

**ADDRESSING THE SUPREME COURT'S
HALF-BAKED EIGHTH AMENDMENT
MAJORITARIANISM:
HOW STATES CAN USE ADVISORY BALLOT
QUESTIONS TO GIVE MORE LEGITIMACY TO
THE COURT'S DEATH PENALTY DECISIONS**

INTRODUCTION

Over its half-century-long struggle¹ with how to determine whether a particular application of the death penalty is unconstitutional under the Eighth Amendment's prohibition on "cruel and unusual punishments,"² the Supreme Court has arrived at a two-part approach for how to answer these questions. The first part of this approach requires the Court to assess "objective indicia" of society's moral standards about a particular application of the death penalty.³ The Court has recognized two main "objective indicia" that it relies upon to divine Americans' moral feelings toward particular uses of the death penalty: (1) legislative enactments by state legislatures regarding the use of the death penalty at issue and (2) the frequency at which sentencing juries will impose the death penalty for a crime for which it is authorized.⁴

By looking to these supposedly objective indicia to inform a critical portion of its decisions, the Court adopts a majoritarian approach for death penalty cases. As many critics have pointed out, however, there are flaws with both of these indicia that make them unlikely to provide an accurate sense of Americans' moral views on whether particular crimes should be punishable by death.⁵ If these sources are ineffective at accurately estimating public sentiment, then they are failing to serve their only purpose in death penalty cases. Therefore, the Court needs to reevaluate its approach to death penalty jurisprudence. This does not necessarily require that the Court abandon objective indicia altogether. This Note proposes one possible solution whereby these unreliable indicia would be replaced by a more reliable indicator of Americans' views: instituting advisory ballot questions that allow Americans to declare their personal views about the morality of

1. The first Supreme Court case of the modern era addressing the constitutionality of the death penalty was *Furman v. Georgia*, 408 U.S. 238 (1972).

2. U.S. CONST. amend. VIII.

3. *Kennedy v. Louisiana*, 554 U.S. 407, 419–21 (2008).

4. *Id.* at 421.

5. *See infra* Part II.

punishing particular crimes with death at the time they vote in general elections.

Part I provides background information about the difference between counter-majoritarian and majoritarian approaches to answering constitutional questions and about the historical development of the Court's death penalty jurisprudence. Part II surveys problems with the Court's current approach of using state legislative enactments and the practices of sentencing juries to determine societal views about the acceptability of the death penalty in particular situations—problems which make the Court's reliance on these sources inapposite. Part III summarizes another concern with the Court's current objective indicia approach: that many believe that the Court manipulates the objective indicia analysis to match whatever result the majority of Justices favor based on their personal views. Part IV briefly explores the Court's limited use of public opinion polling in its reasoning in death penalty cases and its ultimate rejection of reliance on public opinion polls in these cases. Part IV then proposes giving the Court a new source of data from which it can reliably determine societal views about the death penalty: advisory ballot questions in all states that allow individual Americans to express their views on the acceptability of the death penalty in specific situations at the time they vote in general elections.

I. BACKGROUND

A. *Majoritarianism vs. Counter-Majoritarianism*

At the heart of the Supreme Court's death penalty jurisprudence lies the question of its purpose as an institution. Counter-majoritarians contend that the Supreme Court is a body that “use[s] its own reasoned judgment—regardless of where the majority stands on an issue—when engaging constitutional interpretation.”⁶ To them, the Court is an institution designed to protect individuals and minorities from being left to the mercy of the majority.⁷

Conversely, majoritarians reject the idea that the Court serves as a true check on majority opinion.⁸ In general, majoritarian scholars take the position that the Court derives constitutional meaning from sources extrinsic to the Constitution, supposedly “objective” factors that reflect the

6. Joseph Landau, *New Majoritarian Constitutionalism*, 103 IOWA L. REV. 1033, 1038 (2018).

7. *See id.* at 1038 n.18.

8. *See, e.g.*, JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA*, at xii (2006) (“Far from protecting minorities against the tyranny of the majority or thwarting the will of the people, courts for most of American history have tended to reflect the constitutional views of majorities.”).

consensus views of the American public on constitutional questions.⁹ These scholars tend to argue that the Court usually reaches constitutional decisions by referring to these majoritarian sources.¹⁰ Many constitutional scholars even argue that it is better for the Court to reflect the constitutional views of the majority of the American public in its decisions rather than serve as an independent check against majority opinion.¹¹

There are persuasive reasons to believe a majoritarian approach by the Court is superior to a counter-majoritarian one, at least in the context of Eighth Amendment issues. Majoritarian sources can help the Court decide hard cases.¹² Looking to majoritarian sources can also help the Court give content to constitutional language that does not have an obvious meaning that can be determined from the plain text itself, such as “cruel and unusual punishments.”¹³ A majoritarian approach may also be superior because decisions made through such an approach better protect the Court’s legitimacy.¹⁴ Constitutional decisions that have majoritarian support will likely receive less backlash from the public and be more stable.¹⁵ Finally, the Framers themselves may have meant for a majoritarian approach to be applied to interpreting the Eighth Amendment if, as one scholar argues, they understood the word “unusual” to mean “contrary to long usage.”¹⁶ According to this meaning, punishments that were once often imposed but which had fallen out of popular usage for long periods lost their presumption of validity.¹⁷ Therefore, if a particular punishment fell out of favor with the public at large and ceased to be often imposed, it could come to be considered “unusual” by the courts and no longer permissible.¹⁸ Which punishments were “unusual” could therefore change over time as certain punishments were no longer imposed.

9. Landau, *supra* note 6, at 1035.

10. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 601 (1993).

11. See, e.g., ROSEN, *supra* note 8, at 210 (“The courts can best serve the country . . . by reflecting and enforcing the constitutional views of the American people.”).

12. Landau, *supra* note 6, at 1039.

13. *Id.* at 1043.

14. *Id.* at 1041.

15. *Id.* at 1043.

16. John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1767, 1800–10 (2008).

17. *Id.* at 1813.

18. See *id.* at 1813–15 (discussing an example of an early American state court finding a punishment that was once permitted at common law no longer permissible because it had completely fallen out of usage for a long period of time).

B. Evolution of the Supreme Court's Death Penalty Jurisprudence

The Eighth Amendment provides that “cruel and unusual punishments” shall not be inflicted.¹⁹ The Supreme Court’s early Eighth Amendment jurisprudence emphasized the amendment primarily as one proscribing the use of torture as punishment.²⁰ In the early twentieth century, however, the Court began to take a more expansive view of the Eighth Amendment in *Weems v. United States*.²¹ In *Weems*, the Court surveyed scholarship that connected the Eighth Amendment’s prohibition on “cruel and unusual punishment” to a similarly worded provision in the English Bill of Rights of 1688 and considered whether the Eighth Amendment was meant only to prohibit certain torturous punishments like those enacted by the Stuart monarchs.²² Even if the Amendment was initially written with the Stuarts’ abuses in mind, the Court reasoned that the Amendment’s drafters did not intend for the Amendment’s scope need to be confined only to the specific conduct that gave rise to it.²³ Here, for the first time, the Court acknowledged that the Eighth Amendment “may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”²⁴

Weems both broadened the Eighth Amendment beyond a mere prohibition of torture into a requirement that demands proportionality between the crime committed and the punishment inflicted in response and determined that the reference point for what is “cruel and unusual” was not fixed to conceptions of cruelty that existed in the early days of the United States.²⁵ In *Trop v. Dulles*, the Court reaffirmed its commitment to the notion that what is cruel and unusual is not fixed but rather can and does change over time.²⁶ There a plurality of the Court first stated that the Eighth Amendment’s prohibition on cruel and unusual punishment depends on “the evolving standards of decency that mark the progress of a maturing society.”²⁷

19. U.S. CONST. amend. VIII.

20. See *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1879) (“[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment].”); *In re Kemmler*, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death”); *Gregg v. Georgia*, 428 U.S. 153, 170 (1976) (plurality opinion) (noting that early Eighth Amendment case law focused on determining whether particular methods of execution were similar to torture or other barbarous methods).

