Grado en Criminología y Políticas Públicas de Prevención.

Trabajo de Fin de Grado (21113)

Curso 2020-2021

IS NATIONAL CONSENSUS A COURT'S CONSENSUS?

AN EMPIRICAL ANALYSIS OF THE PROPORTIONALITY REVIEW IN THE EIGHTH AMENDMENT JURISPRUDENCE OF THE SUPREME COURT OF THE UNITED STATES.

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Adrián Agenjo Aguado,

A 14 de junio de 2021.

AGRADECIMIENTOS

En primer lugar, me gustaría agradecer a mi tutor, David Felip i Saborit, por haber aceptado supervisar este trabajo, por haberme ayudado a enfocarlo como es debido y por todo el tiempo invertido en brindarme ayuda.

También me gustaría agradecer a todos los profesores que me inspiran, que despiertan mi curiosidad por lo que enseñan y que nutren mi pasión por el conocimiento.

Asimismo, quiero hacer mención de mis amigos que han accedido a revisar desinteresadamente este trabajo.

Quiero agradecer, por último, y por ello más importante, a mis padres, quienes se han deslomado toda su vida para que yo pudiera acceder a la Universidad.

ABSTRACT

The proportionality review, a doctrine developed under the Eighth Amendment to the United States Constitution, has been one of the main grounds used by the Supreme Court of the United States to limit the infliction of the death penalty and life imprisonment without parole. The proportionality analysis is based in an independent judgement and objective test, also known as national consensus review, by which the Court observes whether there is a societal consensus against one punishment in order to invalidate it.

The goal of this research is to analyze, through a systematized and empirical study of the proportionality cases of the Supreme Court of the United States, the main components of the national consensus test, the frequency of its application, its alleged objective nature, and its methodological accuracy, from a social science and criminological point of view.

RESUMEN

El análisis de proporcionalidad, una doctrina desarrollada bajo la Octava Enmienda de la Constitución de los Estados Unidos ha sido uno de los principales supuestos empleados por el Tribunal Supremo de los Estados Unidos para limitar la imposición de la pena de muerte y la cadena perpetua. El análisis de proporcionalidad se basa en un juicio independiente y un test objetivo, también conocido como juicio del consenso nacional, mediante el cual la Corte observa si existe un consenso social en contra de un castigo para poder invalidarlo.

El objetivo de esta investigación es analizar, a través de un estudio sistemático y empírico de los casos de proporcionalidad del Tribunal Supremo de los Estados Unidos, los principales elementos del test del consenso nacional, la frecuencia de su aplicación, su presunta naturaleza objetiva, y su fiabilidad metodológica, desde el punto de vista de las ciencias sociales y la criminología.

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Justices in these Eighth Amendment cases become transformed into social scientists: they must gather, categorize, analyze, and draw conclusions from data, given the limits of their methods[1].

1. INTRODUCTION

It is no secret that the criminal justice system of the United States of America (hereinafter, 'U.S.') is unique or, at least, exceedingly rare. This rareness is not, however, positive. It is not common in western countries (be them from a civil law or common law tradition) to have such a punitive criminal justice system, where juveniles are sometimes tried as adults, where prison and other measures such as solitary confinement are so commonly inflicted, and, especially, where the death penalty[2] and life sentencing without parole are constitutionally protected punishments that can be imposed in an excessive wide range of cases —a range of cases that has been significantly reduced in the last decades.

Interestingly, one of the main grounds that has led to a decreasing imposition of the death penalty and life imprisonment has been proportionality, as a basis used by the United States Supreme Court (hereinafter, 'SCOTUS' or 'the Court') to invalidate the infliction of such punishments in relation to the age of the defendant, their mental characteristics, the nature of the crime involved or the participation of the accused in its commission. This is a major difference of the role of proportionality in the common law jurisdiction of the U.S. in comparison to other continental systems (such as Spain or Germany). In the latter cases, constitutional courts have rarely proscribed certain punishments to certain crimes as disproportionate, but the proportionality test used in each jurisdiction also differs, as they contain dissimilar subprinciples.

Indeed, we can also find some uniqueness in the proportionality review carried out by the SCOTUS. We are generally acquainted with the idea that courts do not usually regard to public opinion in their rulings, especially the higher tribunals. This is precisely the contrary in the case of the national consensus test, one of the constitutionally accepted criteria encompassed by the proportionality review of the SCOTUS. With this test, the Court has analyzed the existence of a *societal consensus* or *public opinion* against the application of certain punishments. This is the object of research of the present study.

[1] Finkel (1995: 613).
[2] In the U.S there has been 1532 executions since 1976, as to March of 2021 (Death Penalty Information Center, 2021).

Thus, this research will focus on the indicators and parameters used to measure the national consensus in the SCOTUS jurisprudence, combining, first, a descriptive approach, that will deal with the current and historical measurement of potentially existing societal consensuses, and, second, a critical approach, that will explore the different methodological critiques to this measurement and the ways to improve it. Therefore, the research will involve three major issues of interest of criminological studies: on the one hand, the assessment of public opinion towards punishment, on the other, the usage of consistent criteria by courts to produce their decisions on criminal or penitentiary matters, and, between both, the utilization of popular opinion indicators by courts in cases related to the criminal justice system.

The paper is structured in the following way: first, a theoretical framework on the principle of proportionality is provided, tackling this principle in broader and continental perspective, followed by an analysis of its application in the SCOTUS jurisprudence. It is there where the different elements of the proportionality review will be considered, particularly, the national consensus test. Second, the methodological scheme of the investigation is presented, being formulated several hypothesis and questions that will allow a systematized analysis of the selected decisions. Third, the results of the analysis will be portrayed in a descriptive manner. Then, I will turn to consider the different methodological critiques that have been presented in relation to the national consensus review, revising the main academic literature and applying it to the descriptive findings. Lastly, the potential limitations and the final conclusions of the study will be addressed.

2. THEORETICAL FRAMEWORK

2.1 The Principle of Proportionality: Foundations and Continental Perspective

2.1.1 The Foundations of Proportionality

The principle of proportionality in criminal law serves as a guiding principle for crime policy-making and, at the same time, as a limitation of the state's *ius puniendi* (De la Mata, 2017). The latter aspect is coherent with the idea that in a democratic system the actions of the State affecting fundamental rights and freedoms (particularly, the exercise of its penal power) must be a useful, indispensable and beneficial resource for the protection of other rights and freedoms (Lascuraín, 2014).

Some authors sustain that the rationale of proportionality can be found in the idea of deterrence, more concretely, in general positive prevention (Mir Puig, 2016: 90)[3]. Other scholars consider that prevention does not explain (only by itself) the constraining power of proportionality and argue that it is additionally destined to reduce state-run punitive violence. An example is Lopera (2006: 45), who refers to proportionality as 'the limit of limits': a principle constituting a limit to the state limitations of rights and freedoms.

Consequently, the principle of proportionality bounds the penal lawmaker at the time to decide whether to criminalize *ex novo* a conduct, assigning to that behavior a punishment in abstract, but also when determining the general or specific applicable aggravating or mitigating circumstances (Lascuraín, 2007: 138).

2.1.2 The Relevance of Proportionality for the Criminal Justice System

Proportionality constitutes a highly relevant principle from a criminal justice system perspective. Firstly, because proportionality is necessary to achieve humanity in punishment. As Husak (2019a: 97) recalls, *'sentencing according to the principle of proportionality is crucial if the state is to treat offenders as they deserve'*. Mínguez (2019), by conducting a historical review on the relationship of the principles of proportionality and humanity, reaches the conclusion that proportionality and humanity are inherently linked, constituting restrictions to utilitarian and retributionist penological theories that would render punishment limitless or inefficient.

Secondly, proportionality is, at the same time, vital as a form of ensuring the legitimacy of the criminal justice system. In this sense, Hart (1968) believed that in order to retain their legitimacy, laws must reflect widely shared public attitudes. Indeed, public opinion research proves that most people believe that criminals should be punished as much as (or no more than) they deserve[4] —this is, that they should be punished in a proportional manner. This explains why the rhetoric of penal populism tries to disguise the necessary appeal to proportionality when legislating (Lacey and Pickard, 2015: 237), favoring the idea of dangerousness over proportionality (Husak, 2019b).

[3] In the common law tradition scholarship, it is sometimes regarded as 'norm-defining and norm-reinforcing effects.'

[4] Some studies would be Robert, Stalans, Indermaur, Hough (2003), Robinson and Darley (2007), Robinson (2017) or Darley (2017).

Lastly, an increasing criminological literature has been produced on the matter of which indicators tribunals use to determine the proportionality of punishments (or *comparative excessiveness*) in specific cases. Despite this not being usual in continental legal systems, where the proportionality test is purely normative, several empirical studies have attempted to systematize the indicators used within the relative proportionality review carried out by the Supreme Courts of California[5], South Carolina[6], Ohio[7], Maryland[8], and Georgia[9], especially with regards to the death penalty.

2.1.3 The Metrics of Proportionality

Certain Anglo-Saxon scholarship has tried to develop stringent rules governing the measurement of proportionality. In this sense, according to Tonry (2019), we can distinguish horizontal and vertical proportionality. Whereas horizontal proportionality requires that equally serious crimes must be punished with equal severity, vertical proportionality requires that offenders must be punished in a more or less severe manner in proportion to the seriousness of the crime committed[10].

