
J. Blake Byrd

I. INTRODUCTION

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

The final clause of the Eighth Amendment is the source of this nation’s prohibition on unconstitutional punishments. The provision’s meaning is itself a matter of debate because the Framers left little evidence of why they included it. In the latter half of the 1800s, the United States Supreme Court’s Eighth Amendment jurisprudence began with questions about the method of death. Later, the Court divined a dynamic rule for interpreting the Eighth Amendment from the “evolving standards of decency that mark the progress of a maturing society.” This well-settled rule is meant to compensate for the provision’s inherent vagueness and the lack of conclusive evidence from the historical record regarding its meaning. The alternative, the Court concluded, was that the clause would be limited to protecting the citizenry from the tortuous and barbaric practices of eighteenth-century England; thus, the provision would be rendered moot as time marched on and society progressed. Today, the Court’s evolving-standards test has two steps: The Court (1) looks at objective indicia of societal consensus against a particular practice and (2) ultimately uses its independent judgment to analyze whether the punishment is proportional to the offender’s mental state and category of crime. There is tension within the Court, however, because some members believe that the evolving-standards jurisprudence is mistaken, and they fervently reject a proportionality analysis.

The United States has a long history of executing juveniles, and, in Roper v. Simmons, the Court concluded this history. In Roper, the Court

1. UNITED STATES CONST. amend. VIII (emphasis added).
2. Id.
3. Furman v. Georgia, 408 U.S. 238, 263 (1972) (per curiam); see infra Part III.B.2.
8. See infra Part IV.
9. See infra Part IV.
10. 543 U.S. 551 (2005); see infra Part IV.
11. Roper, 543 U.S. at 578.
held that the execution of offenders who were under eighteen at the time of their crime is unconstitutional under the Eighth Amendment’s prohibition of “cruel and unusual punishments.”\(^{12}\)

This note begins with the facts of \textit{Roper},\(^{13}\) and then it examines the history of the juvenile death penalty since colonial times.\(^{14}\) Also, the note addresses the origins of the Court’s evolving-standards doctrine.\(^{15}\) Next, the note examines the cases that preceded the \textit{Roper} decision by focusing on those cases in which the Court was asked to decide if the evolving standards of decency prohibited the execution of two different classes of offenders: the mentally retarded and juveniles.\(^{16}\) After an analysis of the \textit{Roper} decision, the note concludes with a discussion regarding whether the evolving-standards test is an unprincipled method, or whether it is the best way to approach these types of Eighth Amendment claims.\(^{17}\)

\textbf{II. FACTS}

\textbf{A. The Crime}

In early September 1993, seventeen-year-old Christopher Simmons talked with fifteen-year-old Charlie Benjamin and sixteen-year-old John Tessmer about committing burglary and murder.\(^{18}\) The three boys often went to hang out at their friend Brian Moomey’s house, a twenty-nine-year-old convicted felon who threw nightly parties attended by local teenagers.\(^{19}\) At one of these parties, Moomey overheard Simmons describing to Benjamin and Tessmer a plan to burglarize a house and kill the occupants.\(^{20}\) Moomey also heard Simmons assure his friends that “they could do it and not get charged for it because they are juveniles.”\(^{21}\)

At 2:00 a.m. on September 8, 1993, Simmons and Benjamin left Moomey’s, without Tessmer, and went to burglarize the home of Shirley Crook.\(^{22}\) The two boys found an open back window, unlocked the door, and entered the house.\(^{23}\) As they moved through the house, Simmons turned on a

\begin{flushleft}
\textbf{12. } Id.
\textbf{13. } See infra Part III.
\textbf{14. } See infra Part III.A.
\textbf{15. } See infra Part III.B.
\textbf{16. } See infra Part III.C.
\textbf{17. } See infra Parts IV–V.
\textbf{18. } State v. Simmons, 944 S.W.2d 165, 169 (Mo. 1997) (en banc).
\textbf{20. } Id.
\textbf{21. } Id.
\textbf{22. } Simmons, 944 S.W.2d at 169.
\textbf{23. } Id.
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hallway light, which awoke Mrs. Crook. Simmons entered the bedroom and recognized Mrs. Crook from a previous automobile accident, which involved them both.

