to state officials through political networks. For many of the most important state policies, these organized interests are the true 'laboratories of democracy' . . . .").

117 *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971) (describing a shared "belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways").

118 Smith, Robinson, & Hughes, *supra* note 90, at 598–99.

119 As opposed to legislation, public opinion polls, or other indicators that the Supreme Court has used to define evolving standards of decency in the past. *See supra* Part I.

120 *See supra* Section II.A.

121 James Gardner dubs these exchanges "the [m]ethodology [w]ars" and describes this discernment process as a collective attempt to explain "why, how, and in what circumstances state constitutions could legitimately be interpreted to provide more expansive protection for human rights than the U.S. Constitution." James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 366 (2016).

122 Williams, *supra* note 79, at 969 (noting in 2020 that "[t]hese matters are still in debate today").

1. Lockstepping

In general, the term "lockstepping" refers to state constitutional interpretation that matches or follows federal constitutional law interpretation.[123] Advocates of a "lockstep" approach to state constitutional interpretation believe state courts should follow the lead of the U.S. Supreme Court and conform to federal constitutional interpretations when state rights provisions match the language in the federal Bill of Rights.[124] However, the lockstep approach makes state constitutional provisions redundant in these instances.[125] Predictably, lockstep analysis hinders the development of state constitutional law, in particular because state courts often issue lockstep decisions without explaining any independent reasoning.[126]

While lockstepping is clearly not the ideal approach for the development of robust state constitutional discourse, it is the dominant approach of most state courts.[127] Lockstepping has historically been the most common method used in cases under state analogs to the Eighth Amendment.[128] For example, Louisiana's Eighth Amendment analog explicitly includes a ban on "excessive" punishment,[129] but Louisiana courts seemingly interpret the state constitution to afford no greater protection than the federal constitution.[130] However, lockstepping with the Supreme Court's interpretation of the Eighth Amendment is not a

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123 For a useful overview of the lockstepping approach and the differing approaches applied in state court opinions that lockstep with federal holdings, see Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 Wm. & Mary L. Rev. 1499 (2005).

124 G. Alan Tarr, Understanding State Constitutions 206 (1998).

125 *Id.* at 182. Tarr calls this "a dubious result," particularly in light of state constitutional provisions that were enacted after the Supreme Court incorporated similar federal constitutional protections against the states. *Id.*

126 Gardner, *supra* note 85, at 792–93. Gardner summarizes this argument bluntly: "The litigant who asks why the two documents have the same meaning in a particular case is told by the court, in effect, 'they just do.'" *Id.*

127 *See* Blocher, *supra* note 12, at 339 ("[M]ost state courts adopt federal constitutional law as their own."); Smith, Robinson & Hughes, *supra* note 90, at 561 (noting that a "majority of states" use the lockstep approach and most other states use a "limited lockstep" approach in which state constitutions are merely gap-fillers for federal constitutional law).

128 *See, e.g.*, Berry, *supra* note 5, at 1636–37 ("The overwhelming majority of states—forty—follow the Supreme Court's approach . . . applying a gross disproportionality standard to determine constitutionality under the state constitution.").

129 La. Const. art. I, § 20.

130 *See, e.g.*, State v. Ervin, 370 So. 3d 1236, 1245, 1247 (La. Ct. App. 2023) (holding that 50 years imprisonment for each count of armed robbery was not constitutionally excessive); State v. Taylor, 740 So. 2d 216, 223–24 (La. Ct. App. 1999) (upholding fifteen-year sentence of hard labor for armed robbery and conducting a mixed analysis under both the U.S. Constitution and the Louisiana Constitution); *see also* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. Rev. 1201, 1221–22 (2020) ("According to the Louisiana courts, the term excessive in the state constitution is synonymous with gross disproportionality.").

given. Some recent examples suggest that state supreme courts may be more willing to expand beyond federal constitutional rights than they once were.[131]

2. *The Primacy Approach*

The primacy approach is the opposite of the lockstepping approach. It puts state constitutions in a "primary" position and instructs state courts to interpret state constitutional provisions independently, using U.S. Supreme Court opinions "as mere persuasive authority when necessary to protect individual rights."[132] This approach allows state supreme courts to exercise independent judgment and tailor decisions to their state's unique history and constitutional framework.[133] However, the primacy approach is labor intensive; judges must start from scratch and become intimately familiar with the specific contours of their state constitutions and their histories.[134] Still, a number of state courts have taken up the mantle of the primacy approach. Indiana[135] and New Jersey[136] are prime examples.