Similarly, Duus-Otterström (2019: 31–32) argues that the formal rules that govern the proportionality tenet are ***(i)*** *parity* (equally serious crimes should get equally severe punishments), ***(ii)*** *difference* (unequally serious crimes should get unequally severe punishments), ***(iii)*** *positive slope* (the more serious a crime, the more severe the punishment should be) and ***(iv)*** *spacing* (the difference in severity between punishments should correspond to the difference in seriousness between crimes). This view operates with two cardinal scales: one mapping crimes in terms of its seriousness, the other mapping punishments in terms of its severity.

Some of this doctrine has attempted to develop a 'punishment unit' scheme according to which the severity of every punishment could be measured, allowing for the possibility to sentence offenders using concrete number of units (Morris and Tonry, 1990). Robinson (1987) considered that such a sentencing system would make possible to decide whether two modes of punishment are interchangeable. He admitted, however, that the *'preliminary empirical*

[5] See Baldus, Woodworth and Pulaski (1980).
[6] See Paternoster and Kazyaka (1990).
[7] See Berry (2011).
[8] See Philofsky (2006).
[9] See Baldus, Woodworth and Pulaski (1983).
[10] The author refers here to proportionality according to the blameworthiness, and not the seriousness of the crime.

research on the proper assignment of sanction values to particular sanctioning methods' has so far *'resulted in mere informed speculation'* (Robinson, 1987: 54).

2.1.4 The Continental Proportionality Review

The structural architecture of the principle of proportionality in continental doctrine has a German origin (Aguado, 1999) and establishes that a punishment is proportional if suitable, necessary and proportional in a strict sense. These subprinciples must be following a legal *prius*, which is the achievement of a legitimate purpose. The Spanish Supreme Court has clarified that the state penal response must protect interests that are not socially irrelevant or constitutionally prohibited[11]. The SCOTUS has also recognized that the criminal sanctions imposed *'cannot be so totally without penological justification that it results in the gratuitous infliction of suffering'*[12]. In this regard, the purposes that govern sentencing in the U.S. are retribution, deterrence, rehabilitation, and incapacitation[13], which are also the commonly accepted penological goals that a punishment may have.

As for the elements of the continental proportionality review, a brief description of them is reproduced here.

a) Suitability

Suitability is defined as the aptitude or the adequacy of a measure of control to achieve its purpose[14]. As Lopera Mesa (2006: 388) indicates, a penal intervention will not be suitable if its implementation is indifferent in relation to its goal or hinders the achievement of the purpose. According to Díez Ripollés (2005: 94), different operative indicators such as the experience of similar penal interventions or evaluations concerning the efficacy of the punishment must be taken into account when designing criminal legislation. However, these variables are not commonly considered by lawmakers.

b) Necessity

[11] *"Cabe afirmar la proporcionalidad de una reacción penal cuando la norma persiga la preservación de bienes o intereses que no estén constitucionalmente proscritos ni sean socialmente irrelevantes"* states the STC 13/1999, FJ 23. See also STC 55/1996, FJ 7 or STC 161/1997, FJ 10.

[12] See *Gregg v. Georgia*, 428 U. S. 153, 183 (1976) ('*The sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering'*) (Stewart, Powell, and Stevens).

[13] 18 U.S. Code § 3553.

[14] See, as an example, STC 207/1996.

The necessity test will be fulfilled when there is no other less burdensome and equally effective available mean to achieve the legitimate aim[15]. In the words of Bernal (2007), when two interventions are qualified as having a similar efficacy, the less restrictive one must be always applied. This is intimately related with the principle of *ultima ratio* or minimum intervention, a tenet that is not considered to have constitutional status in the U.S. (Lánger, 2020).

c) Strict proportionality

Strict proportionality (also known in the common law tradition as *balancing*) refers to the subprinciple within (broad) proportionality that must exist between the gravity of the crime and the gravity of the punishment. De la Mata Barranco (2017) highlights that this test is met when the socio-individual costs of the punishment do not overcome the costs of the commission of the crime. Some authors have argued that an overall evaluation which takes into account external costs may diminish the guarantee that constitutes the linkage of the punishment to the crime (Navarro, 2010), while others argue that this relationship is an inherent consequence a of a cost-benefit analysis (Silva, 1996).

2.2 The Principle of Proportionality in the U.S: The Eighth Amendment Jurisprudence and the National Consensus

2.2.1 The SCOTUS Proportionality Doctrine in the Eight Amendment Jurisprudence

The Eight Amendment to the U.S. Constitution reads as following:

'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'

The first attempt of the SCOTUS to define the concept of 'cruel and unusual punishment' in relation with proportionality was in *Weems v. United States*[16]. In that case, the Court qualified for the first time a punishment as disproportional, striking down a sentence in

[15] See STC 136/1999, FJ 23; STC 60/2010, FJ 14; STC 55/1996, FJ 8.

[16] Notwithstanding, it was in in *O'Neil v. Vermont*, 144 U.S. 323, 339–40 (1892), where the idea of proportionality was firstly appealed. In that proceeding, Justice Field submitted a dissenting opinion arguing that the Eighth Amendment also condemned '*all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged'.*

the Philippine Islands[17] of 12 years' incarceration at hard labor with chains on the ankles, loss of all civil rights, and perpetual surveillance, for the offense of falsifying public documents. The Court compared the punishment with those meted out for other offenses[18] and concluded that it was excessive[19]. However, the proportionality doctrine was not considered again until 1958, in *Trop v. Dulles*[20], when the Court held that the punishment of expatriation was too severe for the crime of wartime desertion. In the initial cases involving proportionality, *Weems* and *Trop*, the Court considered that the Eight Amendment meaning could change over time and that its meaning could be extracted through *'the evolving standards of decency that mark the progress of a maturing society'*[21].

From there on, the Court created several precedents that applied two different notions of proportionality (Ristroph, 2005). The Court initially established a series of categorical prohibitions of punishments that were, by their nature, grossly disproportionate to the criminal act committed. This review refers to the doctrine of ***absolute proportionality,*** by which the Court has established restrictions to the death penalty and life sentencing without parole (hereinafter 'LWOP'). This doctrine is also referred to as the ***categorical*** analysis of proportionality (Candia and Schlack, 2011).

Within the doctrine of absolute proportionality, the Court has held that death penalty is an absolutely disproportional punishment for all the cases of rape of an adult[22], rape of a child[23], for mentally retarded individuals[24], for juveniles[25] and for felony murder in those cases where the participant did not kill and did not have the intent to kill[26]. It has also been applied to cases of LWOP for juveniles, in *Graham*[27] and *Miller*[28].

[17] At that time, the Philippines were a U.S. Colony. The Court was applying a statutory bill of rights applying to the Philippines which was interpreted as having the same meaning as the Eight Amendment, but not the Eight Amendment itself.
[18] This reflects the idea of 'intrajurisdictional' proportionality.
[19] *Weems v. United States*, 217 U.S. 249, 377 (1910).
[20] *Trop v. Dulles* 356 U.S. 86, 101 (1958).
[21] Ibid.
[22] *Coker v. Georgia*, 433 U.S 584 (1977).
[23] *Kennedy v. Louisiana*, 544 U.S 407 (2008), specifically prohibited the imposition of the death penalty to child rape that did not result in death and remarked that *Coker* only addressed the cases of adult rape.
[24] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[25] *Roper v. Simmons*, 543 U.S. 551 (2005).
[26] *Enmund v. Florida*, 458 U.S. 782 (1982).
[27] *Graham v. Florida*, 560 U.S. 48 (2010).
[28] *Miller v. Alabama*, 567 U.S. 460 (2012)

Many of these decisions were preceded by others that pointed to the contrary view. For instance, in *Stanford* the Court accepted the imposition of the death penalty to juveniles older than 16[29], which was then overturned in *Roper*. The classification in turn consists, then, of two subsets of cases, one considering the nature of the offense, the other considering the characteristics of the offender.

Later, the Court elaborated a *relative or comparative proportionality* doctrine that comprised those cases in which the punishment was not disproportionate to the crime by its nature, but the infliction of that punishment was *'unacceptable in a particular case because it is disproportionate to the punishment imposed on others convicted of the same crime'*[30]. In this subset of cases, the Court considers all the circumstances of the individual case to determine whether the sentence is constitutionally excessive. This doctrine is also known as *circumstantial* or *case-by-case* approach to proportionality (Candia and Schlack, 2011).

Under this approach, the Court declared unconstitutional a LWOP sentence for the defendant's seventh nonviolent felony: the crime of passing a worthless check[31]. Here we would also find the cases of *Harmelin v. Michigan*[32], *Ewing v. California*[33], *Lockyer v. Andrade*[34], *Rummel v. Estelle*[35] and *Hutto v. Davis*[36]. Regarding these cases, the Court has concluded that the Eighth Amendment contains a *'narrow proportionality principle'* that '*does not require strict proportionality between crime and sentence'* but rather *'forbids only extreme sentences that are grossly disproportionate'* to the crime'[37].