Next, Simmons ordered Mrs. Crook to the floor, and when she did not comply, Simmons and Benjamin forced her. Simmons bound her hands behind her back with duct tape, taped her mouth and eyes shut, and marched her out of the house to her minivan. Simmons drove the van to a state park in an adjoining county. Once at the park, Simmons drove to a railroad bridge that spanned a river and unloaded Mrs. Crook. She had managed to free her hands and remove some of the duct tape from her face. Simmons and Benjamin re-bound Mrs. Crook's hands and feet by using duct tape, the strap from her purse, the belt from her bathrobe, and some wire found on the railroad trestle. Next, they walked her to the trestle, hog-tied her hands and feet, and completely wrapped her face with duct tape. Mrs. Crook was alive and conscious as Simmons pushed her into the river below.

Later that day at Moomey's house, Simmons bragged that he killed a woman "because the bitch seen my face." Meanwhile, Shirley's husband, Steven Crook, returned from a trip to find that his wife had not gone to work. Mr. Crook filed a missing person report after his wife failed to appear that night.

On September 9, 1993, two fishermen found a dead body floating in the Meramec River in St. Louis County, Missouri. The victim's head was covered up, and the body's arms and legs were bound by duct tape and electrical wire. The medical examiner later identified the body as Shirley Crook, determined that drowning caused her death, and noted that she was alive when she hit the water.

The next day, the police received information that Simmons was involved in the crime. They arrested Simmons at school, took him in for

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24. Id. at 170.
25. Id.
26. Id.
27. Id.
28. Simmons, 944 S.W.2d at 170.
29. Id.
30. Id.
31. Id.
32. Id.
33. Id.
34. Simmons, 944 S.W.2d at 170.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id.
40. Simmons, 944 S.W.2d at 170.
questioning, and read him his Miranda rights. Simmons waived his Sixth Amendment right to counsel and his Fifth Amendment right to remain silent, and he cooperated with the investigators. After two hours of questioning, Simmons confessed to the burglary and murder, agreed to a videotaped confession, and agreed to participate in a video reenactment of the crime.

B. Procedural History

1. The Trial

The State charged Simmons with first-degree murder, burglary, kidnapping, and theft. At trial, Tessmer and Moomey testified against Simmons. Their testimony detailed Simmons’s plan to commit burglary and murder and also detailed his incriminating comments to Moomey after the crime.

The defense presented no witnesses at trial. In the state’s closing argument, the prosecutor asked the jury not to let Simmons “use his age as a shield to protect him.” The jury found Simmons guilty of all charges and recommended the death sentence. At sentencing, the state offered the testimony of Mrs. Crook’s family, and the defense presented evidence that Simmons had no previous criminal charges or adjudications. In a closing argument, defense counsel referred to this testimony, the lack of any criminal history, and Simmons’s age as mitigating factors against imposition of the death penalty.

The state responded by turning Simmons’s age against him by stating the following: “Seventeen years old. Isn’t that scary? Doesn’t that scare you? Mitigating? Quite the contrary[,] I submit. Quite the contrary.” The court instructed the jury to consider the mitigating factors of Simmons’s lack of any criminal history, his age at the time of the crime, and also his

41. Id.
42. Id.
43. Id.
44. Id.
46. Id. at 4.
47. Id.
48. Id.
49. Simmons, 944 S.W.2d at 170.
50. Brief for Respondent, supra note 19, at 4. Defense counsel also presented the testimony of Simmons’s parents, half-brothers, and friends, who all testified to having a loving relationship with Simmons. Id.
51. Id.
family's testimony on his behalf. The jury sentenced Simmons to death and found three aggravating factors: (1) the murder "was committed for the purpose of receiving money;" (2) the murder "was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the defendant;" and (3) the murder was "outrageously and wantonly vile, horrible, and inhuman" because Simmons bound Mrs. Crook before he killed her.

2. Hearing on Motion for Post-Conviction Relief

Simmons filed a motion in the trial court for post-conviction relief. He claimed that his conviction should be set aside due to ineffective assistance of counsel at both the guilt and sentencing phases because trial counsel chose not to introduce mitigating evidence of Dr. Daniel Cuneo's psychological evaluation of Simmons before trial. At an evidentiary hearing on the motion, Simmons introduced for the first time the results of Dr. Cuneo's evaluation and the results of a new evaluation by Dr. Robert Smith, a clinical psychologist Simmons's post-conviction counsel contacted. These experts testified regarding Simmons's developmental history, maturity level at the time of the crime, and his ability to assist counsel in his defense. Dr. Smith conducted a more thorough evaluation than Dr. Cuneo, and Dr. Smith concluded that Simmons's immaturity, history of childhood abuse, and history of drug and alcohol abuse, evidenced a personality disorder. Dr. Smith ultimately diagnosed Simmons with a schizo-typal personality disorder.
believing that Simmons's impairments affected his ability to assist counsel. Furthermore, Simmons's trial counsel testified at the hearing that Simmons initially denied being abused by his stepfather and denied ever abusing drugs and alcohol, and, more importantly, Simmons never seemed to understand that he was facing the death penalty. Despite this testimony, the trial court denied the motion, finding no merit in Simmons's claim of ineffective assistance of counsel.