21. 217 U.S. 349 (1910).

22. *Id.* at 371–73.

23. *Id.* at 372–73.

24. *Id.* at 378.

25. Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403, 408 (2011).

26. 356 U.S. 86, 99–104 (1958) (plurality opinion).

27. *Id.* at 101.

It was in *Gregg v. Georgia*, a challenge to the constitutionality of the death penalty in any application, that the Court first roughly articulated a test to determine whether a particular punishment is in accord with the “evolving standards of decency” it had mentioned in *Trop*.²⁸ The *Gregg* Court acknowledged that a subjective judgment by the members of the Court would not suffice to make this determination since it is necessary to gauge contemporary values regarding a particular punishment.²⁹ Therefore, the Court stated that it first needed to “look to objective indicia that reflect the public attitude” toward a particular punishment.³⁰ But the *Gregg* Court was also clear that public perception alone could not be conclusive as to the constitutionality of a particular punishment.³¹

Since *Gregg*, the Court has more fully articulated a two-part test for determining the “evolving standards of decency.” Determining this standard “necessarily embodies a moral judgment” because the standard must be applied differently “as the basic mores of society change.”³² Therefore, the Court first looks to objective indicia of societal standards to gauge whether a consensus against a particular application of the death penalty has emerged in the nation.³³ Second, the Court decides in its own independent judgment, based on its own precedents and understanding of the Eighth Amendment, whether a particular application of the death penalty is constitutional.³⁴ This is the basic test the Court has applied for the last half-century when faced with the question of whether a particular application of the death penalty is constitutional under the Eighth Amendment.³⁵

C. Sources of Objective Indicia

The Court has consistently recognized that the most important objective indicator of societal standards of decency for determining whether a consensus against a particular application of the death penalty exists is state legislative enactments.³⁶ The major thrust of the objective indicia analysis

28. 428 U.S. 153 (1976) (plurality opinion) (upholding the constitutionality of the death penalty).

29. *Id.* at 173.

30. *Id.*

31. *Id.*

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

33. *Id.* at 421.

34. *Id.* at 434.

35. *See, e.g., id.* at 421 (rape of a child); *Coker v. Georgia*, 433 U.S. 584, 593–600 (1977) (plurality opinion) (rape of an adult woman); *Atkins v. Virginia*, 536 U.S. 304, 307–13 (2002) (homicide committed by an individual with an intellectual disability); *Roper v. Simmons*, 543 U.S. 551, 564–75 (2005) (homicide committed by a juvenile).

36. *See Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (“The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

therefore involves counting how many states³⁷ permit the particular application of the death penalty at issue and how many forbid it.³⁸ The greater the number of states that forbid the application of the death penalty at issue, the more likely the Court is to conclude that there is a national consensus against that particular application of the death penalty.³⁹

The Court also purports to consider state legislative trends regarding a particular application of the death penalty relevant for determining whether a national consensus has developed against that application. In looking at legislative trends, the Court analyzes whether states that have recently legislated on the application at issue are consistently legislating in the same way.⁴⁰ If states have been consistently legislating to prohibit the application at issue in the time leading up to the case at hand, the Court considers this too as evidence supporting the conclusion that there is a national consensus against that application of the death penalty.⁴¹ Consistency in the direction of the change seems to matter more than the total number of states that change their law to outlaw a particular application of the death penalty, at least when a significant number of states already outlawed that application before a wave of change began.⁴²

State legislation is not the only objective indicium that the Court examines in determining whether a particular application of the death penalty is constitutional.⁴³ The Court also considers how frequently sentencing juries actually impose the death penalty for a particular offense

37. For purposes of the counting, the Court also considers the policy of the federal government on the application of the death penalty at issue. *See Kennedy*, 554 U.S. at 426 (including the federal government as a relevant jurisdiction in the tallying of state legislative enactments). For simplicity, whenever this Note uses the term “states” when discussing the application of the objective indicia portion of the death penalty test, the term is intended to also capture the federal government since it is a jurisdiction the Court also considers in the analysis.

38. *See, e.g., id.* at 422–26 (tallying the number of states prohibiting the death penalty for child rape); *Roper*, 543 U.S. at 564 (tallying states prohibiting the execution of juveniles); *Atkins*, 536 U.S. at 314–15 (tallying states prohibiting the execution of persons with an intellectual disability).

39. *See, e.g., Kennedy*, 554 U.S. at 426 (finding significant evidence of a national consensus against imposing the death penalty for child rape where forty-five of fifty-one jurisdictions did not permit the death penalty for that offense and referencing other cases reaching similar conclusions).

40. *See Atkins*, 536 U.S. at 315 (“It is not so much the number of these States that is significant, but the consistency of the direction of change.”)

41. *See id.* at 313–15 (finding evidence of a national consensus against the execution of individuals with intellectual disabilities from the fact that eighteen states and the federal government passed legislation prohibiting this practice in the fifteen-year period before the case).

42. *See Roper*, 543 U.S. at 565–67 (noting that twelve states already outlawed the death penalty for juveniles before a period where five additional states changed their law to prohibit that practice and stating that the slower rate of change was “counterbalanced by the consistent direction of the change”).

43. *See Kennedy*, 554 U.S. at 433 (“There are measures of consensus other than legislation.”)

for which execution is authorized.⁴⁴ When the death penalty is very rarely imposed as punishment for a crime for which it is authorized, the Court considers that additional evidence of a national consensus against the use of the death penalty for that crime.⁴⁵

II. FLAWS OF THE OBJECTIVE INDICIA INQUIRY

The first part of the Supreme Court's test for whether a particular application of the death penalty is constitutional purports to be purely objective and relies on the objective indicia discussed above to decide whether there is a national consensus against a particular application of the death penalty.⁴⁶ The Court's objective indicia inquiry, however, has been criticized as having flaws that prevent it from being able to lead the Court to an accurate determination about whether there is truly a national consensus against a particular application of the death penalty in the United States.⁴⁷ This Part explores several problems with the objective indicia inquiry and how those problems raise serious questions about whether this test is truly objective and majoritarian.

A. State Population Discrepancies

Even assuming that each state legislature legislates on the death penalty in accordance with the will of the majority of its state's citizens, a tally of state legislation is a highly imperfect means of estimating a national consensus. Differences in the sizes of state populations and in the margin of support versus opposition to execution for a particular offense both make such a tally susceptible to serious inaccuracy.⁴⁸

44. See *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (stating that, in addition to state legislative enactments, the Court has "also looked to data concerning the actions of sentencing juries"), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); see also *Kennedy*, 554 U.S. at 433 (noting that the Court could consider evidence about how often execution was actually imposed as the punishment for a particular crime for which the state authorized execution to help decide whether a consensus had developed against punishing that crime by execution).

45. See, e.g., *Kennedy*, 554 U.S. at 433–34 (finding additional evidence of a national consensus against the use of the death penalty as a punishment for child rape in the fact that no one in the United States had been executed for rape of any kind since 1964 and that only two people had been sentenced to death for child rape in that time); *Thompson v. Oklahoma*, 487 U.S. 815, 852–853 (1988) (O'Connor, J., concurring in the judgment) ("[F]our decades have gone by since the last execution of a defendant who was younger than 16 at the time of the offense, and only 5 out of 1,393 death sentences during a recent 5-year period involved such defendants. . . . [T]hese execution and sentencing statistics support the inference of a national consensus opposing the death penalty for 15-year-olds, but they are not dispositive.")