3. *The Interstitial Approach*

The interstitial approach instructs state courts to conduct state constitutional analysis only if relief is incomplete under the federal constitution.[137] In some ways, it is the middle ground between lockstepping and primacy. The interstitial approach allows state supreme courts to diverge from federal constitutional law, but only when such a departure is somehow justified. Like lockstepping, this approach promotes vertical uniformity between state and federal courts, which may limit forum-shopping and convey neutrality among

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131 *See infra* Section III.A.

132 Samuel Weiss, Note, *Into the Breach: The Case for Robust Noncapital Proportionality Review Under State Constitutions*, 49 HARV. C.R.-C.L. L. REV. 569, 593 (2014). Weiss credits Justice Brennan's article as the impetus of the primacy approach. *Id.*; *see also* Brennan, *supra* note 81, at 491.

133 TARR, *supra* note 124, at 185.

134 *Id.*

135 *See, e.g.*, Price v. State, 622 N.E.2d 954, 957 (Ind. 1993) (declaring that "[i]nterpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it" and engaging in independent state constitutional analysis to interpret a disorderly conduct statute).

136 *See, e.g.*, State v. Schmid, 423 A.2d 615, 628 (N.J. 1980) (holding that "the State Constitution furnishes to individuals the complementary freedoms of speech and assembly and protects the reasonable exercise of those rights" and declining to impose a state action requirement as is necessary to receive protection under the First Amendment of the U.S. Constitution).

137 Landau, *supra* note 75, at 837–38.

the court systems.[138] However, as Justice Hans Linde of the Oregon Supreme Court famously observed, the interstitial approach fails to appreciate the independent value (and necessity) of interpreting state constitutions:

> [I]n my view, to ask when to diverge from federal doctrines is quite a different question from taking a principled view of the state's constitution; in fact, this supplemental or interstitial approach prevents a coherent development of the state's law. My own view has long been that a state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state's law protects the claimed right.[139]

One variation of the interstitial approach is the "factor approach." Some courts and individual justices have advocated for state supreme courts to engage in state constitutional analysis only if a number of factors are satisfied.[140] For example, the Connecticut Supreme Court has historically applied a number of factors to decide whether its state constitutional analysis should diverge from federal constitutional precedent.[141] Of course, a factor-based analysis gives U.S. Supreme Court opinions a "presumption of correctness" that they may not deserve in the context of state constitutions.[142]

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This Part has sketched the contours of state constitutionalism by summarizing the NJF movement beginning in the 1970s, analyzing the

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138 *See* Liu, *supra* note 87, at 1334 (quoting Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. Pa. L. Rev. 703, 733–34 (2016)) (noting that vertical uniformity confers "the appearance of neutrality").

139 Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 178 (1984).

140 *See, e.g.*, State v. Hunt, 450 A.2d 952, 965–67 (N.J. 1982) (Handler, J., concurring) (identifying and explaining "standards or criteria for determining when to invoke [the New Jersey Constitution] as an independent source for protecting individual rights," including textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes). Robert Williams and Lawrence Friedman note that "strikingly similar" criteria were adopted by the Washington Supreme Court. Robert F. Williams & Lawrence Friedman, The Law of American State Constitutions 178–79 (2023) (citing State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986)).

141 *See, e.g.*, State v. Miller, 630 A.2d 1315, 1323–24 (Conn. 1993) (noting text, holdings and dicta of the Connecticut Supreme Court, federal precedent, sister state decisions, history, and economic and sociological considerations as factors the court considers when deciding whether the state constitutional analysis differs from federal constitutional precedent).

142 *See* Williams & Friedman, *supra* note 140, at 199–200; *see also id.* at 199–208 (detailing all of Williams and Friedman's critiques of the factor-based analysis as well as their summary of other scholars' criticisms of the approach).

relevant unique features of state supreme courts and state constitutions, and introducing the possible interpretive methods for state supreme courts to apply when interpreting their state constitutions. The next Part will apply these concepts to the context of cruel and unusual punishment under the Eighth Amendment and its state constitutional analogs. As we will see, the unique features of both the Supreme Court's Eighth Amendment jurisprudence and state constitutional analysis should make state constitutional decisions particularly persuasive and relevant to the Supreme Court's own interpretation of what constitutes cruel and unusual punishment under the Eighth Amendment.