3. Missouri Supreme Court and Federal Petition for a Writ of Habeas Corpus

Simmons appealed his conviction, sentence, and denial of post-conviction relief to the Missouri Supreme Court. The court affirmed on all points and determined that defense counsel's choice to forgo Dr. Cuneo's testimony at trial was a well-informed, strategic decision. The United States Supreme Court denied review. Then, the United States District Court for the Eastern District of Missouri dismissed Simmons's petition for a writ of habeas corpus, and the Eighth Circuit Court of Appeals affirmed. The United States Supreme Court denied review a second time. At this point in the appellate process, Simmons raised no Eighth Amendment issues regarding the constitutionality of the juvenile death penalty.

4. State Habeas Corpus

After the United States Supreme Court decided Atkins v. Virginia, Simmons sought a writ of habeas corpus from the Missouri Supreme Court. Simmons argued that to execute him for a crime committed while he was seventeen would be cruel and unusual punishment under the Eighth Amendment. Because of Stanford v. Kentucky, Simmons did not argue

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61. Brief for Respondent, supra note 19, at 8.
62. Id. at 8–9.
63. Id. at 9.
64. State v. Simmons, 944 S.W.2d 165, 169 (Mo. 1997).
65. Id. at 184.
69. 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibits the execution of the mentally retarded); see infra note 258.
70. State ex rel. Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003) (en banc).
71. Id. at 399.
72. 492 U.S. 361 (1989) (holding that the Eighth Amendment does not prohibit the execution of sixteen and seventeen-year-old offenders); see infra Part III.C.1.b.
that his punishment was unconstitutional in his first appeal to this court.\textsuperscript{73} In light of \textit{Atkins}'s national census against execution of the mentally retarded, however, Simmons saw a new avenue for appeal.\textsuperscript{74} He asked the Missouri Supreme Court to find that a similar consensus had developed, since \textit{Stanford}, against the death penalty for juveniles.\textsuperscript{75}

In order to determine whether the death penalty for juveniles was unconstitutional, the Missouri Supreme Court reviewed the Court's jurisprudence regarding the death penalty for juvenile and mentally retarded offenders.\textsuperscript{76} The court began its analysis by reasoning that it must conduct a \textit{current} analysis for any evolving, national consensus against the juvenile death penalty.\textsuperscript{77} In other words, the court felt that it was not bound by the 1989 evolving-standards analysis from the Supreme Court's decision in \textit{Stanford}.\textsuperscript{78} Rather, the court observed that it "clearly ha[d] the authority and the obligation to determine the case before it based on current—2003—standards of decency."\textsuperscript{79}

After the Missouri Supreme Court reviewed the Supreme Court's death-penalty jurisprudence for juveniles and the mentally retarded, it noted the Court's near-identical approach to each class of offenders.\textsuperscript{80} The state supreme court decided that it would follow the approach set out in \textit{Atkins} to decide whether a national consensus had emerged against the juvenile death penalty.\textsuperscript{81} First, the court noted that \textit{Atkins} discovered a national consensus against the death penalty for the mentally retarded by observing that, since the Court decided \textit{Penry v. Lynaugh},\textsuperscript{82} sixteen state legislatures enacted legislation barring the death penalty for the mentally retarded.\textsuperscript{83} The court added these states to the two states that already barred the practice in \textit{Penry}'s era and the twelve states that prohibited the death penalty outright for a total of thirty states against the death penalty for the mentally retarded.\textsuperscript{84} Since \textit{Stanford}, the court discovered that five more states had banned the penalty for juveniles, bringing the total to sixteen, two fewer than in \textit{Atkins}.\textsuperscript{85} Thus, when it added the twelve abolition states to the equa-

\begin{itemize}
\item \textsuperscript{73} See infra Part II.B.3.
\item \textsuperscript{74} Simmons, 112 S.W.3d at 399.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Id. at 400; see infra Part III.C.
\item \textsuperscript{77} Simmons, 112 S.W.3d at 407.
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Id.
\item \textsuperscript{80} Id.
\item \textsuperscript{81} Id.
\item \textsuperscript{82} 492 U.S. 302 (1989) (holding that the Eighth Amendment did not prohibit the execution of the mentally retarded); see infra note 258.
\item \textsuperscript{83} Simmons, 112 S.W.3d at 408.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id.
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tion, the court concluded that twenty-eight states were against the juvenile death penalty. 86 Furthermore, since Stanford, the court observed that no states had lowered the minimum age for execution. 87