46. See *supra* Section I.C.

47. See *infra* Sections II.A–D.

48. Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1113–14 (2006).

Regardless of their respective population sizes, each state is given equal weight in the tally when the Supreme Court counts how many states allow execution for a particular offense and how many prohibit execution for that same offense.⁴⁹ As a result, even if the majority of states have legislation banning a particular application of the death penalty, it is possible for the majority of citizens to support that application.⁵⁰ For example, imagine the United States consists of three states: State *A* with a population of ten million, State *B* with a population of twenty million, and State *C* with a population of fifty million. If State *A* and State *B* each have legislation banning a particular application of the death penalty because their citizens unanimously oppose that use of the death penalty but State *C* permits that application because its citizens unanimously support that use of the death penalty, then the Supreme Court's current objective indicia approach would probably find a national consensus against that application of the death penalty even though the majority of citizens in the nation actually support its use in that context.

The Court's tally of legislation approach also ignores the fact that the margin of support or opposition to punishing a particular offense with execution within a state's population can vary dramatically from state to state, which affects the total percentage of the population that supports and opposes a particular application of the death penalty.⁵¹ Imagine again that the United States consists of three states, States *D*, *E*, and *F*, each with a population of ten million. States *D* and *E* outlaw a particular application of the death penalty because 55% of their citizens oppose it being used as punishment for the offense in question. State *F*, however, permits that use of the death penalty because 80% of its population approves of punishing the offense in question by death. If the Supreme Court followed its current objective indicia approach, then it would most likely rule that application unconstitutional even though a majority of seventeen million Americans support the death penalty in that situation compared to a minority of thirteen million who oppose it. Given the combined effects of both different population sizes and different margins of support within each state, simply tallying state legislation could result in the erroneous conclusion that there is a national consensus against a particular application of the death penalty where none in fact exists among the population of the country as a whole.⁵²

49. *Id.* at 1114.

50. *Id.*

51. *Id.*

52. *Id.*

B. Morality May Not Be the Rationale Behind Death Penalty Legislation or Jury Decisions

The Court's objective indicia analysis necessarily assumes that state legislation regarding a particular application of the death penalty is based in substantial part on the moral attitudes a state's people hold toward those uses of the death penalty.⁵³ But "[s]tate laws . . . cannot be evidence of some national consensus on the cruelty of a punishment until one has some reason to believe the laws in question were enacted for the purpose" of setting the standard of decency to which the Court's objective indicia approach looks.⁵⁴ It is quite possible for legislators to have motivations other than morality in mind when they vote to prohibit a particular application of the death penalty. For example, such prohibitive legislation might be motivated by concerns about high costs associated with administering and litigating the death penalty in a particular context.⁵⁵ Administering the death penalty is notoriously expensive for states.⁵⁶ The dissenters in *Kennedy v. Louisiana* recognized that prohibitively high financial costs, rather than morals, could be a significant deterrent to authorizing the death penalty for certain crimes.⁵⁷ They offered evidence that this was in fact a primary motivation for at least two states' failure to pass legislation authorizing the death penalty for child rape.⁵⁸ As the dissenters stated, if cost is the motivation behind a state legislature outlawing a particular application of the death penalty, then that legislative choice "cannot be viewed as evidence of a moral consensus against" the death penalty for the application at issue.⁵⁹

The Court also considers the behavior of sentencing juries as an objective indicator of society's standards of decency,⁶⁰ but jurors' decisions not to impose the death penalty are not necessarily based on moral objections to the death penalty for that particular crime.⁶¹ Rather than signifying a moral consensus among the populace against the death penalty for the crime at issue in all cases, that juries infrequently impose the death penalty for

53. See *supra* notes 32–33 and accompanying text.

54. Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 20 (2009).

55. *Id.*

56. See *State Studies on Monetary Costs*, DEATH PENALTY INFORMATION CTR., <https://deathpenaltyinfo.org/policy-issues/costs/summary-of-states-death-penalty> [<https://perma.cc/XE8Q-DT5K>] (providing summaries from multiple states about the high costs associated with administering the death penalty).

57. *Kennedy v. Louisiana*, 554 U.S. 407, 458–59 (2008) (Alito, J., dissenting).

58. See *id.* (examining legislative history from Colorado and Tennessee regarding these proposed statutes).

59. *Id.* at 459.

60. See *supra* note 44 and accompanying text.

61. See *Graham v. Florida*, 560 U.S. 48, 111–12 (2010) (Thomas, J., dissenting) (“[T]he Court is wrong to equate a jurisdiction’s disuse of a legislatively authorized penalty with its moral opposition to it.”).

certain crimes for which the state authorizes execution as punishment may simply indicate that the populace believes executions should be reserved for only the most heinous instances of those crimes.⁶² For example, even if the death penalty were authorized for all cases of first-degree murder, jurors may feel that execution should not be imposed for just any first-degree murder but instead should be reserved only for particularly brutal murders.

Furthermore, jurors for capital trials must be “death qualified.”⁶³ The controlling standard for death qualification allows the prosecution in a capital case to exclude a venire member from the jury if “the juror’s views [about the death penalty] would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’”⁶⁴ But the manner in which this standard has been applied has allowed prosecutors “to strike for cause virtually any juror with serious reservations about his or her ability to impose the death penalty.”⁶⁵ As a result, people who disagree with the morality of the death penalty are excluded from capital juries,⁶⁶ and the death-qualified jurors who remain are not likely to have any moral objection in the abstract to imposing the death penalty for the crime they are selected to try.⁶⁷ While the Court’s objective indicia inquiry assumes juries’ infrequent imposition of the death penalty for a particular crime reflects a societal moral consensus against the death penalty as an acceptable punishment for that crime,⁶⁸ this assumption is dubious if the jurors who are selected to serve on capital trials are death qualified and, therefore, unlikely to be *morally* opposed to sentencing someone to death for the crime they are trying.

62. *See id.* at 111 (“That a punishment is rarely imposed demonstrates nothing more than a general consensus that it should be just that—rarely imposed.”); *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (plurality opinion) (“[T]he relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se*. Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.”).

63. Aliza Plener Cover, *The Eighth Amendment’s Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 119 (2016).

64. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

65. Cover, *supra* note 63, at 119.

66. *See id.* at 126.

67. *See id.* at 121.

68. *See supra* notes 45–46 and accompanying text.

C. The “One-Way Ratchet”

Critical scholars frequently critique the objective indicia approach as a “one-way” or an “irreversible ratchet.”⁶⁹ By its own terms, the phrase “evolving standards of decency” suggests the standard is always subject to change over time, and an Eighth Amendment prohibition on the use of the death penalty in a particular application “should not logically be permanent because there is no evidence that the consensus on which it rests is permanent.”⁷⁰ The Court, however, seemingly assumes that the nation’s “standards of decency” will only evolve in one direction toward lesser and lesser tolerance for the death penalty.⁷¹ But popular support for a particular application of the death penalty is not necessarily fixed on a downward trajectory—it can increase.⁷² If the consensus against a particular application of the death penalty that led the Court to declare that application unconstitutional evolves into a consensus in favor of it, that application will nonetheless remain permanently unconstitutional because state legislatures will be constitutionally prohibited from passing new legislation that reflects that changed consensus.⁷³

Some scholars do believe state legislatures can effectively convince the Court to reinstate the constitutionality of a punishment that the Court has previously found a national consensus against and ruled unconstitutional.⁷⁴ If this is the case, the ratchet may not be as irreversible as the criticism claims. One piece of evidence that potentially supports this answer to the “one-way ratchet” criticism is the fact that when the Court has declared a particular application of the death penalty unconstitutional under the Eighth

69. See, e.g., Jacobi, *supra* note 48, at 1119–23; Eric Posner, *The Eighth Amendment Ratchet Puzzle in Kennedy v. Louisiana*, SLATE (June 25, 2008, 11:06 AM), <https://slate.com/news-and-politics/2008/06/the-eighth-amendment-ratchet-puzzle-in-kennedy-v-louisiana.html> [<https://perma.cc/W76A-5SQ2>].

