these restrictions ensure that capital punishment in America, now, is constitutional. Specifically, the Court should examine whether widely expressed concern over arbitrary imposition of the death penalty reflects evolving standards of decency it should agree withð that capital punishment violates the cruel and unusual clause of the Eighth Amendment.[4] Now, for now.

Evaluating a punishment under the cruel and unusual clause requires a two-part analysis. First,

statutes,[19] in part, because after invalidating all capital punishment statutes four years prior in *Furman v. Georgia*,[20] at least thirty-five states had passed new statutes for imposing capital punishment.[21] The Court also found persuasive the 254 death sentences juries handed down between *Furman* and the end of 1974, noting that ñ[t]he jury also is a significant and reliable objective index of contemporary values because it is so directly involved.ò[22]

The Court again used objective indicia of evolving standards of decency the following year to determine whether death is a constitutional punishment for the rape of an adult woman, in *Coker v. Georgia*.[23] The evolving standards evidence indicating the punishment was ñcruel and unusualò centered on forty-nine states prohibiting the penalty,[24] and that less than ten percent of convicted rapists in Georgia had been sentenced to deathð indicating it was being arbitrarily imposed.[25] Since *Coker*, the Court has found evolving standards of decency through much less compelling evidence, a trend that began with its decision in *Enmund v. Florida* in 1982.

In *Enmund*, the Court addressed whether capital punishment is constitutional for felony murder when the defendant neither killed, attempted to kill, nor inteW* nQ492.9000008nQ492.9000008nQ492. G[(t)-4(o)106, l

While the *Gregg*, *Coker*, and *Enmund* Courts did not use the term ñnational consensusò in their objective indicia analysis,[31] two cases decided on the same day in 1989, *Penry v. Lynaugh* and *Stanford v. Kentucky*,[32] effectively affirmed the requirement of a majoritarian ñnational consensusò to find a punishment unconstitutional.[33] In *Penry*, the appellant argued that an ñemerging national consensusò against the execution of the ñmentally retarded,ò compelled the Court to find capital punishment for that class of individuals unconstitutional.[34] At the time, only two states specifically prohibited execution of the ñmentally retarded.ò[35] However, because only fourteen states prohibited capital punishment outright,[36] the Court found no national consensus,[37] and declined on that basis to consider whether execution of the ñmentally retardedò was constitutional.[38]

In *Stanford*, the Court considered whether capital punishment was constitutional for individuals who commit their crimes when seventeen years old or younger.[39] It did not include states with outright capital punishment bans in its calculus of a national consensus,[40] limiting its assessment to whether the twelve of thirty-seven states that allowed capital punishment, yet prohibited the execution of individuals who committed their crimes when seventeen years old or younger, constituted a majoritarian consensus.[41] The Court found the objective indicia did ñnot establish the degree of national consensus [the] Court ha[d] previously thought sufficient to label a particular punishment cruel and unusual.ò[42] However, even if the Court had included states with outright capital punishment prohibitions (as urged by the dissent),[43] only a slight majorityð twenty-seven statesð prohibited executing individuals who committed their crimes when seventeen years old or

31. Gregg v. Georgia, 428 U.S. 153 (1976); Coker v. Georgia, 433 U.S. 584 (1977); *Enmund*, 458 U.S. 782.

32. *See* Stanford v. Kentucky, 492 U.S. 361 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989).

33. *See* Penry v. Lynaugh, 492 U.S. 302, 335 (ñ[T]here is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.ò); Stanford v. Kentucky, 492 U.S. 361, 377 (ñHaving failed to establish a [national] consensus . . . [w]e decline . . . to rest constitutional law on such uncertain foundations.ò).

34. *Penry*, 492 U.S. at 333-34.

35. *Id.* at 334.

36. *Id.*

37. *Id.*

38. *See id*. at 335; *Stanford*, 492 U.S. at 368.

39. *Stanford*, 492 U.S. at 368.

40. *Id.* at 370-71.

41. *Id.*

42. *Id.* at 371.