Some have considered that the doctrine of relative proportionality would also include cases such as *Furman v. Georgia*, in which the Court held that the death penalty at that time violated the Eight Amendment, since it was administered in an arbitrary and discriminatory manner, harming the minorities and the poor[38], or *Woodson v. North Carolina*, in which the Court invalidated North Carolina's death penalty scheme, since it imposed the death penalty to

[29] *Stanford v. Kentucky*, 492. U.S. 361 (1989)
[30] *Pulley v. Harris*, 465 U.S. 37, 43 (1984).
[31] *Solem v. Helm*, 463 U.S. 277 (1983).
[32] *Harmelin v. Michigan*, 501 U.S. 957 (1991).
[33] *Ewing v. California*, 538 U.S. 11 (2003).
[34] *Lockyer v. Andrade*, 538 U.S. 63 (2003).
[35] *Rummel v. Estelle*, 445 U.S. 263 (1980).
[36] *Hutto v. Davis*, 454 U.S. 370 (1982).
[37] *Harmelin*, at 1000–1001 (Kennedy).
[38] *Furman v. Georgia*, 408 U.S. 238 (1972).

all murders, without distinction, leaving no discretion to the juries[39]. Notwithstanding, these cases are rather a matter of punishments being arbitrarily imposed than being cruel and unusual (generally or individually) because of its excessiveness (Berry, 2011: 68).

2.2.2 The Elements of the Absolute Proportionality Review

In the cases of absolute proportionality review, the Court uses two standards to conduct the proportionality assessment: an objective and a subjective one. Regarding the first, the Court examines *'objective, majoritarian criteria, looking to the sentencing schemes of state legislatures, jury sentencing decisions, and sometimes to international norms and standards to determine what the 'evolving standards of decency' demonstrate to be proportional'* (Berry, 2011: 67). In other words, *'the Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue'*[40].

On the other hand, the Court applies its own subjective or independent judgment[41] to determine whether the punishment is excessive or not. Namely, the Court decides *'guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose'*[42]. As an example, the Court conducted an independent or subjective assessment in *Roper*, finding that juveniles lack of maturity and sense of responsibility and their character is not as well formed as that of an adult, tending to have more reckless attitudes[43]. Then, based on these findings, the majority proceeded to argue that the two penological justifications for the death penalty (retribution and deterrence) applied with lesser force[44].

2.2.3 The National Consensus

The objective analysis that the Court uses to determine that one punishment is disproportionate is also known as national consensus. The rationale of the national consensus

[39] *Woodson v. North Carolina*, 428 U.S. 280, 291 (1976).
[40] *Graham*, at 61.
[41] The terminology of subjective or independent analysis is the one used by academia. As an example, see (Myers, 2006).
[42] *Kennedy*, at 417.
[43] *Roper*, at 568-570.
[44] *Roper*, at 571-574.

lies on the idea that the Eight Amendment must be read according the *'evolving standards of decency'*[45], an element that is constantly reiterated by the jurisprudence of the Court.

However, the national consensus criteria cannot be merely regarded as 'an additional indicator' since the Court has highlighted its importance in several occasions. Expressly, the Court indicated in *Stanford* that *'although several of the Court's cases have engaged in so-called proportionality analysis —which examines whether there is a disproportion between the punishment imposed and the defendant's blameworthiness, and whether a punishment makes any measurable contribution to acceptable goals of punishment— those decisions have never invalidated a punishment on that basis alone, but have done so only when there was also objective evidence of state laws or jury determinations establishing a societal consensus against the penalty'*[46].

Although the national consensus must not be *'wholly unanimous among state legislatures'*[47], the Court has also made clear that the threshold for finding national consensus is rather exigent, requiring a state's punishment to be a significant outlier from the rest of the nation[48].

The sociological research on this topic has been fundamental to constitutional litigation[49]. Not surprisingly, the assessment and application of this objective indicia has been of an increasing academic interest and object of several critiques both outside (Ely, 1978) and inside the Court[50].

The Court's national consensus assessment has been based on a variety of not undisputed indicators. Mainly, the criteria has been based on[51]:

[45] *Trop*, at 101.
[46] *Stanford*, at 377-380.
[47] *Coker*, at 596.
[48] *Stanford*, at 370-71.
[49] For a brief review of the contribution of social science in criminal and constitutional litigation can be found in Nietzel, Hasemann and McCarthy (1998).
[50] See, as an example, *Atkins*, at 388 (Scalia) ('*Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members'*).
[51] This classification is similar to the one offered by Myers (2006).

i. State enactments, this is, the analysis of the favorable or unfavorable legislation of each U.S. state towards a certain punishment, allowing or prohibiting its application in the challenged cases,

ii. Execution practices, in terms of how many or how frequently sentences are materially executed,

iii. Sentencing practices, namely, the data related to the decisions taken by juries or the general number of sentences imposed for one crime or one class of defendant[52],

iv. A consistent direction of change among state laws, as a separate indicator to the state enactments, which may show that there has been an increasing change in the societal consensus in a relatively short period of time[53],

v. And, lastly, other indicators of public opinion, such as surveys, public opinion polls, referendums or the opinion expressed by relevant institutions or associations.

3. METHODOLOGY

This research strives to analyze how the national consensus criteria has been construed in the jurisprudence of the SCOTUS under the Eight Amendment umbrella. The method adopted to pursue that goal is a systematized analysis of all the cases involving *absolute proportionality review* since the 1976 decision of *Gregg v. Georgia* (including this case), which reinstated the death penalty in the U.S., ending the *de facto* moratorium on the death penalty imposed by the Court in its 1972 decision of *Furman v. Georgia.* The study comprises a number of 13 cases[54], which can be seen in Table 1 of the Annex.

[52] *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), where the Court identified *'data concerning the actions of sentencing juries'* as relevant to the measure of contemporary standards of decency.

[53] *Atkins*, at 315-316.

[54] There are two cases to be explicitly excluded of the analysis. The first is *Panetti v. Quarterman*, 551 U.S. 930 (2007), where the Court ruled that criminal defendants sentenced to death may not be executed if they do not understand the reason for their imminent execution. Here the Court used other reasonings that were far from a traditional absolute proportionality review test. In the second place, *Hall v. Florida*, 572 U.S. 701 (2014), where the Court merely considered what definition of 'intellectual disability' conformed to its categorical prohibition in Atkins. Therefore, the decision in Hall did not create an independent categorical restriction on a certain type of punishment based on the individual characteristics of the defendant or the nature of the offence or the individual characteristics of the offender. Paradoxically, a national consensus review was used as an interpretative tool to assess whether the Florida scheme for identifying mentally retarded defendants in capital punishment cases violated the standards established in *Atkins.* For an in-depth analysis of the case and on its relevance as unprecedented case see Sarma (2014). For a similar reasoning on its exclusion of the group of cases of absolute proportionality see Kukavica (2018).

The analysis will focus on two elements: first, the variety and consistency of the indicators used to determine the existence of a national consensus, and second, the relationship between the national consensus finding and both the subjective judgement and the dissenting opinions, addressing its relevance, frequency of application and alleged objective character.

3.1 The National Consensus Indicators

Firstly, I will draw the attention to the different indicators that are used by the Court to determine the existence of a societal consensus against one punishment, focusing on which indicators have been more frequently used by the jurisprudence and the essential traits of the content of each indicator.

This will be done through a systematic classification of the indicators used in each case. In this part, it will be determined whether each of the following variables **(U)** have been used or not in the particular case (affirmative or negative answer) and what numerical data **(N)** concerning the content of each indicator used was mentioned, as indicated in the following table. The results are portrayed in Table 2 of the Annex.

Indicator	***Usage***	***Numerical data***	
State enactments	$\boldsymbol{U_1}$	$\boldsymbol{N_1}$	Number of states that employed the impugned punishment at that time. The states formulating in $\boldsymbol{N_1}$ are states that authorize or allow the punishment at stake (and not the states against it).
Execution practices	$\boldsymbol{U_2}$	$\boldsymbol{N_2}$	Number of executions of the punishment in a year or during a period of time.
Sentencing practices	$\boldsymbol{U_3}$	$\boldsymbol{N_3}$	Number of juries that applied the impugned punishment and general number of sentences of that punishment.
Consistent direction of change	$\boldsymbol{U_4}$	$\boldsymbol{N_4}$	Number of changes among state laws per year or during a period of time.
Other indicators of public opinion	$\boldsymbol{U_5}$	$\boldsymbol{N_5}$	Surveys, referendum, opinion of non-judicial authorities or other indicators of public opinion that do not fall within the other categories.

Table 1. Classification of indicators. Source: own formulation.

3.2 Hypotheses concerning the Nature of the National Consensus

On the other hand, a separate table will be elaborated in order to verify or dismiss several hypotheses that will serve as indicia so as to reach a conclusion regarding the overall relevance and frequency of application of the national consensus test in the proportionality jurisprudence; and its alleged objective nature, specially considering the relationship between the national consensus, the subjective judgement of the majority and the dissents.

Firstly, two informative questions will be posed to each decision:

$\boldsymbol{I_1}$***:*** *Which punishment does the judgment address?*

This question will be answered with: death penalty (DP), Life sentencing without parole (LWOP) or three strikes law (3SL).

$\boldsymbol{I_2}$***:*** *Does the judgment prohibit the punishment?*

This question will be responded affirmatively or negatively.

Then, several hypotheses will be verified or falsified, presenting a corresponding question to each ruling to observe the general lines of the jurisprudence.