70. Jacobi, *supra* note 48, at 1119.

71. See *id.* at 1122.

72. See *id.* at 1120–21 (explaining that studies have found variation in support levels for the death penalty to be systemic and discussing one study finding that support for the death penalty varies positively with increased crime rates, particularly homicide rates).

73. See *id.* at 1121. Some Supreme Court Justices have acknowledged the force of the “one-way ratchet” critique, but others have seemingly downplayed concerns about its significance. Compare *Thompson v. Oklahoma*, 487 U.S. 815, 855 (1988) (O’Connor, J., concurring in the judgment) (“[H]ad this Court then [mistakenly] declared the existence of [a consensus against the death penalty], and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.”), with *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) (Scalia, J., concurring) (“The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.”).

74. See, e.g., Jeffrey Omar Usman, *State Legislatures and Solving the Eighth Amendment Ratchet Puzzle*, 20 U. PA. J. CONST. L. 677, 712–719 (2018) (arguing that state legislatures can accomplish this through use of contingent legislation and resolutions).

Amendment after previously holding it constitutional in an earlier case, it has not overruled the earlier case.⁷⁵ This implies that the Court does not view those cases as being incorrect at the time of decision.⁷⁶ But whether or not the ratchet is reversible in theory, it will probably never be reversible in practice if state legislatures are deterred from attempting to pass legislation to trigger a reversal since doing so would require them to knowingly pass unconstitutional laws.⁷⁷ Attempts at reversal seem even less likely in light of evidence that state legislators do not understand that the Court's Eighth Amendment jurisprudence purports to give them a role in determining which applications of the death penalty are constitutional and which are not.⁷⁸

D. State Legislatures Are Not Necessarily Representative of State Citizens' Views on the Death Penalty

The Court's current objective indicia approach rests largely on the assumption that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."⁷⁹ But, as this Section argues, there is much evidence that undercuts this assumption. In fact, though the Court's objective indicia approach is largely recognized as majoritarian for its significant reliance on the actions of state legislatures,⁸⁰ one scholar has recently gone so far as to argue that state legislatures are "the states' least majoritarian branch."⁸¹

As an initial matter, the fact that state legislators are elected in winner-takes-all elections in single-member districts creates an electoral bias that can profoundly affect the makeup of state legislatures.⁸² The biasing effects

75. See *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding execution of an individual with an intellectual disability constitutional under the Eighth Amendment) *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding execution of a minor constitutional under the Eighth Amendment) *abrogated by* *Roper v. Simmons*, 543 U.S. 551 (2005). Neither decision explicitly overruled the precedent from which it parted. Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1174–75 (2014).

76. See *Roper*, 543 U.S. at 608 (Scalia, J., dissenting) ("[T]oday's opinion . . . announc[es] the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago [in *Stanford*] was *wrong*, but that the Constitution *has changed*.").

77. See Posner, *supra* note 69.

78. See David Niven & Aliza Plener Cover, *The Arbiters of Decency: A Study of Legislators' Eighth Amendment Role*, 93 WASH. L. REV. 1397, 1439–40 (2018) (concluding based on a study of legislative debates regarding death penalty legislation in three states that state legislators generally do not understand the role the Court's Eighth Amendment jurisprudence gives them in determining the meaning of that amendment).

79. *Penry*, 492 U.S. at 331.

80. See, e.g., Cover, *supra* note 75, at 1172; Sigler, *supra* note 25, at 410.

81. Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1756 (2021).

82. See *id.* at 1759–60.

of these types of elections is especially pronounced when specific voting groups, such as members of one political party, tend to congregate densely in a particular geographical area.⁸³ When group members are heavily concentrated in fewer voting districts, they will lose more districts than their total population within the state suggests they should.⁸⁴ Even if this concentration of like-minded voters is voluntary, the biasing effect on the makeup of a state legislature can be substantial.⁸⁵ Partisan gerrymandering can aggravate the problem even further by deliberately drawing district lines to exacerbate this concentration.⁸⁶

The risk of combining winner-takes-all elections in single-member voting districts with natural concentrations of like-minded voters and partisan gerrymandering is that the state legislature will be controlled by a “manufactured majority”—a situation in which the party that won less than a majority of statewide votes obtains the majority of seats in the legislature—or that the majority party of the state legislature will possess a share of seats in substantial excess of its share of the statewide vote, even if it captured a majority of the vote statewide.⁸⁷ These situations have occurred surprisingly often throughout the last half century across the United States.⁸⁸ If in many instances state legislatures are controlled by the party which did not receive the majority of the statewide vote, then it is unlikely that these legislatures always legislate in accordance with the will of the majority of the voters, especially since voters have become increasingly ideologically sorted between the two major political parties with little overlap in policy preferences.⁸⁹

There are other reasons to be concerned that state legislative enactments are not likely to yield an accurate estimate about societal morals concerning particular applications of the death penalty. For one, a substantial portion of state legislature races nationwide have gone uncontested in recent years,⁹⁰

83. See *id.* at 1761.

84. See *id.*

85. See *id.*

86. See *id.* Any chance that the federal judiciary will curb partisan gerrymandering has seemingly been foreclosed by the Supreme Court’s decision in *Rucho v. Common Cause*, in which a bare majority of the Court held that “partisan gerrymandering claims present political questions beyond the reach of the federal courts.” 139 S. Ct. 2484, 2506–07 (2019) (5-4 decision).

87. See Seifter, *supra* note 81, at 1762–68.

88. Between 1968 and 2016 there were 146 instances where state senates were controlled by the political party that did not receive the most votes statewide and 121 instances where the same phenomenon occurred in state houses. See *id.* at 1764. These instances were distributed across the nation. See *id.* at 1764–65 (mapping the frequency of minoritarian control of state houses and state senates nationwide).

89. See *id.* at 1758.

90. See Barry C. Burden & Rochelle Snyder, *Explaining Uncontested Seats in Congress and State Legislatures*, 49 AM. POL. RSCH. 247, 251 (2021) (showing that in recent years around 30% of state legislature races in non-southern states have been uncontested while around 60% of state legislature races in southern states have been uncontested).

meaning that many Americans have not had an opportunity to consider candidates' differing views on death penalty issues. Even when state legislators are chosen in contested elections, it is not clear that they take the public's views on death penalty issues into account when deciding how they will vote on such issues.⁹¹ In one study of legislative debates regarding the repeal of the death penalty in the state legislatures of Connecticut, Illinois, and Nebraska conducted in the last decade, most legislators did not cite public sentiment for support for their positions on the issue during their floor speeches.⁹² Some even explicitly stated they would cast their vote against the majority of their constituents' preference.⁹³ Even when public sentiment was cited in legislators' speeches, it was usually presented in anecdotal or impressionistic terms, leading the authors of the study to conclude that "[i]t is fair to say that legislators are not regularly employing scientific polling data to gauge public sentiment back home."⁹⁴ Legislators in Nebraska either severely misjudged public sentiment or blatantly ignored it because their vote to repeal the death penalty in the state was quickly overturned by a statewide referendum in which over 60% of Nebraska voters favored reinstatement of the death penalty.⁹⁵

III. THE OBJECTIVE INDICIA INQUIRY'S PERCEPTION PROBLEM

As has been demonstrated, the Court's objective indicia analysis suffers from a multitude of methodological flaws,⁹⁶ but it also suffers from a perception problem. Many critics allege that the Justices use the objective indicia analysis as merely a front to enable them to reach whatever decision they want to reach based on their personal preferences.⁹⁷ Indeed, even some members of the Court itself have raised this criticism.⁹⁸ The Court has never decided a case where the majority's result on the objective indicia inquiry did not align with the majority's "independent judgment" regarding the

91. See Niven & Cover, *supra* note 78, at 1422 (finding in a study of the legislative debates in three state legislatures on death penalty repeal that only 35% of floor speeches made in support of the death penalty mentioned public sentiment on the issue while only 15% of floor speeches opposed to the death penalty mentioned public sentiment).