The court emphasized Atkins’s observation that only five individuals known to be mentally retarded had been executed in the fourteen years since Penry. 88 Similarly, the court found that only six juvenile offenders had been executed since Stanford and that only 22 out of the 366 American juvenile executions in history had occurred since 1973. 89 The court also observed that the vast majority of juvenile death sentences were reversed on a variety of grounds. 90 Accordingly, the court concluded that the practice of sentencing and executing juveniles had become an unusual practice. 91

Next, the court noted the sizeable opposition to the juvenile death penalty by many professional, social, and religious organizations. 92 It observed that, although Stanford largely rejected the importance of these groups, Atkins marked a return to consideration of this evidence in the evolving-standards analysis. 93 Therefore, the views of these organizations, as well as the views of the international community, persuaded the court. 94

Finally, the court conducted an independent examination of the retributive and deterrent goals that the death penalty was meant to serve. 95 As for retribution, the court followed Atkins and reasoned that it was necessary to categorically exclude juveniles from the death penalty because, as a class, they are less developed mentally, less mature, less able to reason, and, therefore, less culpable, generally. 96 Similarly, the deterrent goals were not served because juveniles generally do not think about the consequences of their actions. 97 Also, the court observed that the sentencing jury in the present case highlighted the dangers of wrongful execution of these offenders because, even though Missouri required youth to be a mitigating factor, the prosecutor used Simmons’s age as an aggravating factor. 98 The Missouri Supreme Court concluded that “the Supreme Court of the United States would hold that the execution of persons for crimes committed when they were under [eighteen] years of age violates the ‘evolving standards of de-

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86. Id.
87. Id.
88. Id. at 409.
89. Simmons, 112 S.W.3d at 409.
90. Id.
91. Id. at 410.
92. Id.
93. Id. at 411.
94. Id.
95. Simmons, 112 S.W.3d at 411.
96. Id. at 412.
97. Id. at 413.
98. Id.
cency that mark the progress of a maturing society,' and is prohibited by the Eighth Amendment."

III. BACKGROUND

The United States has executed hundreds of juveniles in its history. Many offenders were executed for murder; however, a substantial number of offenders were executed for other crimes that did not result in death, including arson, assault, battery, attempted rape, bestiality, and robbery. The United States Supreme Court did not squarely address the constitutionality of the juvenile death penalty until 1988 in Thompson v. Oklahoma. In Thompson, the Court held that the Eighth Amendment prohibited the execution of juvenile offenders who were under the age of sixteen at the time of their capital crime. Eighteen years later, after the decision in Roper v. Simmons, the Court interpreted the Eighth Amendment to prohibit the execution of any juvenile who was under eighteen at the time of the offender’s capital crime. This section briefly addresses the history of the juvenile death penalty since colonial times. Then, the section highlights the Court’s early approach to Eighth Amendment claims and lays out the doctrine underlying how the Court analyzes Eighth Amendment claims today. Finally, the section discusses what the Court did in the eighteen intervening years between Thompson and Roper.

A. Early History of the Juvenile Death Penalty

The United States’s history of capital punishment for juvenile offenders has its origins in the English common law in which the penalty for this class of offenders was commonplace, but it was not without standards. Documentation of early Anglo-Saxon criminal sentencing dates back to at

99. Id.
102. 487 U.S. 815 (1988) (plurality); see infra Part III.C.1.a.
103. Thompson, 487 U.S. at 838.
104. 543 U.S. 551 (2005); see infra Part IV.
106. See infra Part III.A.
107. See infra Part III.B.
108. See infra Part III.C.
least the fourteenth century, when the minimum age of criminal culpability for homicide was set at age seven.\textsuperscript{110} A child below age seven who committed a felony went “free of judgment because he knoweth not of good and evil.”\textsuperscript{111} From this period through the eighteenth century, there was a rebuttable presumption that a child offender above the age of seven but below the age of fourteen could not form the criminal intent required for a sentence of death.\textsuperscript{112} There was no rebuttable presumption for offenders over age fourteen.\textsuperscript{113} The United States Supreme Court later accepted these views in \textit{In re Gault}.\textsuperscript{114}