> $\boldsymbol{H_1}$***:*** *The prohibition or absence of prohibition is always based on the finding of a national consensus.*
>
> $\boldsymbol{Q_1}$***:*** *Is the prohibition or absence of prohibition based on the finding of a national consensus in the case?*

This question will be answered affirmatively or negatively and will serve to see the overall relevance of the national consensus as a ground that influences or determines the prohibition of a class of punishment. The answer will be affirmative even in the case that the Court jointly uses the subjective analysis to invalidate the punishment.

> $\boldsymbol{H_2}$***:*** *The national consensus analysis always coincides with the subjective or independent analysis.*
>
> $\boldsymbol{Q_2}$***:*** *Does the national consensus coincide with the subjective or independent analysis in the case?*

In *Coker*, the Court stated that '*these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgments should be informed by objective factors to the maximum possible extent*'[55].

It is clear that the Court has created a trend by which all decisions concerning absolute proportionality must be sustained by external and societal indicators to increase the objectivity of the decision, discarding the possibility of proscribing punishments solely on the basis of a subjective analysis (although the Court may bring its own judgement, considering whether there is reason to agree or disagree with the judgement reached by the citizenry and its legislators)[56].

Therefore, this hypothesis strives to address whether the national consensus is an element that truly transforms the absolute proportionality review to an objective assessment. Despite not being wholly conclusive, if the majority of the subjective judgements of the Court coincide with their national consensus finding, there might be grounds to believe that the Court tries to instrumentalize the national consensus review to make it have the same direction as the independent analysis. The answer of the question will be affirmative or negative.

> $\boldsymbol{H_3}$***:*** *The majority of the Court discounts certain states to measure the national consensus.*
>
> $\boldsymbol{Q_3}$***:*** *Does the majority of the Court discount certain states to measure the national consensus in the case?*

Justice Scalia advocated, in both dissenting and majority opinions, for excluding certain states of the national consensus calculation in the analysis of the state enactments variable. For instance, Scalia has repeatedly ignored counting states that have completely abolished the death penalty when the issue that was brought before the Court was whether there was a national consensus against the infliction of the death penalty to a particular class of defendants or not.

With this hypothesis it will be observed if this technique has been widely or rarely used by the majority of the Court. The question will be responded affirmatively or negatively.

> $\boldsymbol{H_4}$***:*** *The national consensus is considered as reached when the punishment is a formal* ***or*** *a material outlier.*

[55] *Coker*, at 592
[56] *Coker*, at 597.

Q_4: *Is the national consensus considered as reached when the punishment is a formal* ***<u>or</u>*** *a material outlier in the case?*

The Court has also made clear that to find a national consensus against a type of punishment it must be a significant outlier from the rest of the nation[57]. However, the Court has considered the existence of an outlier class of punishment in two cases: when the punishment was not authorized by a wide majority of states (formal outlier) and when a punishment, although being authorized by some states, is rarely applied in terms of sentencing or execution (material outlier).

With this hypothesis it will be assessed whether the Court has considered, as a ground for the creation of a national consensus, primordially, the existence of a material or formal outlier character of a punishment, or both. Therefore, the question will be answered with formal/material/formal and material, in those cases that the Court has found that a national consensus exists, taking into account on which aspect the Court put an ***emphasis*** on to sustain a concurring societal agreement: the absence of legislative authorizations of a punishment, its rare application, or both.

H_5: *The dissenting opinion always agrees with the national consensus finding or calculation of the majority.*

Q_5: *Does the dissenting opinion agree with the national consensus finding or calculation of the majority in the case?*

In the intent to make the proportionality analysis objective, one could think, precisely, that the objective indicia may be considered unanimously, in the same sense, by all the members of the bench. This has not always been the case. While the dissenting opinions regarding the Eighth Amendment may be formulated by various reasons, the national consensus has also been an object of dispute. This question will be responded as negative for each judgment in case that:

1) There is at least one dissenting opinion,
2) That contradicts the existence or inexistence of a national consensus by the majority of the Court. This is, if the Court considers that there is a national consensus, the dissenting opinion should consider that there is none, and *vice versa*.

On the contrary, it will be marked as affirmative if the dissenting opinions do not expressly dispute the direction of the national consensus judgement (including as an affirmative

[57] *Stanford*, at 370-71.

answer cases of acquiescence or silence by the dissenting opinions on this issue). With this hypothesis, it will be determined to which extent the national consensus measurement is a consensus within the justices of the Court.

> $\boldsymbol{H_6}$***:*** *The dissenting opinion always agrees with the relevance or applicability of the national consensus test attributed by the majority.*
>
> $\boldsymbol{Q_6}$***:*** *Does the dissenting opinion agree with the relevance or applicability of national consensus test attributed by the majority in the case?*

Not in every single case have the dissenting opinions contradicted the existence or inexistence of the national consensus found by the Court. As an example, in *Coker,* Justice Powell stated *'The plurality* ***properly*** *examines these indicia, which do support the conclusion that society finds the death penalty unacceptable for the crime of rape in the absence of excessive brutality or severe injury. But it has not been shown that society finds the penalty disproportionate for all rapes*'[58]. Notwithstanding, some dissents have challenged the national consensus test on other grounds, mainly, on whether it should be applied to the case or taken into account as a relevant criterion. This hypothesis will be marked as negative for each judgement in which:

1) There is at least one dissenting opinion,
2) That has considered that the national consensus may not be relevant or may not be applied to the case, in the case the majority ruled that the national consensus indicia was relevant and applicable. In the case the majority considered that the national consensus was not be relevant or applicable, it will be marked as a negative answer if the dissenting opinion affirmed the application or relevance of the national consensus.

As the prior hypothesis, it will be marked positively in case the dissenting opinion does not challenge the majority's decision on these grounds.

The results are portrayed in Table 3 of the Annex.

4. DESCRIPTIVE ANALYSIS OF THE RESULTS

The systematized results of applying the methodology to the cases can be observed in Table 2 and Table 3 of the Annex. A detailed descriptive explanation of them is offered in this subsection.

[58] *Coker,* at 604.

4.1 The National Consensus Indicators

In respect of the results of the analysis of the indicators employed to address an alleged existence of a national consensus, the most used indicators are state enactments (being used in all the cases), followed by sentencing practices of a diverse kind (used in 75% of the cases) and execution practices (used in 50% of the cases). Other indicators of public opinions are rarely used (in 25% of the cases), as well the consistent direction of change criteria (only in 2 cases, constituting 17% of them).

	State Enactments	***Execution Practices***	***Sentencing Practices***	***Direction of Change***	***Indicators of Public opinion***
Number of cases	12	6	9	2	3
% of the total cases	100%	50%	75%	17%	25%

Table 2. Results of the utilization frequency of each indication. Percentage calculated over the 12 cases that used the national consensus test, ***excluding Miller****. Source: own formulation.*

As for state enactments in cases in which a national consensus was found, it can be observed that there has been a progressive relaxation of the threshold of states needed for a national consensus to exist, to the extent that in *Graham* the majority of states (76%) permitted the challenged punishment.

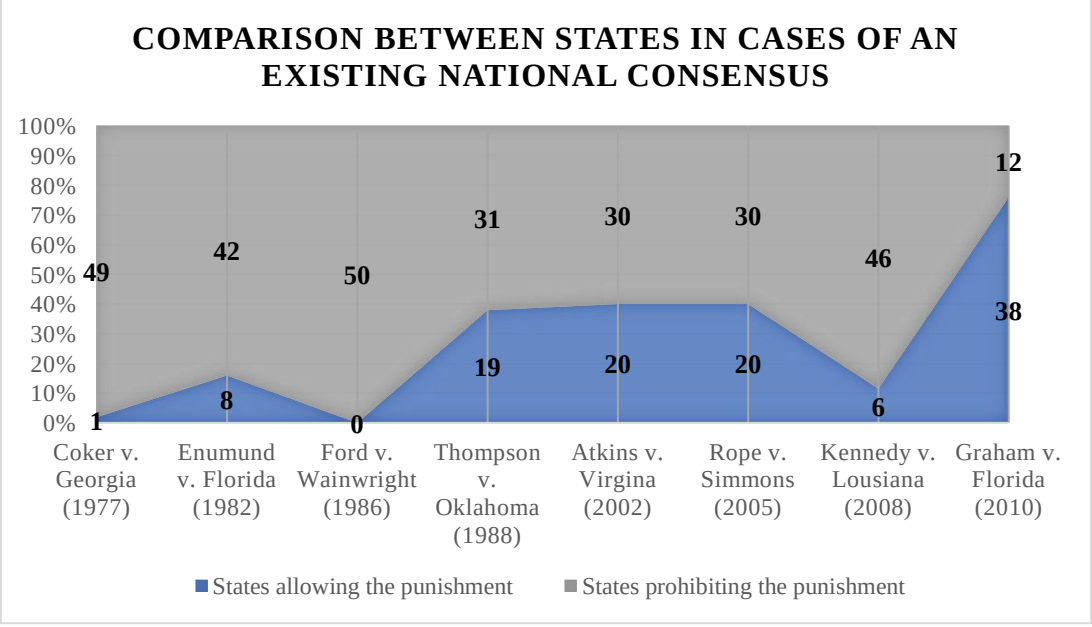

Chart 1. States allowing and prohibiting a punishment in cases in which the Court found a national consensus against that punishment. Source: own formulation.