III
State Constitutional Decisions as Evidence of Evolution

This Part first discusses two recent state constitutional decisions in which state supreme courts have declared certain punishments to be cruel and unusual under state analogs to the Eighth Amendment. For ease of reference, both examples will focus on extensions of the Supreme Court's juvenile line of cases (i.e., *Miller*, *Roper*, and *Graham*). Taken together, these two cases are an example of how different states can move in the same general direction in developing their respective state constitutional law precedents, thus signaling to the Supreme Court that the standards of society are shifting in more than just one state. The fact that both examples build on the Supreme Court's own precedents illustrates how state constitutional law can iteratively develop concepts first introduced through federal constitutional law. This Note then argues that the Supreme Court should view these kinds of decisions as highly persuasive evidence of evolving standards of decency in its own Eighth Amendment cases.

A. Recent State Constitutional Decisions

1. State v. Comer

In *State v. Comer*, two individuals challenged a New Jersey statute that required a minimum sentence of thirty years without parole for first-degree murder.[143] Comer and Zarate, who were both convicted of homicides as juveniles, argued that the statute was unconstitutional as applied to juveniles because "the law divests sentencing judges of discretion to apply mitigating factors that apply to youth and does not

[143] State v. Comer, 266 A.3d 374, 380 (N.J. 2022); *see also* N.J. Stat. Ann. § 2C:11-3(b)(1) (West 2023).

adequately reflect a juvenile's diminished moral culpability."[144] The New Jersey Supreme Court declined to strike down the statute, but held that the New Jersey Constitution entitles juvenile offenders to a resentencing once they have served twenty years of a sentence of at least thirty years.[145]

In so holding, the court relied on decisions under the Eighth Amendment as well as decisions under Article I, Paragraph 12 of the New Jersey Constitution, which also bars cruel and unusual punishment.[146] The court endorsed the primacy approach[147] and deemed it "appropriate to conduct an independent analysis under the State Constitution."[148] However, the court also acknowledged that the test of what constitutes cruel and unusual punishment under both constitutions is "generally the same"[149]:

> First, does the punishment for the crime conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective?[150]

In answering the first question, the court looked to legislative developments in New Jersey,[151] trends in other states,[152] other state

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144 *Comer*, 266 A.3d at 387. In referring to the "mitigating factors that apply to youth," the litigants and the court were referring to the *Miller* factors established by the Supreme Court in *Miller v. Alabama*. 567 U.S. 460, 489 (2012) ("[O]ur individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."). The *Miller* factors are (1) age and accompanying "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) family and home environment; (3) special circumstances of the offense (including "peer pressures"); (4) "incompetencies associated with youth" in navigating the legal system; and (5) "the possibility of rehabilitation." *Id.* at 477–78.

145 *Comer*, 266 A.3d at 370 ("[W]e will permit juvenile offenders convicted under the law to petition for a review of their sentence after they have served two decades in prison.").

146 N.J. Const. art. I, § 12 ("[C]ruel and unusual punishments shall not be inflicted.").

147 For a discussion of the primacy approach, see *supra* Section II.C.2.

148 *Comer*, 266 A.3d at 388.

149 *Id.* at 388 (quoting State v. Zuber, 152 A.3d 197, 206 (N.J. 2017)). In *Zuber*, the court held that de facto life sentences "are sufficient to trigger the protections of *Miller* under the Federal and State Constitutions" and thus granted Zuber a resentencing at which the court would be required to consider the *Miller* factors. *Zuber*, 152 A.3d at 212–13, 215.

150 *Comer*, 266 A.3d at 388 (quoting *Zuber*, 152 A.3d at 206).

151 *Id.* at 395 (noting, for example, that "the Legislature recently amended the sentencing statute, which now requires judges to consider youth as a mitigating factor at the time of sentencing").

152 *Id.* at 396 ("Today, in at least 13 states and the District of Columbia, juveniles can be paroled or resentenced before serving 30 years in prison. . . . [M]ost of those states passed laws that allow for lesser sentences after *Graham* and *Miller*.").

supreme court decisions,[153] and national sentencing practices.[154] The court determined that "[t]hose sources and trends all suggest that a 30-year parole bar does not conform to contemporary standards of decency."[155] The court then concluded that the thirty-year parole bar may also be grossly disproportionate.[156] Finally, the court echoed the Supreme Court in *Roper* and noted that "because of the diminished culpability of juveniles, the traditional penological justifications—retribution, deterrence, incapacitation, and rehabilitation—'apply . . . with lesser force than to adults.'"[157] As a consequence of such diminished culpability, the court determined that no legitimate penological objective justified the thirty-year parole bar.[158]