The first juvenile execution in American history occurred in 1642 when a sixteen-year-old boy was executed in Plymouth Colony, Massachusetts.\textsuperscript{115} From this period to 1973, 344 juveniles were executed in the United States,\textsuperscript{116} and at least thirty-nine of these offenders were between the ages of ten and fifteen at the time of their capital crimes.\textsuperscript{117} In the modern era of death-penalty jurisprudence, beginning with the landmark 1972 decision of \textit{Furman v. Georgia},\textsuperscript{118} twenty-two juvenile offenders have been executed.\textsuperscript{119} Thus, from 1642 through February 2005, at least 366 juveniles were executed out of about 20,000 confirmed executions in United States history.\textsuperscript{120}

B. Early Eighth Amendment Jurisprudence

1. \textit{Focusing on the Method of Death: Static Interpretation of the Clause}

Well into the nineteenth century, American society generally had no moral or legal problems with capital punishment,\textsuperscript{121} and the first constitutional claims raised under the Eighth Amendment’s prohibition of “cruel and unusual punishments” did not occur until 1878,\textsuperscript{122} when the Court de-

\begin{itemize}
  \item \textsuperscript{111} Id. at 364.
  \item \textsuperscript{112} See id. at 366–67; see also WILLIAM BLACKSTONE, 4 COMMENTARIES, *23–24.
  \item \textsuperscript{113} Kean, supra note 110, at 369.
  \item \textsuperscript{114} Streib Treatise, supra note 101, at 614–15 (quoting \textit{In re Gault}, 387 U.S. 1, 16 (1967)).
  \item \textsuperscript{115} Streib Treatise, supra note 101, at 55. Thomas Graunger was convicted of bestiality, a capital offense, for sodomizing a horse and cow. Id.
  \item \textsuperscript{116} JUVENILE DEATH STATISTICS, supra note 100, at 4.
  \item \textsuperscript{117} Streib Article, supra note 109, at 619.
  \item \textsuperscript{118} 408 U.S. 238 (1972) (per curiam).
  \item \textsuperscript{119} JUVENILE DEATH STATISTICS, supra note 100, at 4.
  \item \textsuperscript{120} Id.
  \item \textsuperscript{122} Id. at 1.
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cided Wilkerson v. Utah. In Wilkerson, the Court held that execution by firing squad did not violate the Eighth Amendment. The Court noted that, at a minimum, the clause forbids torture, but the Court also observed—with great foresight—that the provision would be difficult to define with precision. Twelve years later, the Court held in In re Kemmler that death by electrocution was not a violation of the clause. In these cases, the issue of the death penalty itself was not before the Court. The justices simply weighed the constitutionality of these methods of execution against the Court's definitions of torture and barbaric treatment, determining that death by electrocution or firing squad was neither a "cruel" nor "unusual" method of death. The Court would later change course in Weems v. United States, in which it reasoned that if the provision were interpreted simply as a safeguard from torture and barbarism, then the clause would be "effectively read out of the Bill of Rights" because no governmental authority could justify such conduct in a free society. Therefore, Wilkerson and Kemmler represent a more static framework within which the Court could analyze and apply the provision—an interpretative technique that would be flatly rejected in Weems.

123. 99 U.S. 130 (1878).
124. Id. at 136–37.
125. Id. at 135–36. The Court cited Blackstone for examples of torture and barbaric methods:

[T]he prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female . . . . Difficulty would attend the effort to define with exactness the extent of the constitutional provision[,] which provides that cruel and unusual punishments shall not be inflicted; but[,] it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by . . . [the] Constitution.

Id.

126. 136 U.S. 436 (1890).
127. Id. at 443–44. "Punishments are cruel when they involve torture or a lingering death; but[,] the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." Id. at 447.