As for the cases in which the Court decided that there was no national consensus in place, the states that authorized the penalty were always the majority or at least the 50%, as in *Stanford*[59].

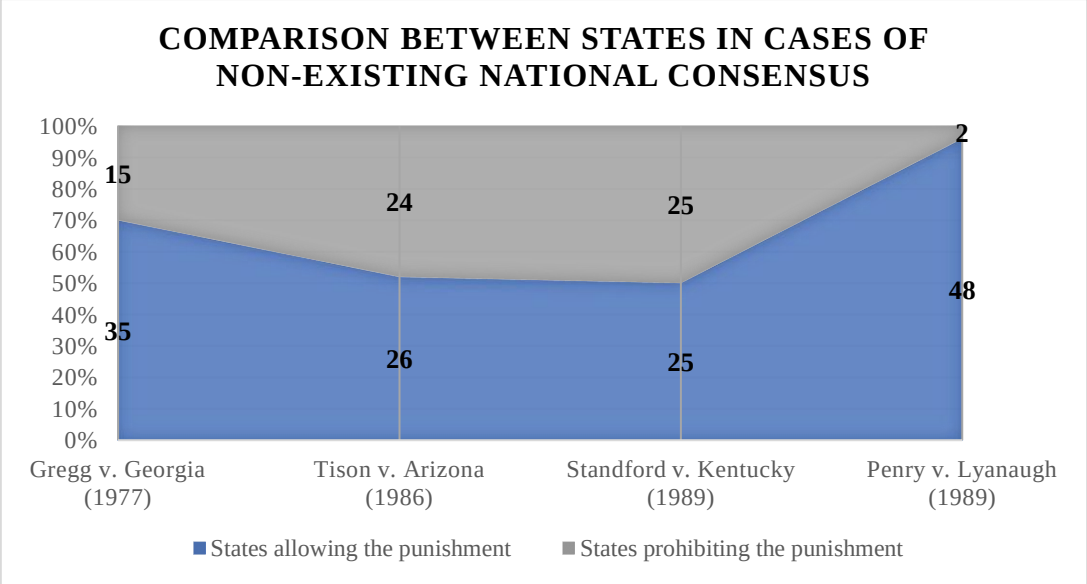

Chart 2. States allowing and prohibiting a punishment in cases in which the Court did not find a national consensus against that punishment. Source: own formulation.

Relating to data concerning execution practices, the Court has considered ***(i)*** the number of executions given a certain period in 5 cases and ***(ii)*** the flat numbers of states that materially execute the sentences in 2 cases. In *Atkins*, the Court considered both variables.

In regards to sentencing practices, ***(i)*** relative or absolute numbers of sentences imposed in a period of time and/or in a group of states were used in 8 cases, ***(ii)*** relative data of sentencing juries was used once, and ***(iii)*** a number of cases ruled by other Courts was also quoted once. The only case that combined two indicators was *Coker*, appearing data concerning the ***(i)*** and the ***(ii)*** elements.

Concerning the consistent direction of change variable, it was used twice, addressing the flipping position of 18 states (in 14 years) in *Atkins* and 5 states (in 15 years) in *Roper*. Both cases involved the overturning of a precedent.

Lastly, other indicators of public opinion have been used 3 times. In *Gregg*, the Court quoted state referendums and opinion polls and, in *Thompson*, the opinion of recognized

[59] This taking into account the 25 states that allowed the execution of juveniles of 17 years old. The states that allowed the execution of juveniles of 16 years old were 22.

institutions such as the American Bar Association and the American Law Institute. In *Atkins*, both variables were mentioned.

4.2 Hypotheses concerning the Nature of the National Consensus

As for the informative questions, the cases majorly involved the consideration of the death penalty, but the two latest cases involved LWOP. None involved three strikes laws.

	Death Penalty cases	**LWOP**
Total of cases	11	2
Prohibitions	7	2
Prohibitions based on a national consensus	7	1

Table 3. Punishments considered in the analysis and its respective prohibition rate. Source: own formulation.

Considering the different hypothesis and questions of binary affirmative/negative answer, $\boldsymbol{Q_1}$, $\boldsymbol{Q_2}$ and $\boldsymbol{Q_6}$ were answered positively in most cases, contrarily to $\boldsymbol{Q_3}$ and $\boldsymbol{Q_5}$.

CASE	$\boldsymbol{Q_1}$	$\boldsymbol{Q_2}$	$\boldsymbol{Q_3}$	$\boldsymbol{Q_5}$	$\boldsymbol{Q_6}$
Affirmative answers	12	12	2	2	11
% of the total cases	92%	92%	15%	15%	85%

Table 4. Number of binary questions affirmatively answered in absolute and relative terms. Source: own formulation.

Concerning the first hypothesis ($\boldsymbol{H_1}$***:*** *The prohibition or absence of prohibition is always based on the finding of a national consensus*), the constitutional proscription or permission of the punishment always coincides with the national consensus analysis, except in the last case, *Miller*, in which the Court departed from the previous precedents and did not examine any societal consensus. The results are similar for the second hypothesis ($\boldsymbol{H_2}$***:*** *The national consensus analysis always coincides with the subjective or independent analysis*), being found that the direction of the subjective judgement is always the same as the national consensus assessment. The exception is, again, *Miller*, in which no coincidence can be found since there was no national consensus review carried out.

As for the discounting states technique (***H_3:*** *The majority of the Court discounts certain states to measure the national consensus*), it has only been used in two occasions: *Tison* (1987) and *Stanford* (1989), the first opinion being written by Justice O'Connor and the second by Justice Scalia.

Concerning the hypotheses that involved dissenting opinions, the dissents agreed with the national consensus finding of the majority in 2 cases (***H_5:*** *The dissenting opinion always agrees with the national consensus finding or calculation of the majority*). It happened in *Ford* and *Penry*, precedents with an overwhelming support in favor of an existence (50 states against the punishment in *Ford*) or non-existence (48 states in favor of the punishment in Penry) of a national consensus.

On the other hand, the dissenting opinion agreed with the relevance or applicability (***H_6:*** *The dissenting opinion always agrees with the relevance or applicability of the national consensus test attributed by the majority*) of the national consensus criteria in 11 cases, excluding *Gregg*, the first case of the examination, and *Miller*, the last case.

As for the consideration of formal or material character of the outsider that may constitute the punishment when there is a societal consensus against it (***H_4:*** *The national consensus is considered as reached when the punishment is a formal* ***or*** *a material outlier*), in 2 cases it was emphasized that the punishment was a formal outlier, in 5 that it was a material outlier, and once that it was both.

5. CRITICAL ANALYSYS

In this part, the main methodological critiques to national consensus are presented, in combination with the results of the descriptive analysis.

5.1 Is National Consensus an Objective Parameter?

a) The National Consensus and the Subjective Judgements

In his *Atkins* dissenting opinion, Chief Justice Rehnquist criticized the national consensus review of the majority, arguing that it was *'a post hoc rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency'*[60]. This is one of the numerous examples that illustrate one of the main concerns of judges and scholars concerning the doctrine of national consensus: is

[60] *Atkins*, at 322 (Rehnquist).

the national consensus a real objective factor? Or is it simply a technique used to disguise the subjective analysis and make it have an objective appearance?

The comments of the Supreme Court do not help to explain the relationship that exists between the subjective analysis and the national consensus (the known as objective analysis), *i.e* whether one overrides the other if different, and why, or whether they are weighted equally in a balanced analysis.

In *Coker* and *Thompson,* the delivered opinion started with the independent judgment, and then turned to confirm its decision observing the objective indicia[61]. In *Atkins*, the Court determined that the goal of the subjective judgment was to determine *'whether there is reason to disagree with the judgment reached by the citizenry and its legislators'*[62]. In *Kennedy* and *Graham*, on the other side, the Court began with an assessment of the objective indicia, which was followed by the independent judgment[63]. In *Kennedy*, the Court specifically stated that the challenged punishment violated the Eight Amendment *'based both on consensus and our own independent judgment'*[64]. Finally, *Stanford*, the Court indicated that:

> *'While the dissent is correct that several of our cases have engaged in so-called "proportionality" analysis, examining whether "there is a disproportion 'between the punishment imposed and the defendant's blameworthiness,"' and whether a punishment makes any "measurable contribution to acceptable goals of punishment,", we have never invalidated a punishment on this basis alone. All of our cases condemning a punishment under this mode of analysis also found that the objective indicators of state laws or jury determinations evidenced a societal consensus against that penalty'*[65].

As mentioned in the descriptive analysis, the subjective analysis and the objective indicia of social standards converged in the opinion of the majority of all the cases. In fact, we can also see this coincidence in the dissenting opinions. Apparently, each Justice's personal

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[61] See *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988) (stating that the objective *'indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty');* Coker, at 597 (*'Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate punishment for the crime of raping an adult woman.').*

[62] *Atkins*, at 313.

[63] *Graham*, at 62; Kennedy, at 421.

[64] *Kennedy*, at 421.

[65] *Stanford*, at 379.

judgment has accorded with the Justice's understanding of the society's judgment[66]. Indeed, the only exception is *Miller:* the subjective analysis of the Court did not coincide with the objective indicia because the Court did not argue on the latter aspect, it simply ruled the case on its independent judgement. Still, in the dissenting opinion there was a coincidence between both stages of analysis.