92. See *id.* at 1421–22.

93. See *id.* at 1422.

94. *Id.*

95. See *id.* at 1423.

96. See *supra* Part II.

97. See, e.g., Ian P. Farrell, *Abandoning Objective Indicia*, 122 YALE L.J. ONLINE 303, 312–13 (2013).

98. See *Glossip v. Gross*, 576 U.S. 863, 899 (2015) (Scalia, J., concurring); *Atkins v. Virginia*, 536 U.S. 304, 348–49 (2002) (Scalia, J., dissenting).

constitutionality of a particular application of the death penalty.⁹⁹ This is potential evidence that the Court is simply manipulating the malleable “objective” data so that what the Court claims is society’s consensus will always align with its independent judgment.¹⁰⁰ For example, in *Kennedy v. Louisiana*,¹⁰¹ both the majority and dissent claimed that the objective indicia analysis supported the outcome they reached regarding the constitutionality of the death penalty as applied to child rapists, but both opinions approached the objective indicia analysis differently. The majority stressed the total number of states that do not allow the death penalty to be inflicted on these criminals,¹⁰² while the dissent stressed a trend in the states toward permitting this punishment for child rapists.¹⁰³ If the Court wants the public to perceive its decisions concerning the death penalty as the product of a legitimate, majoritarian approach, then this goal is threatened by the credible criticism that the Court’s objective indicia inquiry simply camouflages its constitutional freestyling.

IV. USING ADVISORY BALLOT QUESTIONS TO GIVE THE COURT A MORE RELIABLE SOURCE ABOUT AMERICAN’S MORAL VIEWS ON THE DEATH PENALTY

If the Court’s current approach of looking to state legislative enactments and jury sentencing decisions to gauge the moral sentiment of the American people regarding particular uses of the death penalty is unreliable,¹⁰⁴ then the Court must change its approach to death penalty cases. There are two basic options. One is that the Court can scrap the objective indicia inquiry from its death penalty jurisprudence altogether, but that seems unlikely.¹⁰⁵

99. See Farrell, *supra* note 97, at 313. For a brief description of the independent judgement prong of the Court’s death penalty test, which follows the objective indicia inquiry, see *supra* note 34 and accompanying text.

100. See Farrell, *supra* note 97, at 313.

101. 554 U.S. 407 (2008).

102. See *id.* at 422–26.

103. See *id.* at 455–61 (Alito, J., dissenting).

104. See *supra* Part II.

105. The Court’s decision in *Miller v. Alabama*, 567 U.S. 460 (2012), a non-death penalty case dealing with mandatory life without parole sentences for juveniles, provided some evidence that the Court might abandon the objective indicia approach in Eighth Amendment cases. See Farrell, *supra* note 97, at 304. In holding that sentencing schemes mandating life without parole sentences for juveniles are unconstitutional under the Eighth Amendment, the Court in *Miller* did not employ the objective indicia approach at all, even though it is typically used in cases that assess the constitutionality of specific non-death penalty sentences, as well. See *id.* But the *Miller* majority opinion suggests that it was only an exception to the usual approach of consulting the objective indicia rather than a wholesale abandonment of that approach. See *id.* Furthermore, two members of the 5-4 *Miller* majority, Justice Kennedy and Justice Ginsburg, are no longer on the Court, and a majority of the current Court seems to have low regard for the *Miller* decision, at least according to the remaining members of the *Miller* majority. See

The other is that the Court can replace, or at least supplement, state legislative enactments and jury sentencing decisions with other, more objective indicators of societal views about the death penalty.¹⁰⁶

One indicator of societal views that may seem an obvious candidate for inclusion in an amended objective indicia approach is public opinion polls.¹⁰⁷ This Part discusses the Court's prior treatment of polls in death penalty cases and its seeming rejection of them as an indicator to consult during the objective indicia inquiry.¹⁰⁸ It then proposes an alternative to public opinion polls that would be harder for the Court to dismiss as an objective indicator of societal views. This alternative is for states to place advisory questions about the death penalty on ballots at the time of statewide general elections, which would give American voters the chance to make their moral views on the death penalty known every election year.¹⁰⁹ The Court could then consider the results of these ballot questions during the objective indicia inquiry whenever a death penalty question comes before it. The Court may even feel significant pressure to consider these results from the state advisory questions to preserve the legitimacy of the objective indicia approach.

A. *The Supreme Court's Treatment of Public Opinion Polls*

The Court's earliest death penalty cases of the modern era, *Furman v. Georgia*¹¹⁰ and *Gregg v. Georgia*,¹¹¹ both featured some limited references to public opinion polling. In *Furman*, the dissenting Justices argued that public opinion polls conducted in the decade before the case

Jones v. Mississippi, 141 S. Ct. 1307, 1328–30 (2021) (Sotomayor, J., dissenting) (accusing the majority in *Jones* of “gut[ting]” and distorting *Miller* “beyond recognition”). The *Jones* majority, however, did not discuss *Miller*'s departure from the objective indicia analysis. Two post-*Miller* cases, both dealing with states' standards for determining whether a defendant had an intellectual disability for purposes of death penalty eligibility, also provoked dissents that attacked the majority for not following the objective indicia approach. See *Hall v. Florida*, 572 U.S. 701, 724–43 (2014) (Alito, J., dissenting); *Moore v. Texas*, 137 S. Ct. 1039, 1053–62 (2017) (Roberts, C.J., dissenting). All things considered, it seems far too early to conclude that the end has arrived for the objective indicia approach, especially since some circuit courts have still employed it in post-*Miller* Eighth Amendment cases. See, e.g., *Crawford v. Cuomo*, 796 F.3d 252, 259–60 (2d Cir. 2015); *Ricks v. Shover*, 891 F.3d 468, 477 (3d Cir. 2018).

106. Aliza Plener Cover offers an example of an amended objective indicia approach, arguing that the Court should consider the number of potential jurors who are stricken from jury service because they are not “death qualified” during the objective indicia inquiry. Cover, *supra* note 63, at 144–49. For a brief description of death qualification, see *supra* notes 63–68 and accompanying text.

107. For an argument that the Court should consult public opinion polls in its death penalty cases as part of the objective indicia inquiry, see David Niven, Jeremy Zilber & Kenneth W. Miller, *A “Feeble Effort to Fabricate National Consensus”: The Supreme Court's Measurement of Current Social Attitudes Regarding the Death Penalty*, 33 N. KY. L. REV. 83, 109–112 (2006).

108. See *infra* Section IV.A.

109. See *infra* Section IV.C.

110. 408 U.S. 238 (1972).