The New Jersey Supreme Court thus applied a test quite similar to the U.S. Supreme Court's test for cruel and unusual punishments to strike down the state's thirty-year parole bar as applied to juveniles. For purposes of this Note, *Comer* is a prime example of a state supreme court exercising its independent authority to provide greater protection than the Eighth Amendment under its own constitution's Eighth Amendment analog.[159]

2. Commonwealth v. Mattis

In *Diatchenko v. District Attorney for the Suffolk District (Diatchenko I)*, the Supreme Judicial Court of Massachusetts extended *Miller*'s ban on mandatory juvenile life without parole (LWOP) sentences to discretionary juvenile LWOP sentences under Article 26 of the Massachusetts Constitution.[160] Then, in January 2024,

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153 *Id.* ("[T]wo recent State Supreme Court decisions held that mandatory minimum sentences for juveniles constitute cruel and unusual punishment."). The court was referencing *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014), and *State v. Houston-Sconiers*, 391 P.3d 409 (Wash. 2017). In *Lyle*, the Iowa Supreme Court held mandatory minimum sentences unconstitutional as applied to juveniles under the Iowa Constitution's cruel and unusual punishments clause. 854 N.W.2d at 380 (interpreting IOWA CONST. art. I, § 17). In *Houston-Sconiers*, the Washington Supreme Court held a mandatory firearm sentence enhancement unconstitutional as applied to juveniles under the Eighth Amendment. 391 P.3d at 422 (interpreting U.S. CONST. amend. VIII).

154 *Comer*, 266 A.3d at 396 (noting that "[s]ince *Montgomery* held that *Miller* applies retroactively, approximately 1,300 juvenile offenders serving life without parole throughout the nation have had their sentences reduced to a median term of '25 years before parole or release eligibility'" (citations omitted)).

155 *Id.*

156 *Id.* at 397 (noting that, in "cases that remain in [juvenile court]," "[j]uveniles . . . adjudicated of purposeful and knowing murder face up to 20 years").

157 *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 571 (2005)).

158 *See id.* at 401–03.

159 *See id.* at 388.

160 Diatchenko v. Dist. Att'y for the Suffolk Dist. (Diatchenko I), 1 N.E.3d 270, 284–85 (Mass. 2013) ("With current scientific evidence in mind, we conclude that the discretionary

Commonwealth v. Mattis extended the holding of *Diatchenko I* to emerging adults—defined as eighteen-, nineteen-, and twenty-year-olds—and held that these individuals likewise cannot be constitutionally sentenced to LWOP.[161] *Diatchenko I* and *Mattis* thus represent two distinct expansions of protection from cruel and unusual punishment under the Massachusetts Constitution. This Note will focus on the *Mattis* decision because it is more recent and arguably a more significant departure from the U.S. Supreme Court's precedents. *Mattis* is not the first expansion of the juvenile line of cases to young adults, but it is the most recent at the time of this writing and perhaps the most sweeping in terms of its remedy. While other recent state supreme court cases have afforded state constitutional protections to young adults,[162] *Mattis* is extraordinary because it applies to discretionary as well as mandatory LWOP sentences.[163]

To hold these sentences unconstitutional, the Supreme Judicial Court of Massachusetts looked to "precedent and contemporary standards of decency in the Commonwealth and elsewhere."[164] In assessing precedent, the court found the juvenile lines of cases—both the U.S. Supreme Court's and the Massachusetts Supreme Judicial Court's—to be controlling because the *Mattis* evidentiary record "confirm[ed] that the brains of emerging adults are similar to those of juveniles."[165] To conclude that contemporary standards of decency also weighed in favor of holding LWOP unconstitutional, the

imposition of a sentence of life in prison without the possibility of parole on juveniles . . . violates the prohibition against 'cruel or unusual punishment[ ]' in art. 26."); *see also* Mass. Const. art. 26 ("No magistrate or court of law, shall . . . inflict cruel or unusual punishments."). *Diatchenko I*, while not a focus of this Note, is an interesting case study of the majoritarian dynamics that can influence the development and impact of state constitutional law. When the court decided *Diatchenko I*, the next harshest penalty after life without parole was the sentence for murder in the second degree, "a mandatory sentence of life with the possibility of parole after fifteen years." Commonwealth v. Watt, 146 N.E.3d 414, 426 (Mass. 2020). This was the sentence that therefore applied to juveniles convicted of first-degree murder after *Diatchenko I*, but then the Legislature amended the sentencing scheme to subject juveniles "convicted of murder in the first degree based on extreme atrocity or cruelty" to a thirty-year parole bar. *Id.* at 426 n.11; *see also* Mass. Gen. Laws ch. 279, § 24 (West 2023). Of course, a thirty-year parole bar is the scheme that was struck down by the New Jersey Supreme Court in *Comer*. *See supra* Section III.A.1. The interplay between state supreme court decisions, state legislatures, and other states' developments thus requires careful parsing.