Therefore, it cannot be extracted from the jurisprudence of the Court a conclusion on whether there is ***(i)*** a relationship of hierarchical supremacy or equality between the objective and the independent judgments and, consequently, ***(ii)*** what would happened if the objective indicia analysis diverges from the subjective judgment.

In terms of the relationship between the opinion of the majority and the dissents on the national consensus, a coincident view was only found in the two cases in which there was an insurmountable evidence in favor or against the national consensus of the case (*Ford* and *Penry*). This shows that the national consensus review is often applied in different manners in each case, an additional evidence that points out that the objective judgements may be influenced by the subjective vision of the judge.

b) Is the Usage of National Consensus by itself a Consensus?

National consensus appears to be a true interpretative requirement in the view of the Court. In our analysis, it has only been challenged in two cases: by a dissenting opinion, in *Gregg*, and in the latest case, *Miller*. In the rest of the cases (11), the majority and the dissents of the Court have always agreed in using the national consensus test to see if the punishment fitted within the Eight Amendment framework. Possibly, this did not happen in *Gregg* because it was the first modern case that considered proportionality and yet no precedent was settled.

Therefore, the national consensus constitutes a consolidated formal precedent in the Eighth Amendment proportionality jurisprudence. However, the fact that there is a Court's consensus on that the national consensus examination must be used, is not incompatible with the fact that there is no consensus on ***how*** this test must be used. In reality, there is a national consensus test that discounts states, and another one that disregards state enactments and overweighs the criteria of sentencing practices; one test that finds an existing consensus with a certain range of data, and another test that, with similar numbers, finds that there is not consensus at all.

[66] This same conclusion was also reached by Farrell (1978).

Precisely, from this perspective, it would seem surprising that the Court eradicated the national consensus review in its more recent case on the issue of proportionality (*Miller*). This move from the Court is, however, not stunning at all when one sees the progressive relaxation of the substantial threshold previously required to find a societal consensus against one penalty. Thus, we can conclude that there is a consensus on the 'title', that is irrelevant to the 'content'[67].

5.2 The Importance of State Legislation

a) Accuracy of State Legislature

State legislation appears, *prima facie*, as the most relevant indicator in the national consensus doctrine of the Court, as it has been employed in every single case involving the absolute proportionality review. Notwithstanding, the heavy reliance of the Court in state enactments is problematic, since there is no scholarship that demonstrates that state legislative action is a pure reflection of social preferences or values.

In this regard, research shows that there are many factors that influence legislative decision-making beyond public opinion, such as political party affiliation, ideological disposition, legislative committee membership, collegial interaction, personal experience, interest groups, staff, and previous decisions by the legislators (Gillers, 1980). On the other hand, scholar research has proven that elected officials tend to be more punitive and less interested in reform in comparison to the general public (Gottfredson, Taylor, 1984; Riley, Rose, 1980). Especifically, several studies show that lawmakers also have a tendency to overestimate public support for the death penalty (McGarrell, Sandys, 1996; Whitehead, Blankeship, Wright, 1999). Additionally, Finkel (1995) notes that a relevant influence on state legislative behavior is their interpretation of the Court's thinking. In other words, the Court takes into account the behavior of legislators who are, at the same time, taking into account the behavior of the Court. This issue was specifically addressed by Chief Justice Burger in *Coker*, were he offered a similar objection to using state legislative action in that case, asserting that states did a forecast of the future holdings of the Court which perturbed the representative character of state enactments[68].

b) The Legitimacy of Discounting States

[67] As a professor of mine, Mariona Llobet, would usually say: *'más allá de este punto de encuentro, todo son desencuentros'.*
[68] *Coker*, at 614 (Burger).

According to Scalia, the national consensus review must be conducted in states for which the issue exists[69]. *Scilicet*, states without the death penalty should not have a say when the application of the death penalty to a class of defendant is being challenged. As he explained in *Simmons*, *'consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under eighteen is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of course they don't like it, but that sheds no light whatever on the point at issue'*[70].

This is how in his *Atkins* dissent, Scalia determined that 47% of the states have banned the execution of the mentally retarded[71]. In *Simmons* he also concluded that only 47% states were against the executions of juveniles[72] and proclaimed that '*words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus'*[73].

This technique finds no support as a consistent precedent, as it has only been used two times by the majority, and in terms of reasoning. On the second aspect, there is no meaningful foundation for Scalia's proposition: it cannot be found in any constitutional text and it excludes states that also have their right to weigh on the state legislative action test when they elect their penalties other than death (Niven, Zilber and Miller, 2006).

In fact, if we were to agree with the idea that only states that 'have an interest' in the issue at stake should be considered, we would have to specifically limit the test to those states that have explicitly considered whether to ban the imposition of a punishment, and have chosen to do so or not. Using this logical reduction, Brennan determined that only 9% of the states are left endorsing the execution of sixteen-year-old juveniles in *Stanford*[74], since the other states did not directly address the issue in their legislative or policy debates.

c) The Case for Overturning Precedents: The Issue of the Consistent Direction of Change

In *Atkins* and *Rope* the Court overturned precedents from the 1980s when it concluded that a new national consensus had emerged regarding the breadth with which the public believed death sentences should be imposed, and it did so by arguing that there was a new element to consider in the balancing of objective indicia: a consistent direction of legislative change in a

[69] *Thompson*, at 868 (Scalia).
[70] *Roper*, at 611 (Scalia).
[71] *Atkins*, at 342 (Scalia).
[72] *Roper*, at 609 (Scalia)
[73] Ibid.
[74] *Stanford*, at 384 (Brennan).

few states. Relying on the *'the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime'*[75], the Court decided that a growing trend of states that cut in the same direction *'might counterbalance an otherwise weak a demonstration of consensus'*[76].

This new element added a new layer of vagueness in applying the objective indicia analysis and leads to think that it is not the total number of states for or against a punishment what only matters (Farrell, 2013: 814).

d) The Necessary Threshold of States to Find a National Consensus

As it can be observed in Chart 1 *(supra 4.1)*, there has been a progressive relaxation of the threshold of contrary states to one punishment needed to find a national consensus against that punishment. In *Thompson*, 19 states were in favor of the challenged penalty, while in Rope and *Atkins* there were 20, and in *Graham* 38. The Court emphasized in all those cases that the national consensus was rather material than formal, being found an unusual imposition of the disputed punishment.

As it happens with the national consensus, the state legislative action examination is always used but there is no consistency in its material application. It seems that is rather a primary formal test that can be easily declined by the data related to sentencing and execution practices. With the current jurisprudence, one could easily imagine a case in which no state prohibits an specific punishment; but that punishment is so rarely inflicted that the Court could decide that there is a societal agreement against that penalty despite its widespread legislative availability (as it similarly happened in *Graham*).

In sum, the variety of issues presented point out that the use of state legislation, as Jacobi (2008: 1149) claims it, *'is so methodologically indeterminate as to be entirely subjective'.*

5.3 Sentencing and Executing: Application and Methodological Limits

a) Applied Accuracy of Data of Sentencing and Execution Practices

As mentioned, the low number of sentences or executions of one punishment has been used by the Court to find a national consensus against that class of penalty, and this, at the same time, has been criticized by numerous dissents and expressly rejected by the majority in other occasions. Justice Scalia stated in *Thompson* that the fact that the capital punishments imposed

[75] *Atkins*, at 315-316.
[76] Ibid.

to juveniles under sixteen-years-old is rare cannot lead to the finding of a national consensus, because this rarity can be explained by the mandated application of mitigating factors by juries to minors, the exercise of executive clemency and by the inherent small population of minors committing capital crimes. More generally, Scalia has reasoned that the low number of sentences or executions can be also explained because certain classes of defendants constitute a tiny fraction of society[77]. These rationales were later upheld as an argument by the majority in *Stanford.*

The main issue here is whether the data used, as it has been applied, can be considered as accurate as to find a national consensus at all. In this sense, the Court has used different stages of data:

i. Firstly, the Court has employed (mostly) absolute data, stating how many criminals of one class (with certain individual characteristics, having committed one specific crime or with a certain grade of crime participation) were sentenced or executed in a certain period of time in *Gregg, Kennedy, Graham* or *Thompson.*

ii. Secondly, the Court has used this data and has compared it with the total number of sentences or executions of the death penalty (even mentioning the % value represented by these), in *Stanford, Enmund* or *Roper*.

iii. Third, the Court has presented data of the activities of juries, constructed in relative terms, in *Coker*, where the Court stated that 1 of 6 rapists were convicted with death penalty by sentencing jurors in Georgia, and 1 of 10 in other jurisdictions.

iv. Lastly, the Court quoted cases of other Courts to support its objective analysis in *Tison*.

The problematic matter is that none of these numbers help to reach a conclusion as to whether there is a societal consensus against a penalty, except the third type of data. Not strictly because of the argumentation raised by the conservative wing of the Court (namely, that there are few defendants sentenced to the death penalty or executed because they represent a small part of the population), but, certainly, because of the underlying methodological critique that inspired this argument.