111. 428 U.S. 153 (1976).

showed “nothing approximating the universal condemnation of capital punishment.”¹¹² The dissenters were careful to note, however, that in citing these polls they were not “intimating that any judicial reliance could ever be placed on [public opinion polls].”¹¹³ Four years later in *Gregg*, Justice Stewart’s plurality opinion cited a couple of public opinion polls finding majority support for the death penalty without remarking on how much weight, if any, the Court should give to them.¹¹⁴ References to public opinion polls disappeared entirely from the opinions in the Court’s next major death penalty case the following year, *Coker v. Georgia*.¹¹⁵ A little over a decade later, the petitioner in *Penry v. Lynaugh* offered results from several public opinion polls to support his argument that a national consensus had emerged against executing those with intellectual disabilities.¹¹⁶ Justice O’Connor’s majority opinion seemed to dismiss public opinion polls as an unreliable source of evidence about societal views when she wrote in response that “[t]he public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely.”¹¹⁷

Despite Justice O’Connor’s statement in *Penry*, there was one later instance where it appeared polls might at least return to being a source of evidence the Court would consider on a limited basis, as in *Furman* and *Gregg*.¹¹⁸ In 2002, after analyzing state legislative enactments and jury sentencing practices in another case considering whether the death penalty was constitutionally permissible as a punishment for the intellectually disabled, the majority in *Atkins v. Virginia*—in a footnote—cited public opinion polling results as “[a]dditional evidence” of a national consensus against this use of the death penalty.¹¹⁹ The majority stated that the polling evidence was “by no means dispositive” and that the polls only offered support for its ruling because of their “consistency with the legislative evidence.”¹²⁰ Even this brief endorsement—if it can even be called an endorsement—of polls as having a very limited role in the objective indicia

112. *Furman*, 408 U.S. at 386 (Burger, C.J., dissenting).

113. *Id.* at 385.

114. *See Gregg*, 428 U.S. at 181 n.25.

115. *See Niven, Zilber & Miller, supra* note 107, at 87–88 (noting the “sudden disappearance” of public opinion polling from *Coker*).

116. *Penry v. Lynaugh*, 492 U.S. 302, 334–35 (1989).

117. *Id.* at 335. In *Stanford v. Kentucky*, decided the same day as *Penry*, a plurality of the Court not joined by Justice O’Connor also “decline[d] the invitation to rest constitutional law upon” public opinion polls in a case involving the constitutionality of the death penalty for juveniles. *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality opinion).

118. *See supra* notes 110–16 and accompanying text.

119. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

120. *See id.*

inquiry provoked strident opposition from the dissenters in *Atkins*, who vigorously assailed any reliance on polls.¹²¹ The *Atkins* dissenters appear to have prevailed in their opposition to using public opinion polling as even limited evidence of a national consensus because public opinion polls were not cited again in the Court's two major post-*Atkins* cases involving specific applications of the death penalty.¹²²

B. Problems with Public Opinion Polls

In his *Atkins* dissent, Chief Justice Rehnquist specifically mentioned that one reason for his opposition to relying on public opinion polls in any capacity was the fact that errors can occur that can skew the results of polls and render them unreliable as a barometer of societal views.¹²³ Among the potential sources of error he mentioned were the way in which the population samples for polls are designed, the way in which the survey questions are asked, and the way in which statistical analysis is used to interpret the data collected by polls.¹²⁴ These are all components of public opinion polls that can undermine the polls' reliability if improperly implemented.¹²⁵

To Chief Justice Rehnquist's concerns about the reliability of polls from two decades ago, we can add more recently emerging ones. The rise in cell phone use has dramatically decreased participation in public opinion polling,¹²⁶ and this in turn may mean that those who do answer pollsters these days are not as likely to generate a representative population sample.¹²⁷ Public confidence in polls also seems to have declined after pre-

121. See *id.* at 325–26 (Rehnquist, C.J., dissenting) (arguing that the results of public opinion polls should be given no weight in discerning societal views about particular uses of the death penalty); *id.* at 347 (Scalia, J., dissenting) (deeming the results of public opinion polls “irrelevant” to the object of inquiry and calling the majority's reliance on them worthy of “the Prize for the Court's Most Feeble Effort to fabricate ‘national consensus’”).

122. See *Roper v. Simmons*, 543 U.S. 551 (2005) (citing no public opinion polling in finding a national consensus against the execution of juveniles); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (citing no public opinion polling in finding a national consensus against the execution of child rapists).

123. *Atkins*, 536 U.S. at 326 (Rehnquist, C.J., dissenting).

124. See *id.*

125. See Niven, Zilber & Miller, *supra* note 107, at 109.

126. See Joseph P. Williams, *The Problem with Polls*, U.S. NEWS (Sept. 28, 2015, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2015/09/28/why-public-opinion-polls-are-increasingly-inaccurate> [<https://perma.cc/N6VP-T9VE>].

127. See Joshua Clinton, *Polling Problems and Why We Should Still Trust (Some) Polls*, VAND. UNIV. (Jan. 11, 2021, 3:50 PM), <https://www.vanderbilt.edu/unity/2021/01/11/polling-problems-and-why-we-should-still-trust-some-polls/> [<https://perma.cc/C7AU-446k>].

election polls from the 2016 and 2020 presidential elections greatly deviated from the actual election results those years.¹²⁸

Though public opinion polls can be flawed, social scientists still believe they are the most effective means available to gauge what the public thinks about issues.¹²⁹ The purpose of this Note is not to resolve the debate about whether the Court should reconsider use of public opinion polls as part of the objective indicia inquiry in death penalty cases. Rather, accepting that the Court rejects even limited reliance on public opinion polls in these cases, this Note proposes that states take action to provide the Court data about societal views on the death penalty from a similar but different source that will be harder for the Court to dismiss as unreliable—namely, advisory ballot questions open to the entire statewide electorate.

C. States' Power to Create Advisory Ballot Questions to Determine American's Moral Views on the Death Penalty

According to current death penalty precedent, states have the power to provide the Court evidence of a national consensus against a particular use of the death penalty by their legislative enactments.¹³⁰ But states also have the power to create a more reliable way for the Court to learn Americans' views about particular uses of the death penalty through their ability to add advisory questions to ballots during elections. "An advisory question is a type of ballot measure in which citizens vote on a non-binding question."¹³¹ These questions cannot change the law but instead "allow voters to voice their preference and allow the state legislature or local government to gauge public opinion on the issue being presented."¹³² In a way, these are just larger scale public opinion polls.¹³³ A more reliable alternative to the Court's current objective indicia approach would be for all fifty states to add advisory questions to their ballots. Every two years at the time of statewide general elections, states would invite citizens to express their views on the moral acceptability of the death penalty in particular contexts via these advisory questions.

128. *See id.* Pre-election polls aimed at predicting election outcomes, however, require that pollsters factor more assumptions into their polling methodology than do polls aimed at gauging general public opinion on specific issues such as the death penalty. *See id.* Pollsters measuring general public opinion can therefore be "far more confident" in their outcomes than pre-election pollsters who must make "educated guesses about what the electorate will be." *See id.*

129. *See id.*; Niven, Zilber & Miller, *supra* note 107, at 109–10.

130. *See supra* notes 36–39 and accompanying text.

131. *Advisory Question*, BALLOTEDIA, https://ballotpedia.org/Advisory_question [<https://perma.cc/Y8V7-EWBC>] (last visited Nov. 21, 2022).

132. *Id.*

133. *See Donovan v. Priest*, 931 S.W.2d 119, 125–26 (Ark. 1996) (stating that the purpose of an advisory referendum is "ostensibly . . . for polling").