161 *See* Commonwealth v. Mattis, 224 N.E.3d 410, 415 (Mass. 2024).

162 *See In re* Monschke, 482 P.3d 276, 287 (Wash. 2021) (banning mandatory LWOP sentences for offenders under twenty-one under the Washington Constitution); People v. Parks, 987 N.W.2d 161, 183 (Mich. 2022) (banning mandatory LWOP sentences for eighteen-year-old offenders under the Michigan Constitution).

163 *Mattis*, 224 N.E.3d at 415.

164 *Id.*

165 *Id.* at 420.

court assessed the current state of the science,[166] statutes and other legislative developments in Massachusetts and elsewhere,[167] recent state supreme court decisions,[168] and international standards.[169] In summary, the court held:

> Supreme Court precedent, as well as our own, dictate that youthful characteristics must be considered in sentencing, that the brains of emerging adults are not fully developed and are more similar to those of juveniles than older adults, and that our contemporary standards of decency in the Commonwealth and elsewhere disfavor imposing the Commonwealth's harshest sentence on this cohort.[170]

The *Mattis* decision, like *Comer*, provides a useful, recent example of a state supreme court affording relief under its state constitution's cruel and unusual punishments clause. Critically, both courts did so by relying on, applying, and extending Supreme Court precedent interpreting the Eighth Amendment. The Eighth Amendment thus has a clear impact on the development of corresponding state constitutional

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166 The court determined that "years of targeted research and greater access to relatively new and sophisticated brain imaging techniques [such as sMRI and fMRI]" have revealed that emerging adults "have a lack of impulse control" similar to juveniles, "are more prone to risk taking in pursuit of rewards than those under eighteen years and those over twenty-one years," "are more susceptible to peer influence than individuals over twenty-one years," and "have a greater capacity for change than older individuals due to the plasticity of their brains." *Id.* at 421. Plasticity is "the ability [to] change in response to the environment." *Id.* at 423.

167 *See id.* at 424 (relying on Massachusetts and other state statutes to determine contemporary standards of decency). The court emphasized a number of Massachusetts-specific developments, including the statutory authorization of the Department of Youth Services "to maintain custody of young people adjudicated as youthful offenders up to twenty-one years of age," a legislative authorization for the Department of Correction to "establish young adult correctional units," and the formation by the Legislature of a "Task Force on Emerging Adults in the Criminal Justice System." *Id.* at 424–25 (citations omitted). The court then turned to out-of-state examples. *Id.* at 425 (noting, as one of many examples, that the District of Columbia "provides a chance at sentence reduction for people who were under twenty-five years old when they committed a crime"); *see also* D.C. CODE § 24-403.03 (2021) (describing sentence reduction policy for individuals under the age of twenty-five). Aside from recent developments, the court also noted that "Massachusetts, like most States, distinguishes emerging adults from older adults on a range of issues" including the purchase and sale of alcoholic beverages, the purchase of tobacco products, the obtaining of a license to carry a handgun, becoming a police officer, and gambling. *Mattis*, 224 N.E.3d at 426.

168 *See Mattis*, 224 N.E.3d at 426 ("Recently, the high courts in Washington and Michigan prohibited the mandatory imposition of life without the possibility of parole for those who are from eighteen to twenty years of age, and for those who are eighteen years of age, respectively."); *see also supra* notes 145–59 and accompanying text (examining the New Jersey State Supreme Court's decision in *Comer*).

169 *See Mattis*, 224 N.E.3d at 427–28 (noting, for example, that "[t]he United Kingdom has banned life without parole for any offender under twenty-one years of age at the time of the offense").

170 *See id.* at 428.

law. The question to which we now turn is the inverse: What impact, if any, should state constitutional decisions interpreting cruel and unusual punishment clauses have on the Supreme Court's interpretation of the Eighth Amendment?