Indicating that there are certain absolute numbers concerning one class of sentences tells us nothing about the question at bar: whether these sentences and executions are unusual as to express a societal consensus against a punishment. The same happens when this absolute data

[77] *Atkins*, at 364-370 (Scalia).

is compared, and transformed into relative data, with denominators that are not appropriate (Finkel, 1993). To know that of the 3599 death sentences imposed between 1990 and 2003, only 123 were imposed on juveniles, which constitutes 3.4% of the total number of death penalty sentences (see *Roper*), reflect nothing about the existence of a national consensus. There would be a rejection of jurors to the death penalty for juveniles, in this case, if there were 123 cases brought to trial in which a minor faced a capital sentence, from 1990 to 2003? Not at all: in fact, the conclusion would be that society very much accepts the infliction of death penalty to minors. Contrarily, what if the total cases brought to trial were 123.000? The minors convicted with the death penalty would be then just the 1% of those prosecuted in court and we could affirm that there are grounds to believe that jurors generally reject the imposition of that punishment.

In this sense, the only data that is statistically legitimated to draw conclusions of this kind, about the substantial disparity between the authorization of penalties of states and the application of those penalties, is the one used by the Court in *Coker*, where the Court directly used relative data of the activities of juries (the third class of the aforementioned data). With those statistics, it can be easily observed how many of the cases brought to trial ended with the challenged punishment: we know that of every 6 rapists tried in Georgia, one was convicted, and of every 10 tried in other jurisdictions, one was convicted. *Id est*, the jurors generally rejected the application of death penalty to rapists.

Thus, although the data concerning sentencing and executions appear to have some kind of supremacy over state legislation, this data is often presented in a manner that is not appropriate, from a socioscientific point of view, to have a say on the existence of an alleged societal consensus.

b) Inherent Problems of relating to Sentencing and Execution Practices

Despite the flawed specific application by the Court of the information concerning sentencing and execution activities, these sources of information of the community sentiment are additionally not inherently unproblematic.

Briefly, sentencing jurors present two major biases that prevent them from being representative samples of the entire American population. Firstly, scholarly research proves that jury pools tend to underrepresent certain social strata, specially marginalized minorities and citizens with a low socio-economic status (Forde-Mazrui, 1999; King, 1993), demographic groups that tend to show a lower support to the death penalty (Barkan and Cohn, 1994).

The second major problem is the *death-qualification bias:* a death-qualified jury is one in which the capital punishment is a prospective sentence, and such a jury will be mandatorily composed of jurors who are not categorically opposed to the imposition of the death penalty. In other words, all the potential jurors that are generally against death penalty in all cases are excused. This procedure has been upheld by the Supreme Court[78]. Some commentators have criticized that the death-qualification exclusion has a similar effect as intentionally excluding jurors based on race or gender (Salgado, 2005), a procedural strategy that is constitutionally prohibited[79].

5.4 The Issue of Public Opinion Polls

The question about whether the Court should use social science evidence concerning public opinion has been one of the most controversial matters. It was Justice Brennan, in his concurring opinion in *Furman*, the first judge that used data of this kind, arguing that society had already rejected death penalty, citing polls and referenda as evidence[80]. However, he was not the only one that recurred to public opinion polls. The dissenting justices noted that *'polls [...] have shown nothing approximating the universal condemnation of capital punishment*'[81]. In fact, Justice Powell, in his separate dissent, joined by Justice Rehnquist, sustained that the opinion on capital punishment is fairly divided and that state referenda on the death penalty has not consistently rejected its practice[82].

Although *Furman* was excluded of our analysis, it settled a precedent: as some scholars expected (White, 1975), social evidence of this kind was again used in *Gregg*, where the Court reinstated the death penalty and the plurality opinion employed results of public opinion polls and state referendums, such as one celebrated in California, to conclude that the American society still considered the death penalty as a necessary criminal sanction[83].

This trend, however, ended in *Coker,* when Justice White limited the objective factors that could inform of a societal consensus to state legislative action and sentencing juries' decisions[84], despite the references in *Gregg* to more direct measures of public sentiment. This is how the Court unexpectedly departed from consulting social science to measure national

[78] In *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *Lockhart v. McCree*, 476 U.S. 162 (1986).
[79] *Batson v. Kentucky*, 476 U.S. 79 (1986), ruling that that this practice violated the Equal Protection Clause of the Fourteenth Amendment.
[80] *Furman,* at 299-300 (Brennan)
[81] *Furman,* at 386 (Burger).
[82] *Furman,* at 441 n.36 (Powell).
[83] *Gregg*, at 153, 171, 179.
[84] *Coker*, at 595-96.

consensus. Since then, socioscientific evidence has not had any major influence in proportionality cases. Indeed, it was only timidly quoted again in *Atkins*, where a single footnote in the decision noted that *'polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong'*[85], referring to the results of 27 independent surveys showing overwhelming public opposition to imposing the death penalty on mentally retarded individuals.

The members of the Court (especially, the conservative wing of the bench) have not only ignored (in the best case) this kind of data but have been hostile towards it in numerous occasions. In *Stanford*, the majority stated that the Court cannot rely on *'socioscientific, ethicoscientific, or even purely scientific evidence'*[86]. In *Atkins*, Rehnquist's dissent undermined the validity of those polls stating that *'An extensive body of social science literature describes how methodological and other errors can affect the reliability and validity of estimates about the opinions and attitude of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the result'*[87] and specifically quoted two books in support of his arguments: Survey Errors and Surveys Costs (Groves, 1989) and Surveying Subjective Phenomena (Tuner and Martin, 1984).

The Court could have easily opted, instead, to reach the same conclusion in some of its cases, considering the whole breadth of available evidence, or focusing on the best and most representative measures available (Finkel, 1995), as it has done similarly with socioscientific research that provided data concerning numbers of sentences and executions in *Enmund*[88] or *Graham*[89]. The usage of social science research that measures public sentiments would be also consistent with the utilization of general social science research evidence by the Court. A study made by Aker (1993), shows that in the 28 cases related to the death penalty between 1986 and 1989, the justices of the Supreme Court cited social research evidence in 10 of them (35.7%). Between 1963 and 1985, 22 of the 48 (45.8%) death penalty cases incorporated social science research evidence (Acker, 1990).

[85] *Atkins,* at 317 n.21.
[86] *Stanford,* at 378.
[87] *Atkins,* at 326-327 (Rehnquist).
[88] *Enmund,* at 795, quoting Kalven and Zeisel (1966).
[89] *Graham,* at 62-63, quoting Annino, Rasmussen and Rice (1994).

Not surprisingly, several social scientists[90] have lamented the Courts unwillingness to consider and apply relevant public opinion polls and other social evidence in death penalty cases since *Coker*. Indeed, the other indicators are far from being flawless, and present at least as many issues (from a methodological point of view) as public opinion polls.

6. LIMITATIONS AND FUTURE RESEARCH

This research may face different methodological limitations. The first one is the number of sentences analyzed (13). This number is narrow in comparison to other jurisprudential studies. Therefore, some of the results could be seen rather as indicators of consolidated trends (and, maybe, some trends *in statu nascendi*) rather than categorical statements. Notwithstanding, the reduced number of judgments considered is justified by the jurisdiction and the matter selected. Moreover, the hypotheses posed were rather general and transversal to every judgement, so the results obtained were based on the whole universe of the sentences selected. Furthermore, some of the hypothesis formulated were to be interpreted jointly, which offered a greatest basis to reach the final conclusions (*i.e* that the national consensus is rather subjective or that it is strongly inaccurate).

A related matter is the time spacing between the different judgements. Certain judgements were temporarily separated by a period of 10 years, and others were issued in the same year. This has an incidence in terms of changes of members of Court and the existing prevailing majority (conservative or liberal) over time, although some authors argue that the idiosyncrasy of the Supreme Court may vary even with no modification in its composition (Mishler and Sheehan, 1993). Despite this, analyzing long term trends is essential in a jurisdiction where precedents have an almost binding force.

Another potential limitation is the simplification of the pronouncements of the Court. In certain cases, procedural rules or legal reasonings non-related to the core doctrine of absolute proportionality were excluded from the analysis, although they may have had an impact on the final decision of the Court. In this line, the analysis did not intend to enter in every single theoretical argument presented in favor or against the national consensus test and all of its elements, but rather addressed the major methodological issues as a criminological study.

This research is the first systematized study on the national consensus element of the absolute proportionality doctrine. None of the related scholarship observed by the author provide quantified results, or even formulates hypotheses, on this matter. Most articles are

[90] Mainly Acker (1991) or Haney and Deana (1994).

limited to consider individual decisions or a group of cases and often offer a legal analysis. The originality of this work lies there: offering a criminological (or social science based) approach to the entire jurisprudence of an extremely specific test that was never addressed with this perspective before. The methodology was, however, appropriately nourished by social science studies made on Supreme Court's decisions (at a national or federal level, in the U.S)[91] and attitudinal models of judicial behavior[92].

7. CONCLUSIONS

This study presents three main findings: the Court's consensuses on the national consensus, that the national consensus is mainly a subjective standard and that it is highly inaccurate.

First, there are three judicial agreements around the national consensuses: ***(i)*** that it should be used in cases of absolute proportionality, ***(ii)*** that it is necessary to find a national consensus against a punishment to categorically prohibit it and ***(iii)*** that state legislative action, sentencing and execution activities are the main sources to measure societal sentiments. However, these consensuses refer to 'labels' but not to 'content': this is, it is necessary to use the national consensus review, state legislation, sentencing and execution practices, but there is no consensus on which is the threshold of the national consensus, which states qualify for the state legislative action test or how sentencing and execution data should be applied.