128. FOLEY, supra note 121, at 19.
130. 217 U.S. 349 (1910); see infra Part III.B.2.
131. Furman v. Georgia, 408 U.S. 238, 265 (1972) (per curiam) (Brennan, J., concurring); see Weems, 217 U.S. at 371.
2. The Evolving Standards of Decency: Dynamic Interpretation of the Clause

*Weems v. United States* was a non-capital case in which the offender was convicted of falsifying records and was sentenced to twelve years of hard labor with his wrists and ankles in chains. The Court did not discover a precise definition of "cruel and unusual punishments" in previous cases, and it found little evidence regarding the Framers' intent in adopting the phrase. Nevertheless, the Court did uncover some debate about the provision from the Virginia and Pennsylvania ratifying conventions—history that the *Furman* Court would later analyze in much greater detail. In *Furman*, Justice William Brennan concluded that the Framers were concerned with legislative power and that the provision was included to prevent the legislature from enacting outrageous criminal punishments. Justice Brennan, however, also stated that it is impossible to know exactly what punishments the Framers considered "cruel and unusual," but that the Framers certainly meant to exclude torture. Thus, the majority in *Weems* concluded that the provision would be rendered moot if it were confined to the evils that had existed in 1791. Furthermore, the Court stated the following:

> Time works changes, brings into existence new conditions and purposes. Therefore[,] a principle, to be vital, must be capable of wider application than the mischief[,] which gave it birth. [] Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas.  

Thus, the *Weems* majority did not bind itself to an original-intent analysis of this provision, nor did it feel constrained by the meager evidence of the Framers' ideas in adopting the provision. In arguing for the clause's flexibility, Justice Joseph McKenna never concluded that the death penalty was itself unconstitutional. The opinion did, however, unmoor the phrase from its early interpretations as strictly forbidding certain eighteenth-century

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134. *Id.* at 369.
135. *Id.* at 371–72; *Furman*, 408 U.S. at 258–60 (Brennan, J., concurring) (analyzing in detail the debates from the Virginia and Massachusetts ratifying conventions, as well as the First Congress, regarding the intent of the Framers in adopting the phrase "cruel and unusual").
137. *Id.*
139. *Id.* (emphasis added).
140. FOLEY, supra note 121, at 24.
141. *Id.* at 26.
punishments. The wide-ranging, jurisprudential change lies in the *Weems* majority’s claim that the Constitution could not be limited to the narrow interpretation surrounding its birth, nor could its provisions be reduced to “impotent and lifeless formulas.” Instead, the provisions should be interpreted based on gradual changes in public opinion. In what is now a familiar mantra of strict constructionists, Justice Byron White dissented to what he saw as the majority replacing its judgment for that of the legislature; he stated that the clause simply reflects the Framers’ intention to prohibit the types of torturous and barbaric punitive practices common in seventeenth-century England.

*Trop v. Dulles* was another non-capital case with significant implications for the Court’s Eighth Amendment jurisprudence. The defendant serviceman was court-martialed for desertion, and when he later applied for a passport, he learned that the conviction had also stripped him of his United States citizenship. The statute was a Civil War holdover enacted by Congress under its war powers, and the law granted discretion to the military in deciding whether a deserter would be denationalized. In a five-four decision, Chief Justice Earl Warren wrote for the majority and cited *Weems* for the Court’s view of the Eighth Amendment: “[T]he Court recognized in [*Weems*] that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the *evolving standards of decency that mark the progress of a maturing society.*” Despite the Court’s inability to define the precise scope of the provision, the majority stated that “[t]he basic concept underlying the Eighth Amendment is nothing more than the dignity of man.”

In holding that denationalization was a “cruel and unusual” punishment, the majority added that the punishment of statelessness is completely uncivilized because it destroys the individual’s status in organized society. Chief Justice Warren reasoned that, because the death penalty was still widely accepted, it could not be said to violate the “cruel” prong of the

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142. ID.
143. *Id.* at 25–26; see also *Weems*, 217 U.S. at 373.
145. *Id.* at 387, 397 (White, J., dissenting). The Court has frequently cited the following article in its modern death-penalty jurisprudence beginning in *Furman* and as recently as *Roper*. Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*: The Original Meaning,” 57 CAL. L. REV. 839 (1969).
146. 356 U.S. 86 (1958) (plurality).
147. *Id.* at 100–01.
148. *Id.* at 87–88.
149. *Id.* at 89–90.
150. *Id.* at 100–01 (emphasis added).
151. *Id.* at 100.
152. See *Trop*, 356 U.S. at 101.
Equally clear to Chief Justice Warren, however, was that the mere existence of the death penalty did not license the government "to devise any punishment short of death within the limits of its imagination." Similar to Justice McKenna's opinion in Weems, Chief Justice Warren opined that the Constitution's provisions are not "time-worn adages or hollow shibboleths," but that "[t]hey are vital, living principles that authorize and limit governmental powers in our Nation."