B. The Persuasive Potential of State Constitutional Decisions

State supreme court decisions have been historically, albeit infrequently, persuasive to the Supreme Court.[171] State constitutional law decisions have paved the roads for several major U.S. Supreme Court decisions,[172] and there is nothing problematic about federal courts, including the Supreme Court, looking to state courts for constitutional inspiration.[173] The Court can simply consider and apply state court reasoning to make its own decisions.[174] Scholars have called this process the "federalization" of state court doctrine[175] and "reverse incorporation of state constitutional law."[176]

The Court has considered state courts' reasoning in a variety of contexts. Marriage equality is an example.[177] In *Obergefell v. Hodges*, Justice Kennedy's opinion, holding that same-sex couples are constitutionally entitled to marriage equality under the Fourteenth Amendment, included an appendix of state constitutional decisions that legalized same-sex marriage.[178] The opinion also noted that while states were divided on the issue of same-sex marriage, "the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions."[179] Interestingly, Justice Kennedy effectively used these state constitutional decisions as evidence of evolving ideas about same-sex marriage. In justifying the Court's decision to make a ruling on such a contentious issue, he reasoned that "[j]udicial opinions addressing the issue have been informed by

171 *See* Blocher, *supra* note 12, at 368 (noting that the argument for federal courts using state court decisions as guidance is not "a radical normative claim" but also that it is "inaccurate as a descriptive one").

172 *See* Williams, *supra* note 79, at 964.

173 *See, e.g.*, Gerald S. Dickinson, *A Theory of Federalization Doctrine*, 128 Dick. L. Rev. 75, 90 (2023) (arguing that "[n]either federalism principles nor the federal Supremacy Clause prohibit the Supreme Court from borrowing state doctrine" and that such borrowing need not require "complete nationalization of a specific right or protection").

174 *See id.*

175 *See generally id.*

176 *See generally* Blocher, *supra* note 12.

177 *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015) (legalizing same-sex marriage).

178 *Id.* at 686 (first citing Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); then citing Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); then citing Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); then citing Griego v. Oliver, 316 P.3d 865 (N.M. 2013); and then citing Garden State Equal. v. Dow, 79 A.3d 1036 (N.J. 2013)).

179 *Id.* at 663.

the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades."[180] The Court felt that prior judicial decisions, in addition to other indicators including referenda, legislative debates, grassroots campaigns, "countless studies, papers, books, and other popular and scholarly writing," provided sufficient guidance to decide the constitutional question.[181]

Batson v. Kentucky is another illuminating example. In *Batson*, Justice Powell's majority opinion held racially motivated peremptory challenges in criminal cases unconstitutional under the Equal Protection Clause.[182] Justice Powell rejected the State's arguments that limiting the entirely discretionary use of the peremptory challenge would deny litigants a fair trial and create administrative issues.[183] He did so by noting that some states were already applying "a version of the evidentiary standard we recognize today," and in those states, the sky had not fallen as the State claimed it would.[184] Thus, in *Batson*, the Court deployed state constitutional decisions to bolster its rejection of contrary arguments.[185]

New York Times v. Sullivan,[186] *Mapp v. Ohio*,[187] and *Lawrence v. Texas*[188] are additional instances in which the Court looked to state

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180 *Id.* at 676.

181 *Id.*

182 Batson v. Kentucky, 476 U.S. 79, 89 (1986) ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.").

183 *See id.* at 98–99.

184 *Id.* at 99; *see also id.* at 105 (Marshall, J., concurring) ("Evidentiary analysis similar to that set out by the Court . . . has been adopted as a matter of state law in States including Massachusetts and California.").

185 *See id.* at 82 n.1 (majority opinion) (citing state constitutional decisions supporting the Court's holding). The Court cited decisions from California, Delaware, Florida, and Massachusetts. *See* People v. Wheeler, 583 P.2d 748 (Cal. 1978); Riley v. State, 496 A.2d 997 (Del. 1985); State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979).

186 New York Times v. Sullivan, 376 U.S. 254, 280 (1964) (adopting a federal defamation rule based on "a like rule, which has been adopted by a number of state courts").

187 Mapp v. Ohio, 367 U.S. 643, 651 (1961) (applying the exclusionary rule, which disallows the use of illegally obtained evidence in prosecutions, against the states). The Court noted that "the experience of the states is impressive. . . . The movement toward the rule of exclusion has been halting but seemingly inexorable." *Id.* at 660 (citation omitted).

188 Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (holding a Texas sodomy law unconstitutional under the Fourteenth Amendment's Due Process Clause). *Lawrence* overruled a previous (and recent) case, *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld the constitutionality of sodomy laws. In justifying this departure from the doctrine of stare decisis, Justice Kennedy's opinion noted that "courts of five different States have declined to follow [*Bowers*] in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment." *Lawrence*, 539 U.S. at 576 (first

constitutional decisions to guide their own.[189] Thus, while I suggest an uncommon approach to interpreting the Eighth Amendment, it is not unprecedented and could easily be expanded.