The Supreme Court has indicated there is no constitutional bar to states' ability to use advisory questions to gauge citizens' views on issues of public concern. In *Kimble v Swackhamer*, then-Justice Rehnquist, in his capacity as Circuit Justice, denied a request for injunctive relief that would prevent the state of Nevada from placing an advisory question on its November election ballots to gauge citizen support for the Equal Rights Amendment.¹³⁴ In denying the request for injunctive relief, Justice Rehnquist said he could "see no constitutional obstacle to a nonbinding, advisory referendum of this sort."¹³⁵ The full Court ultimately dismissed the appeal "for want of [a] substantial federal question" without any apparent disagreement with Justice Rehnquist's view about the constitutionality of the advisory question.¹³⁶ The challenge to the advisory question in *Kimble* was based on the argument that using an advisory question for the state legislature to ascertain the level of public support for a constitutional amendment violated Article V of the Constitution by impermissibly altering the amendment process.¹³⁷ If the Court found no constitutional problem with the advisory questions at issue in *Kimble*, there is no reason to think the Court would take issue with using advisory questions to gauge public opinion on different uses of the death penalty. In fact, legislatures have used advisory questions on death penalty issues in the past without any hint of this practice being problematic under the federal Constitution.¹³⁸ States therefore appear to be unconstrained by federal law from implementing these advisory questions.¹³⁹

Adding advisory questions to the ballot for Americans to express their views on the acceptability of the death penalty would address multiple issues with the current objective indicia approach. The Court's aim with the objective indicia approach is to find whether a *national* consensus exists,¹⁴⁰ and the Court's ability to consider results from advisory questions on the

134. 439 U.S. 1385, 1385, 1388 (1978) (Rehnquist, J., in chambers).

135. *Id.* at 1388.

136. *Kimble v. Swackhamer*, 439 U.S. 1041, 1041 (1978).

137. *Kimble*, 439 U.S. at 1386; *see also* U.S. CONST. art. V.

138. *See* Tim Jones, *Wisconsin Voters to Weigh in on Matter of Life or Death Penalty*, L.A. TIMES (July 2, 2006, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2006-jul-02-adna-execute2-story.html> [<https://perma.cc/2CD7-FMR2>]; *Wisconsin Death Penalty, Question 2 (2006)*, BALLOTPEdia, [https://ballotpedia.org/Wisconsin_Death_Penalty_Question_2_\(2006\)](https://ballotpedia.org/Wisconsin_Death_Penalty_Question_2_(2006)) [<https://perma.cc/3RR4-KGN9>] (last visited Nov. 21, 2022) (providing the text of an advisory question regarding the death penalty that appeared on the ballot during Wisconsin's 2006 elections).

139. Some current state laws, however, may be a barrier to use of advisory questions. *See* N.M. STAT. ANN. § 1-16-8 (2022) ("In no case shall a nonbinding or merely advisory question be placed on the ballot for any election held pursuant to the [New Mexico] Election Code."). States, of course, are free to change their legislation and to amend their state constitutions as needed to make advisory ballot questions permissible.

140. *See Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008) (referring to evidence of a national consensus); *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (same).

ballot would give the Court a more accurate sense of what the national picture looks like. By looking at these results, the Court would no longer have to rely on the dubious assumption that state legislation will accurately reflect the moral attitudes of the majority of that state's people;¹⁴¹ it would be able to observe directly what the voters themselves think. Use of these results in the objective indicia inquiry would also solve the current approach's failure to account for differences in state population sizes and differences in the margin of support or opposition toward a particular use of the death penalty within each state.¹⁴² The ballot results from all fifty states could be aggregated such that the Court would be able to know a nationwide margin of support or opposition to a particular use of the death penalty. Differences in state populations would no longer be able to distort the Court's perception about how many total Americans hold particular views.¹⁴³

By providing the Court with results from advisory ballot questions about the death penalty, the states could also solve the "one-way ratchet" problem. Recall the dilemma—once the Court declares a particular application of the death penalty unconstitutional, state legislatures are prohibited, or at least strongly deterred, from passing legislation that would permit that use of the death penalty, even if the consensus against that practice changes over time into a consensus in favor of it.¹⁴⁴ This means that the state legislatures will not be able to provide the Court with any legislative evidence that the consensus underlying a ruling of unconstitutionality has changed, even though logically the phrase "evolving standards of decency" suggests that the constitutionality of a particular application of the death penalty should be able to change in either direction as societal attitudes toward it change.¹⁴⁵ Jury decisions also would not be able to supply evidence of a change in the national consensus regarding a particular application of the death penalty since juries will no longer have the option of sentencing someone to death for an offense for which the death penalty has been declared unconstitutional. This is problematic since jury decisions are the only source other than state legislative enactments that the Court consults under the current objective indicia approach.¹⁴⁶

Advisory ballot questions would be a way to present the Court with evidence of a changed consensus, and state legislatures should be far less deterred from placing these on the ballot than they would be from passing

141. See *supra* Part II.D and notes 54–59 and accompanying text.

142. See *supra* Part II.A.

143. See *supra* Part II.A.

144. See *supra* Part II.C.

145. See *Jacobi, supra* note 48, at 1119.

146. See *supra* notes 43–45 and accompanying text.

an unconstitutional law. The advisory ballot questions would not present any off-putting constitutional concerns since the results would not cause any change in law.¹⁴⁷ Having the advisory questions on the ballots every two years at the time of statewide general elections would also ensure that the Court always has up-to-date evidence about where the American people stand on particular uses of the death penalty should a death penalty case come before it.

Relying on the results from advisory ballot questions would also help alleviate the perception problem the Court has created by applying the current objective indicia approach.¹⁴⁸ Some critics charge that the Court manipulates the objective indicia portion of its Eighth Amendment test so that it will always align with the result that the majority wants to reach in any given case,¹⁴⁹ but it would be much harder for the Court to manipulate the results of publicly available ballot results. To reach a result contrary to what the ballot results indicate is the majority attitude toward a particular application of the death penalty, the Court would probably have to abandon all reliance on objective indicia. This would at least expose the façade that the Court cares about the prevailing majority view of Americans on these death penalty questions if it actually does not. On the other side, if the Court did analyze the results of advisory ballot questions during the objective indicia approach and reached a decision that was in harmony with those results, then it would be far more difficult to accuse the Court of simply reaching whatever result it wants irrespective of the attitudes of most Americans.

It would also be more difficult for the Court to dismiss the reliability of advisory ballot questions as an accurate means of discerning Americans' moral attitudes toward particular uses of the death penalty than the reliability of public opinion polls, which the Court has declined to consult in these cases.¹⁵⁰ An advisory ballot question would alleviate Chief Justice Rehnquist's concerns about sampling methodology that, in part, motivated his opposition to reliance on public opinion polls.¹⁵¹ Since the advisory question would be accessible to all voters in the state, there would not be any potentially flawed methodological choices about how to achieve a representative sample that would need to be employed. Furthermore, the number of people who would participate in a statewide general election with an advisory ballot question would be much larger than the number of people

147. See *Advisory Question*, *supra* note 131.

148. See *supra* Part III.

149. See Farrell, *supra* note 97, at 313.

150. See *supra* notes 115–22 and accompanying text.

151. See *Atkins v. Virginia*, 536 U.S. 304, 326 (Rehnquist, C.J., dissenting).

who participate in a typical public opinion poll.¹⁵² The closer the number of voters is to the full population size, the more likely it is that the results will precisely approximate the true sentiment of the full population.¹⁵³ Also, using advisory ballot questions would, in theory, give every American who is eligible to vote and has an opinion on death penalty practices in the United States the opportunity to make that view known.¹⁵⁴ Therefore, reliance on statistical analysis of the results, like Chief Justice Rehnquist was concerned about when it came to public opinion polls,¹⁵⁵ would be unnecessary; the results would speak for themselves.