Second, it seems that the national consensus is not an authentical objective test. On the one hand, because of the full convergence of the national consensus test and the independent or subjective judgement in each decision of the majority. This coincidence can also be observed individually in each judge, even when they are dissenting. Additionally, we have no comment of the Court on whether one analysis (the objective or the subjective) would potentially override the other in case of dissonance. On the other hand, because the justices have progressively added additional layers of vagueness to the test in order to cut the national consensus test in the same direction than its own judgment, mainly: ***(i)*** the technique of discounting states, ***(ii)*** the consideration of a consistent direction of change in state legislation and the ***(iii)*** inaccurate and one-sided application of sentencing and execution indicators. All these elements have led to a flexibilization of the stringent threshold that the national consensus was supposed to have and

[91] Some of them, quoted throughout the paper, on death penalty application and cases of relative proportionality.
[92] See essentially Segal and Spaeth (2002).

may have led to the abandonment of the test in the last case of the Court. In sum, the national consensus is mainly a subjective standard.

Third, and lastly, the national consensus test is highly inaccurate as to measure societal values since its own indicators present inherent and applied problems of accuracy. As for state enactments, scholarly research proves that legislative action does not fully represent public opinions, and it is not clear whether all states should be considered or weighed equally in the state legislate action test. On data concerning sentencing and execution practices, this is often presented as absolute numbers or relative numbers with wrong denominators. Additionally, sentencing juries in cases of the death penalty are biased since they tend to exclude groups and individuals that are generally against capital punishment. It is also disputed whether sentencing and execution data prevail over the examination of state enactments, although in the latest cases this has happened. Opinion polls, on the other side, are generally disregarded as inaccurate even when they may some potential to measure public sentiment, especially considering the other existing methodological problems of the rest of the sources.

To see a constitutional standard so heavily misused is both dangerous and intellectually disappointing, especially if it is misused by the SCOTUS, given the importance and scope of its decisions. Depending on how the national consensus is employed, some people may be executed, or they may be kept alive. In point of fact, some authors even believe that, if death penalty is ever judicially abolished, it will be through proportionality (Steiker and Steiker, 2016). Certainly, is it difficult to imagine a more flawed or subjective national consensus test that as it is right now. If it is the wish of the Court to maintain the utilization of this criteria, it should redefine it, benefiting from the constructive criticisms coming from social science and criminology. Although it is difficult to create an authentical objective test for the issue at stake, and making it compatible with judicial discretion, there is undoubtably room for improvement and for reducing the arbitrariness that accompanies the jurisprudence of the national consensus.

Now, it seems that I should conclude categorically stating that a more consistent, thorough, precise and accurate national consensus review is needed. I will pose, instead, the following question: is it even appropriate to make the qualification of a punishment as cruel, inhumane or beneath one's dignity dependent on societal contemporary values? On that, I will respectfully dissent[93].

[93] The only justice who adopted this view was Justice Marshall, 45 years ago, in *Gregg*, at 233. He was one of the outliers of the study.

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Legislation

18 U.S. Code (Crimes and Criminal Procedure) § 3553 - Imposition of a sentence.

U.S. Constitution, Amendment, XVIII.

9. ANNEX

Table 1

CASE	**Holding**
Gregg v. Georgia (1975)	Death penalty does not violate the Eighth Amendment per se.
Coker v. Georgia (1977)	Imposing death penalty for the crime of rape of an adult is prohibited by the Eighth Amendment
Enmund v. Florida (1982)	Imposing death penalty on someone who aided and abetted but did not himself kill, attempt to kill, or intend to kill, is prohibited by the Eight Amendment.
Ford v. Wainwright (1986)	Imposing death penalty to a defendant who is insane is prohibited by the Eighth Amendment
Tison v. Arizona (1987)	The Eighth Amendment does not prohibit the death penalty as disproportionate in the case of a defendant whose participation in a felony that results in murder is major and whose mental state is one of reckless indifference
Thompson v. Oklahoma (1988)	Imposing death penalty to a person who was under 16 years of age at the time of his or her offense is prohibited by the Eighth Amendment.
Stanford v. Kentucky (1989)	The imposition of death penalty to a person for a crime committed at 16 or 17 years of age is prohibited by the Eighth Amendment.
Penry v. Lynaugh (1989)	The Eighth Amendment does not categorically prohibit the imposition of death penalty to mentally retarded criminals.
Atkins v. Virginia (2002)	Imposing death penalty to mentally retarded criminals are is prohibited by the Eighth Amendment.
Rope v. Simmons (2005)	The imposition of death penalty on offenders who were under the age of 18 when their crimes were committed is prohibited by the Eighth Amendment.
Kennedy v. Louisiana (2008)	The imposition of death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death, is prohibited by the Eighth Amendment.
Graham v. Florida (2010)	The Eighth Amendment does not permit a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime.
Miller v. Alabama (2012)	Sentencing schemes that establish mandatory life in prison without possibility of parole for juvenile homicide offenders are prohibited by the Eighth Amendment.

Table 2

CASE	State Enactments			Execution practices		Sentencing practices	Direction of change		Indicators of public opinion	
	U_1	N_1	U_2	N_2	U_3	N_3	U_4	N_4	U_5	N_5
Gregg v. Georgia (1976)	Yes	35	No		Yes	1974: 254 sentenced 1976: 460 sentenced	No		Yes	Quoted several referendums and public opinion polls
Coker v. Georgia (1977)	Yes	1	No		Yes	1/6 rapists convicted to death penalty in Georgia. 6 rapists sentenced to death since 1873. 1/10 rapists convicted in other jurisdictions	No		No	No
Enmund v. Florida (1982)	Yes	8	Yes	6/362 executions were for felony murder since 1954	Yes	3 of the 796 convicted for DP in 1981	No		No	
Ford v. Wainwright (1986)	Yes	0	No		No		No		No	
Tison v. Arizona (1987)	Yes	26	No		Yes	Quotes 6 cases of other courts that have applied death penalty in those cases.				

Thompson v. Oklahoma (1988)	Yes	19	Yes	Last execution took place in 1948.	Yes	Only 5 minors less than 16 sentenced to death from 1982 to 1986	No		Yes	The American Bar Association and the American Law Institute were in favor of the position of the Court
Stanford v. Kentucky (1989)	Yes	25 (17y) 22 (16y)	Yes	30/2106 death row inmates from 1982-1988 were 17 or less (1.37%). 2% of the executions between 1642 and 1986.	Yes	41 of the1813 (2.3%) death sentences imposed between 1982 and 1988	No		No	
Penry v. Lynaugh (1989)	Yes	48	No		No		No		No	
Atkins v. Virginia (2002)	Yes	20	Yes	Only 12 States executed 35 allegedly mentally retarded offenders during the period of 1984-2000.	No		Yes	18 states changed their positions in the last 14 years (5 the last year, 6 in the last two years)	Yes	Mentions the opinion of professional organizations, different religious communities, of the European Union and polling data.
Roper v. Simmons (2005)	Yes	20	Yes	Since 1989 only six States have executed juveniles. In the past 10 years, only 3 have done so.	Yes	123/3599 (3.4%) death sentences were for juveniles between 1990 and 2003.	Yes	5 states have changed their positions	No	

								in the last 15 years.		
Kennedy v. Louisiana (2008)	Yes	6	Yes	No individual has been executed for the rape of a child since 1964.	Yes	Only 2 individuals convicted in Louisiana since 1964.	No		No	
Graham v. Florida (2010)	Yes	38	No		Yes	There are only 123 juvenile nonhomicide offenders sentenced to life without parole sentences (77 in Florida, the other 46 are sentenced in just 10 States).	No		No	
Miller v. Alabama (2012)	No		No		No		No		No	

Table 3

CASE	I_1	I_2	Q_1	Q_2	Q_3	Q_4	Q_5	Q_6
Gregg v. Georgia (1975)	DP	No	Yes	Yes	No	-	No	No
Coker v. Georgia (1977)	DP	Yes	Yes	Yes	No	Formal outlier	No	Yes
Enmund v. Florida (1982)	DP	Yes	Yes	Yes	No	Material outlier	No	Yes
Ford v. Wainwright (1986)	DP	Yes	Yes	Yes	No	Formal outlier	Yes	Yes
Tison v. Arizona (1987)	DP	No	Yes	Yes	Yes	-	No	Yes
Thompson v. Oklahoma (1988)	DP	Yes	Yes	Yes	No	Material outlier	No	Yes
Stanford v. Kentucky (1989)	DP	No	Yes	Yes	Yes	-	No	Yes
Penry v. Lynaugh (1989)	DP	No	Yes	Yes	No	-	Yes	Yes
Atkins v. Virginia (2002)	DP	Yes	Yes	Yes	No	Material outlier	No	Yes
Rope v. Simmons (2005)	DP	Yes	Yes	Yes	No	Material outlier	No	Yes
Kennedy v. Louisiana (2008)	DP	Yes	Yes	Yes	No	Formal and material outlier	No	Yes
Graham v. Florida (2010)	LWOP	Yes	Yes	Yes	No	Material outlier	No	Yes
Miller v. Alabama (2012)	LWOP	Yes	No	No	-	-	No	No