C. State Constitutional Decisions Defining Cruel and Unusual Punishments

While state constitutional decisions may be relied on by the Supreme Court with relative infrequency, the evolving standards of decency framework applied by the Court in Eighth Amendment cases lends itself particularly well to constitutional borrowing. As discussed in Part I, the evolving standards of decency test specifically relies on indicia of evolution derived from the states—namely their legislation, patterns, and practices.[190] Thus far, the Court has not expanded this reliance to state constitutions and state supreme court interpretations thereof, but state constitutions ought to be helpful signposts of evolving social values as well, particularly given the majoritarian bent of state constitutionalism as compared to federal constitutionalism.[191]

Indeed, this Note posits that state constitutions are not just similarly useful to other factors in the evolving standards of decency framework; they are actually *better* indicators than every other factor the Court has previously utilized. One of the most common and most impassioned critiques of the Court's Eighth Amendment jurisprudence is its overreliance on majoritarian definitions of cruel and unusual punishments.[192] The Supreme Court, according to these critics, should not be in the business of developing constitutional doctrine based on the whims of majoritarian impulses.[193] This criticism is difficult to refute.

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citing Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002); then citing Powell v. State, 510 S.E.2d 18, 24 (Ga. 1998); then citing Gryczan v. State, 942 P.2d 112 (Mont. 1997); then citing Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996); and then citing Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992)).

189 *See* Jerry Dickinson, *The U.S. Supreme Court's History of Adopting State Supreme Court Guidance*, State Ct. Rep. (Feb. 12, 2024), https://statecourtreport.org/our-work/analysis-opinion/us-supreme-courts-history-adopting-state-supreme-court-guidance [https://perma.cc/8XXT-GPC3] (discussing these precedents and noting that "federalization is a feature, not a bug, of our constitutional order").

190 *See, e.g.*, *supra* notes 50–60 and accompanying text (discussing evolving standards of decency).

191 Blocher, *supra* note 12, at 379–80; *see also supra* Section II.B (discussing the majoritarian influences on state constitutional law development).

192 *See, e.g.*, *supra* note 63 and accompanying text.

193 *Cf.* Terrance Sandalow, *Judicial Protection of Minorities*, 75 Mich. L. Rev. 1162, 1164 (1977) ("The concern that democratic government will provide inadequate protection for minorities is as old as the nation. . . . One possible safeguard against these dangers is to insulate certain interests . . . by adopting a constitution . . . defining the limits of majority power.").

Setting aside the Court's controversial use of international custom[194] (since majoritarian influences may vary by country), the remaining factors relied upon by the Court are all defined by majorities: of legislators for legislative enactments, sentencing judges for patterns and practices, and poll respondents for public opinion polls.

State constitutional decisions offer a middle ground for the Supreme Court to look to in assessing evolving standards of decency. State supreme courts are not free from majoritarian influence,[195] but perhaps it is impossible to assess evolving standards of decency without at least engaging with the majority view on a punishment in any given era. Ideally, state supreme courts are engaging in careful judicial review of constitutional questions even when it causes conflict with majoritarian institutions.[196] State constitutional decisions, therefore, may offer the Supreme Court guidance on what each state "laboratory"[197] believes is cruel and unusual under their state constitutional analogs to the Eighth Amendment. Such guidance strikes the ideal balance between majoritarian influence and the role of constitutional law in protecting unpopular minorities (such as criminal defendants).

Additionally, these state constitutional decisions often share a close relationship to the Court's own jurisprudence, making them a particularly ideal source to inform its ongoing Eighth Amendment analysis. Many scholars have advocated for broader protections under state constitutions than is afforded under the Eighth Amendment. Some of these arguments are based on different language in state constitutional provisions (i.e., "cruel or unusual" rather than the federal version of "cruel and unusual");[198] others focus on state courts' different role in our federal system and thus apply equally to states with cruel and unusual punishment clauses that are identical to the Eighth Amendment.[199] But empirically, most states lockstep with federal

194 *Cf.* James I. Pearce, *International Materials and the Eighth Amendment: Some Thoughts on Method After* Graham v. Florida, 21 DUKE J. COMPAR. & INT'L L. 235, 236 & n.10 (2010) (noting that "[r]ecent years have seen considerable scholarly controversy over whether the Supreme Court of the United States, or indeed any American court, should use international and foreign law when interpreting the U.S. Constitution" and collecting examples of such debate).

195 *See supra* Section II.B (discussing majoritarian influences over state courts).