Advisory ballot questions, however, would do less to assuage Chief Justice Rehnquist's concerns about the potential distorting effect of how questions are phrased.¹⁵⁶ Just as the phrasing of public opinion poll questions might influence those polled to answer in a way that does not reflect their true views, the wording of ballot questions can exert a similar, potentially distorting influence.¹⁵⁷ But so long as human beings must use language to communicate, this is a dilemma that cannot be completely solved, only mitigated as best as possible. What is more concerning, however, is that state elected officials are typically the ones in charge of drafting the phrasing of ballot questions, which presents politically motivated officials an opportunity to craft ballot questions in a way that is

152. A typical nationally focused public opinion poll relies on responses from only about 1,000 respondents. *List of Polling Firms*, BALLOTPEDIA, https://ballotpedia.org/List_of_polling_firms [<https://perma.cc/MW9N-ZW9J>] (last visited Nov. 21, 2022). In contrast, over two million people cast a vote on Wisconsin's death penalty advisory ballot question in 2006. *Wisconsin Death Penalty, Question 2 (2006)*, *supra* note 138.

153. See Nestor Asiamah, Henry Kofi Mensah & Eric Fosu Oteng-Abayie, *Do Larger Samples Really Lead to More Precise Estimates? A Simulation Study*, 5 AM. J. EDUC. RSCH. 9, 10 (2017) (explaining that increasing the sample size will result in an estimate that more precisely reflects the true measure in the full population); *Margin of Sampling Error/Credibility Interval*, AM. ASS'N FOR PUB. OP. RSCH., <https://www.aapor.org/Education-Resources/Election-Polling-Resources/Margin-of-Sampling-Error-Credibility-Interval.aspx> [<https://perma.cc/4P7V-QYZH>] (last visited Nov. 21, 2022).

154. Those who believe voter suppression is a major problem in the United States would argue that putting these advisory questions about the death penalty on the ballot would not actually give every American the chance to make their view known, and many scholars and organizations believe voter suppression is a significant concern. See, e.g., Renalia Du Bose, *Voter Suppression: A Recent Phenomenon or an American Legacy?*, 50 U. BALT. L. REV. 245, 280 (2021) ("Voter suppression in America is not a recent phenomenon—it is an American legacy."); *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, ACLU (Aug. 18, 2021), <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/> [<https://perma.cc/4XQ7-6RQY>] (describing practices across the United States that the ACLU considers voter suppression and explaining their impact on voters). If a significant number of Americans who would want to answer an advisory ballot question on the death penalty are unable to do so due to voter suppression, it could create concerns that the results of the advisory questions would be improperly skewed in one direction if these excluded Americans would also overwhelmingly tend to answer the advisory questions the same way.

155. See *Atkins*, 536 U.S. at 326 (Rehnquist, C.J., dissenting).

156. See *id.*

157. See Craig M. Burnett & Vladimir Kogan, *When Does Ballot Language Influence Voter Choices? Evidence from a Survey Experiment*, 32 POL. COMM'N 109, 110 (2015) (finding strong evidence that the phrasing of ballot questions can significantly affect voting behavior).

more likely to solicit responses that match their desired outcome.¹⁵⁸ To maximize confidence in the results of these advisory questions, it may be better if legislators delegated the drafting duties elsewhere, perhaps to an independent, bipartisan drafting committee.¹⁵⁹

Beyond these general concerns about the phrasing of ballot questions, other concerns are more specific to the type of advisory questions proposed here. To ensure these ballot questions would be helpful to the Court in answering the moral question the objective indicia approach is meant to address,¹⁶⁰ the ballot questions would have to be worded in a way that specifically focuses on the individual voter's moral attitude toward the death penalty and discourages the voter from indicating support for or opposition to the death penalty based on non-moral reasons.¹⁶¹ Another more practical issue with designing these ballot questions is the logistical problem of ensuring that they give voters the ability to express their views about different applications of the death penalty since individual voters might believe the death penalty is morally acceptable for some crimes or for some classes of people but not for other crimes or classes of people.¹⁶² One option could be to allow voters to write in the crimes for which they believe the death penalty is morally acceptable in some circumstances, but that could

158. Sanford V. Levinson & William D. Blake, *When Americans Think About Constitutional Reform: Some Data and Reflections*, 77 OHIO ST. L.J. 211, 221 (2016).

159. Such a committee could be designed similarly to the redistricting commissions that ten states have adopted and vested with the authority to draw congressional redistricting maps instead of the state legislature. See *Redistricting Commissions: Congressional Plans*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 10, 2021), <https://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx> [<https://perma.cc/2UC8-ZDTN>]. This practice has been held constitutional. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 793 (2015).

160. Recall that the Court has said that determining what the "evolving standards of decency" are "necessarily embodies a moral judgment." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (emphasis added) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)).

161. As has been pointed out, Americans' overall opposition to the death penalty may stem from non-moral reasons even if they may believe the death penalty is morally justified in certain circumstances. See *supra* Section II.B. But only moral opposition should be of concern when it comes to a question of constitutionality. See *supra* note 160 and accompanying text.

162. This is also important because the Court has always addressed particular applications of the death penalty one-by-one, limiting its holdings only to those specific applications before it and avoiding more sweeping pronouncements. See, e.g., *Kennedy*, 554 U.S. 407 (rape of a child); *Coker v. Georgia*, 433 U.S. 584 (1997) (plurality opinion) (rape of an adult woman); *Atkins v. Virginia*, 536 U.S. 304 (2002) (homicide committed by an intellectually disabled individual); *Roper v. Simmons*, 543 U.S. 551 (2005) (homicide committed by a juvenile). One line in *Kennedy*, in which Justice Kennedy stated, "[d]ifficulties in administering the [death] penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim," could be read as a sweeping pronouncement that the death penalty is unconstitutional for all non-homicide crimes against individuals. *Kennedy*, 554 U.S. at 447. This statement, however, seems to be dicta given the Court's historical practice of addressing applications one-by-one and given that the rest of the *Kennedy* opinion frequently reminds the reader that the Court is considering child rape, specifically.

make the tabulation of results lengthier and more complicated. Alternatively, the ballot question could list only those crimes for which the question-designers believe public opinion would be substantially divided. This alternative, however, runs the risk of omitting from the ballot crimes that voters would otherwise want to express an opinion about.

The question-designers would have much to consider about the specifics of how to design the ballot questions, but ultimately the questions must primarily accomplish two things. First, the questions must induce voters to give their view based on whether they feel the death penalty is *morally* justified in any circumstances for a particular crime. Second, the question must allow voters to express an opinion on all crimes for which a substantial portion of the population might believe the death penalty is morally acceptable punishment in at least some cases.

CONCLUSION

Properly or not, the Court has chosen to follow the guidance of majoritarianism for its death penalty jurisprudence. Though one could certainly criticize the Court's decision to follow majoritarianism in this context, that is not the approach this Note has taken. Rather, this Note has accepted the reality that this is the path the Court has forged and instead emphasized all the flaws that cause the Court's objective indicia approach to fall short as a reliable means of determining the national, moral consensus among Americans on particular uses of the death penalty. But it is within the states' power to give both the Court and the American public a better way for these death penalty decisions to be made, one that will give the public far more confidence that the decisions the Court reaches in these cases accurately reflect the true consensus of Americans. By placing advisory questions on the ballot, states can ensure the Court will have the chance to hear what the American people think from their own mouths rather than having to divine this indirectly from unreliable sources of evidence. In the process, states can also reclaim their ability to affect the Court's rulings on the constitutionality of the death penalty even when the Court has previously ruled a particular use unconstitutional.

By implementing advisory ballot questions, the states, the Court, and the American people all stand to gain. The states would have the opportunity to send a message to the Court about the death penalty without having to knowingly pass unconstitutional legislation. The Court would have a more reliable source than those which the Court currently consults from which to determine how Americans feel about the use of the death penalty in particular instances. And most importantly, the American people would have the chance to express their views directly in a way that the Court would

have to take seriously in its death penalty decisions if it wants to credibly be seen as making these decisions through a majoritarian approach.

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