43. *Id.* at 384-85 (Brennan, J., dissenting).

younger.[44] While it can be argued that a majority constitutes consensus, such a finding would have been a significant departure from the Courtôs previous evolving standards jurisprudence.[45]

When the holdings of *Penry* and *Stanford* were later challenged in *Atkins v. Virginia* and *Roper v. Simmons*,[46] respectively, the Court supported departing from the majoritarian approach previously used through a novel interpretation of ñevolving standards.ò

persuasive, because the slower rate of abolition was ñcounterbalanced by the consistent direction of the change.ò[55]

Despite the importance ascribed to these trends in both cases, the Court never affirmatively stated that a national consensus existed. In *Atkins*, the Court only went so far as determining ñit is fair to say that a national consensus has developed.ò[56] In *Roper*, the Court was even more cautious, simply stating that objective indicia provided ñsufficient evidenceò of changes in societal values to warrant exercise of its independent judgment on whether the punishment was unconstitutional.[57]

D. The Role of the Court's Independent Judgment

The Courtôs move away from requiring majoritarian consensus to find a punishment unconstitutional is reflected in the language the Court has used to explain the role of its independent judgment. Over time, the Court has increasingly emphasized its role as ultimate arbiter in cases restricting application of the death penalty, limiting the role of objective indicia in its determination.

In *Coker*, the first case where objective indicia was used to establish that evolving standards of decency restricted application of capital punishment,[58] the Court used the deferential standard that ñjudgment should be informed by objective factors to the *maximum possible extent*.ò[59] In *Enmund*, it stated that objective indicia ñ*weigh heavily* in the balance.ò[60] In *Atkins*, the Court interpreted *Coker* and *Enmund* as requiring a ñ*review* [of] the judgment of legislaturesò before the Courtôs ñown judgment is ôbrought to bear.ôò[61] By the time *Roper* was decided, the Court had abandoned all pretext of deference to objective indicia of a national consensus, stating evidence of evolving standards of decency provided mere ñessential instruction,ò while emphatically reserving ultimate judgment for itself.[62] The language the Court used is telling: ñ*[w]e* then must determine, in the exercise of *our own independent judgment*, whether the death penalty is [unconstitutional] . . . .ò[63]

55. *Roper*, 543 U.S. at 565-66.
56. *Atkins*, 536 U.S. at 316.
57. *Roper*, 543 U.S. at 565-68.
58

juries handed down 120 death sentences.[78] In 2015, the number was down to forty-nine.[79]

Because this significant reduction in death sentences has occurred in lockstep with legislative abolition and governor-imposed moratoria, there are clearly evolving standards of decency regarding the death penalty demonstrated by a consistent direction of change.[80] Yet, while the indicia are certainly persuasive, the Court should determine *why* societal attitudes have changed, to glean ñessential instructionò for rendering its ultimate judgment.[81]

D.

violates the dignity of man.[95] But given that only eighteen states categorically prohibit the death penalty,[96] well short of any number the Court has previously used to establish a ñnational consensus,ò the Court would be wise to limit its inquiry. The focus of the Court should be whether there is a basis to give constitutional weight to the specific concerns driving evolving standards of decency. Specifically, the Court should determine whether the death penalty is unconstitutional, now, due to the arbitrary imposition concerns expressed by state governors imposing moratoria. To do so, the Court should seek guidance from *Furman*, where in overturning all existing death penalty statutes, the five concurring justices expressed concerns over arbitrariness.[97] The Court should then address the holding in *Gregg*, where the Court determined new statutes had resolved the issues raised in *Furman*.[98]

IV. *FURMAN* AND *GREGG* AS GUIDANCE FOR EXERCISING INDEPENDENT JUDGMENT

A. Furman *and* Gregg

Furman and *Gregg* are the only cases to directly address the constitutionality of capital punishment.[99] These cases had radically different outcomes. *Furman* effectively abolished capital punishment in 1972,[100] while *Gregg* reinstated it in 1976.[101] The dramatic difference between the cases lies in *Gregg*ôs judgment that capital punishment regimes can avoid impermissible arbitrariness through carefully crafted statutes. The Court used a narrow concept of arbitrariness, defining it as excessive discretion for juries. Accordingly, it found that statutes providing appropriate guidance and discretion for juries resolved concerns over arbitrariness raised in *Furman*, and were therefore constitutional.[102] Because both cases were plurality decisions,[103] neither controls as precedent the Court must follow. However,

95. *See* Gregg v. Georgia, 428 U.S. 153, 182 (1976) (ñT

the concerns of arbitrariness expressed in *Furman*, and whether they have been resolved by the judgment in *Gregg*, should weigh heavily in the Courtôs independent assessment of whether capital punishment is unconstitutional now.