196 *Cf.* Moore v. Harper, 600 U.S. 1, 37 (2023) (upholding the authority of state supreme courts to engage in judicial review of state legislative acts).

197 *See supra* notes 116–19 and accompanying text.

198 *See, e.g.*, Berry III, *supra* note 130, at 1245 ("[P]rohibition of cruel punishments that need not be unusual opens the door to a broader analysis under state constitutions that use the disjunctive language . . . .").

199 *See, e.g.*, Weiss, *supra* note 132, at 593 ("State courts should not march in lockstep with the Supreme Court when the Court demurs to avoid intervening into a state's criminal justice system.").

constitutional decisions,[200] and even those that do not necessarily lockstep rely heavily on federal precedents in justifying their own constitutional decisions. In both *Comer* and *Mattis*, for example, the courts justified their state constitutional decisions by relying in large part on the U.S. Supreme Court's Eighth Amendment juvenile cases.[201] If the New Jersey Supreme Court strikes down a thirty-year parole bar for juvenile offenders by applying "generally the same" test[202] that the U.S. Supreme Court uses to define cruel and unusual punishments, then presumably that decision's reasoning is at least of interest to the U.S. Supreme Court.

In fact, such decisions should be more than just subjects of interest to the Supreme Court; they should be highly persuasive. While state court decisions are not binding on federal courts interpreting constitutional issues, they may be just as instructive to the Supreme Court as lower federal court decisions.[203] In the Eighth Amendment context, the Supreme Court's precedents explicitly and necessarily rely on other institutional actors to define the society's evolving standards of decency.[204] State constitutional decisions should not merely be added to the list of indicia; they should be elevated above such other factors because state supreme courts are similar institutional actors to the Supreme Court itself.[205] Other indicators of evolving standards of decency considered by the Court in the past, such as public opinion polls or state legislative enactments, may demonstrate societal preferences that are influenced by constitutionally impermissible motivations,

200 *See supra* notes 127–28 and accompanying text.

201 *See supra* Section III.A.

202 *See* State v. Comer, 266 A.3d 374, 383 (N.J. 2022).

203 Several scholars have emphasized the value of state constitutional decisions contributing to constitutional dialogue overall. *See, e.g.*, Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 Hasting Const. L.Q. 93, 97 (2000) ("[I]n acknowledging the value of dialogue, a state court not only honors the authority of its institutional role within the federal scheme, it also engages the U.S. Supreme Court in discourse about the interpretive possibilities inherent in constitutional provisions that 'do not establish and divide fields of black and white.'") (quoting Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting))); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. Rev. 1147, 1168 (1993) (explaining that "the state constitutionalism [he] envision[s] is a process of giving voice to the state court's understanding of the values and principles of the national community" and that such a process enriches "the meaning of American citizenship" because "fifty different courts will talk with each other, as well as with the federal courts, about the meaning of a common enterprise").

204 *See, e.g.*, *supra* notes 49–60 and accompanying text.

205 *Cf.* William L. Carpenter, *Courts of Last Resort*, 19 Yale L.J. 280, 281 (1910) ("It may be said . . . that as the Supreme Court of the United States is the keystone of the arch of the Federal government, so likewise the court of last resort of each State is the keystone of the arch of the government of that State.").

such as racial bias. State supreme courts, while certainly influenced by majoritarian impulses, can exercise their judicial functions by filtering out impermissible elements of the public's views on punishment. By doing this, state supreme courts can consider the public's evolving opinions on what constitutes cruel and unusual punishment as one part of a reasoned, constitutional law analysis without succumbing to majoritarian pressures that do not actually reflect evolving standards of decency. Thus, state supreme courts' judgments of whether punishments are cruel and unusual should be particularly insightful to the Supreme Court.

Conclusion

The Supreme Court's attempt to define the contours of cruel and unusual punishments in an ever-"evolving" society is hardly an enviable task. Fortunately, they need not engage in this difficult exercise alone. This Note has asserted that state constitutional decisions should significantly inform the Supreme Court's determination of evolving standards of decency under the Eighth Amendment because state courts are similar institutional actors that engage in similar constitutional analysis. Just as important, state supreme courts have unique features that may make them particularly effective arbiters of evolving standards of decency. State courts are influenced by majoritarian preferences, but their decisions may contain more measured analyses as compared to other indicators the Supreme Court has used to assess evolving standards of decency in the past (such as state legislative enactments and public opinion polls). State constitutional decisions can therefore provide guidance to the Supreme Court that is influenced by the will of the people but still judicial in nature, and by considering such guidance, the Court can better define what constitutes cruel and unusual punishment today and in the future.