In his dissent, Justice Felix Frankfurter concluded that this punishment was valid under the congressional war power, and he noted that punishment for desertion was not considered to be unusual in other civilized nations. He was baffled by how the majority considered that denationalization could be a fate worse than death because the majority made it clear they had no issue with capital punishment itself. Similar to Justice White's dissent in Weems, Justice Frankfurter saw the majority's decision as an unrestrained usurpation of its judicial power and an unconstitutional foray into legislative and executive territory.

C. Modern Eighth Amendment Jurisprudence: Exempting Classes of Individuals

1. **Juveniles**

The Court decided two juvenile death penalty cases a year apart; however, it took different approaches in each case. In Thompson v. Oklahoma, the plurality—comprised of Justices Stevens, Brennan, Marshall, and Blackmun—decided the case by (1) looking for objective indicia of a national consensus against the execution of fifteen year olds, (2) considering the practice of sentencing juries, (3) conducting a proportionality analysis of the penal goals the death penalty is meant to serve, and (4) considering the practices of other nations. In Stanford v. Kentucky, the majority—comprised of Justices Scalia, White, Kennedy, and Chief Justice Rehnquist—decided the case by looking for objective indicia of national consensus.

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153. Id. at 99.
154. Id.
155. "Shibboleth" is defined as a "slogan," "catchword," or as "[a] common saying or idea." *AM. HERITAGE DICTIONARY* 1130 (2d College ed. 1985).
157. Id. at 121, 126 (Frankfurter, J., dissenting).
158. Id. at 125.
159. Id. at 128.
160. *See infra* Part III.C.1.a–b.
162. Id. at 818.
consensus and the practices of sentencing juries.\textsuperscript{164} The Court in both decisions based its analysis on the evolving standards of decency but disagreed over which states should be counted.\textsuperscript{165} Furthermore, \textit{Stanford} rejected the proportionality analysis and the consideration of the practices in other nations.\textsuperscript{166}

\textbf{a. \textit{Thompson v. Oklahoma}\textsuperscript{167}}

The juvenile death penalty did not become an issue until the 1980s.\textsuperscript{168} Two juvenile death penalty cases tempted the Supreme Court during this period, but the Court did not squarely face the issue until it granted certiorari in \textit{Thompson}.\textsuperscript{169} The Court, in a four-one-three decision, held that the Eighth Amendment prohibited the execution of juveniles who were under sixteen at the time of their capital crime.\textsuperscript{170} Along with three adults, fifteen-year-old Thompson participated in the brutal murder of his former brother-in-law.\textsuperscript{171} In a certification hearing, the Oklahoma trial court recognized that Thompson was a “child” under Oklahoma law but found that there were “no reasonable prospects” for his rehabilitation within the juvenile justice system.\textsuperscript{172} Accordingly, the court tried Thompson as an adult under the state’s statutory certification procedure for juveniles.\textsuperscript{173} At sentencing, the jury found the “especially heinous, atrocious, or cruel” nature of the murder to be an aggravating circumstance and sentenced Thompson to death.\textsuperscript{174} The Court granted certiorari to determine whether the death sentence for a crime committed by a fifteen-year-old was cruel and unusual punishment under the Eighth Amendment.\textsuperscript{175}

Justice John Paul Stevens wrote the plurality opinion and began his analysis by noting that the Framers had not specifically defined the categorical prohibition against cruel and unusual punishments; therefore, he stated that it was the Court’s task to weigh this question against the “evolving

\begin{itemize}
\item \textsuperscript{164} \textit{Id.} at 364.
\item \textsuperscript{165} \textit{See infra} Part III.C.1.a–b.
\item \textsuperscript{166} \textit{See infra} Part III.C.1.b.
\item \textsuperscript{167} 487 U.S. 815 (1988) (plurality opinion).
\item \textsuperscript{169} \textit{Id.} at 131.
\item \textsuperscript{171} \textit{Id.} at 819.
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} \textit{Id.}
\item \textsuperscript{174} \textit{Id.} at 820.
\item \textsuperscript{175} \textit{Id.}
\end{itemize}
standards of decency that mark the progress of a maturing society." 176 Since *Trop*, the Court had developed indicators for how it would review its evolving-standards test. 177 The Court employed these indicators in *Thompson* by (1) looking at state death-penalty laws for any trends or national consensus, (2) considering jury determinations, (3) considering the views of professional organizations and other nations, and (4) making an independent judgment based on a culpability and proportionality analysis of the retributive and deterrent goals of the death penalty. 178