B. The Arbitrariness Concerns of Furman

Although the concurring justices in *Furman* based their conclusions on differing rationale,[104] all five raised concerns related to arbitrariness in the application of capital punishment.[105] Justice Brennan noted that capital punishment was applied in a ñtrivial number of the cases in which it is legally available.ò[106] Justice Marshall was concerned that ñthe burden of capital punishment falls upon the poor, the ignorant, and the under privileged members of society.ò[107] Justice Douglas felt it was being applied ñsparsely, selectively, and spottily to unpopular groups.ò[108] Justices Stewart and White used the most evocative language to condemn the arbitrary nature of capital punishment at the time. White asserted there was ñno meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not,ò[109] while Stewart went a step further, declaring that limited application of the death penalty made it ñcruel and unusual in the same way that being struck by lightning is cruel and unusual.ò[110]

C. The Court "Solves" Arbitrariness Concerns in Gregg

The plurality in *Gregg* interpreted the concurrences in *Furman* as holding capital punishment unconstitutional when applied in an arbitrary or capricious manner.[111] It then focused on *Furman*ôs concerns over unconstitutional arbitrariness, finding that states can always remedy those concerns through carefully constructed statutes.[112] The Court specifically found that Georgiaôs capital punishment regime properly addressed arbitrariness through a bifurcated trial, where the sentencing jury was given adequate guidance to determine whether the defendant deserved death.[113]

104. *See Furman*, 408 U.S. 238.
105. *See id*.
106. *See Furman*, 408 U.S. at 293 (Brennan, J., concurring).
107. *Id*. at 365-66. (Marshall, J., concurring).
108. *Id*. at 256 (Douglas, J., concurring).
109. *Id*. at 313 (White, J., concurring).
110. *Id*. at 309 (Stewart, J., concurring).
111. *See* Gregg v. Georgia, 428 U.S. 153, 195 (1976).
112. *Id*.
113. *Id.*

The Court conceded, however, that statutes similar to Georgiaôs would not in all circumstances be found constitutional.[114] That assessment has proven prescient. The Court has subsequently imposed numerous additional constitutional protections for capital defendants, to further ensure the death penalty is not imposed in an arbitrary manner. As amended through later jurisprudence, the finding of the Court in *Gregg* can properly be stated as follows:

> States can avoid arbitrary imposition of capital punishment through trials with bifurcated guilt and sentencing phases.[115] To ensure arbitrariness is avoided, the guilt phase jury must be permitted to consider a lesser included offense to a capital crime,[116] the sentencing jury (not a judge)[117] must find sufficiently defined aggravating factors to permit the death penalty,[118] and the defendant must be allowed to present all possible mitigating evidence.[119]

Hereinafter, this amended *Gregg* ñholdingò will be referred to as ñthe rule.ò

D. Challenging Capital Punishment Under Furman and Gregg

Any challenge to the constitutionality of capital punishment, now, should begin with an assessment of whether ñthe ruleò eliminates unconstitutional arbitrariness. If it does not, the Court should then determine whether *any* system for imposing capital punishment can properly address the concerns raised in *Furman*. Of course, because these inquiries would be based on the plurality holdings in *Gregg*, the Court is not actually bound by them. However, given the intense emotional nature of the national debate over the death penalty, the Court should treat *Gregg* as binding precedent, to increase the legitimacy of any finding against capital punishment. As such, the Court should only overturn the holdings if doing so is consistent with accepted principles of *stare decisis.*

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B. Prudential and Pragmatic Considerations

In *Casey*, the Court acknowledged the importance of respect for stare decisis,[126] yet held that ñprudential and pragmatic considerationsò should be

invested in capital prosecutions. These investments are the type of reliance that would add inequity to the cost of repudiation. However, this potential inequity is attenuated by additional factors.

i. Reliance by the State

The process for imposing the death penalty on a defendant is a long and arduous one.[141] It requires significant investment by the state at trial,[142] especially during the penalty phase where they must prove aggravating factors, and rebut the defendantôs mç eƺ µ

3. Whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.

ñThe ruleò is rooted in the well-accepted doctrine that states should be allowed to administer penalties as they see fit, as long as they do not violate the constitution. Additionally, rather than entertaining the notion that capital punishment statutes might be outright unconstitutional, the Court has routinely modified them, implicitly upholding the idea that states can address unconstitutional arbitrariness through carefully constructed capital punishment schemes. The primary holding of *Gregg*

consistency of the direction of changeò in societal attitudes toward the death penalty.

Contemporary objective indicia of ñevolving standards of decencyò are rooted in the fallibility of the criminal justice system, and the burdens capital trials and appeals place on the state and victimsô families. These concerns in no way reflect even a tenuous national consensus that capital punishment is inherently wrong. Perhaps such a consensus is emerging. Perhaps these concerns will lead to significant state level abolition. Perhaps there will soon be objective indicia consistent with *Enmund* and *Coker*, actually compelling a finding that capital punishment should be permanently abolished. That is not for the Court to predict. The Court must assess evolving standards of decency and their constitutional implications, now.

Now, there is a ñnational consensusò based on ñe