The Court began by analogizing how American society differentiated between the rights of children and adults by specifically looking at how other Oklahoma laws differentiated between these two classes. 179 The Court stated that Oklahoma had a juvenile justice system like all other states and that it had a statute that permitted sixteen and seventeen-year-olds charged with serious felonies to be tried as adults. 180 The Court also stated that every other civil or criminal statute in Oklahoma treated any person under the age of sixteen as a "child." 181 Furthermore, the Court observed that Oklahoma joined other states in nearly complete unanimity in treating individuals under sixteen as minors by forbidding them to vote, sit on a jury, drive or marry without parental consent, purchase pornography, or gamble. 182 Additionally, the majority considered it relevant that all states had laws setting the maximum age for juvenile court jurisdiction at least at age sixteen. 183

The Court observed that most death-penalty states had not set a minimum age limit for the execution of juvenile offenders. 184 Specifically, nineteen states permitted capital punishment but did not set age minimums, and fourteen states outlawed the practice outright. 185 Accordingly, Justice Stevens reasoned that these jurisdictions did not help in the analysis one way or the other and that the Court should consider only the eighteen states that did establish minimum age limits. 186 Justice Stevens added that the respondents raised no evidence suggesting that the legislatures of the nineteen death-penalty states considered how the interplay of their certification and capital

177. *Id.* at 822.
178. *Id.* at 822–23, 833.
179. *Id.* at 823.
180. *Id.* at 823–24.
181. *Id.* at 824.
183. *Id.*
184. *Id.* at 826.
185. *Id.*
186. *Id.* at 826–29.
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statutes qualified adolescents to be eligible for the death penalty.\footnote{187} Focusing only on the eighteen minimum-age states, the plurality observed that all of those states required that the defendant be at least sixteen to qualify for the death penalty.\footnote{188} To further bolster its consensus argument, the plurality recognized many respected organizations that opposed the death penalty for juveniles and other western nations that forbade the practice outright.\footnote{189}

The Court then turned to the behavior of capital juries in the twentieth century and discovered that eighteen to twenty juveniles were executed for crimes committed while they were under the age of sixteen.\footnote{190} The plurality concluded from this infrequency that "the imposition of the death penalty on [fifteen-year-old offenders] is now generally abhorrent to the conscience of the community."\footnote{191}

Next, Justice Stevens addressed whether there was a difference in the culpability level of a juvenile offender versus an adult offender.\footnote{192} The plurality noted previous cases in which the Court endorsed the proposition that juveniles as a class are less mature and responsible than adults, and it was this crucial difference that the Court determined would require youth to be a mitigating factor in capital cases.\footnote{193} Because the Court endorsed the idea that less culpability should attach to juveniles than to adults for the same crime, it reasoned that the conduct of a juvenile cannot be as morally reprehensible as the same conduct by an adult.\footnote{194}

The plurality observed that the death penalty is supposed to serve the twin penal goals of retribution and deterrence.\footnote{195} In fact, the Court endorsed the proposition that retribution is often justified as a valid expression of society's moral outrage at particular conduct.\footnote{196} The plurality concluded, however, that juveniles are less mature as a class, have a better shot at rehabilitation, and are generally treated differently as a class; therefore, retribution was inapplicable to the execution of a fifteen-year-old offender.\footnote{197} Similarly,
the plurality concluded that the goal of deterrence was inapplicable because it was unlikely that juveniles entertained any cost-benefit analysis as to the possibility of being executed.\textsuperscript{198} Indeed, the Court stated that it is "fanciful" to believe that a teen offender would be deterred by the knowledge that only about twenty juveniles were executed in the twentieth century.\textsuperscript{199}

The plurality vacated the sentence and concluded that the Eighth Amendment prohibits the execution of individuals below the age of sixteen.\textsuperscript{200} The Court based its decision on its independent judgment that the death penalty for these offenders does not contribute to the penal goals that capital punishment is meant to serve; therefore, the punishment is "nothing more than the purposeless and needless imposition of pain and suffering."\textsuperscript{201}

In his dissent, Justice Antonin Scalia agreed that the best indicator of evolving standards was the legislation society enacts, but he took issue with the plurality's national-consensus analysis because it did not recognize the nineteen states that allowed the death penalty as counterevidence that these states implicitly support the penalty for this class of offenders.\textsuperscript{202} All of these death-penalty states had statutes that certified juveniles into criminal court and did not deliberately close this avenue of certification for fifteen-year-olds; thus, the interplay of the statutes made the child offender eligible for the death penalty.\textsuperscript{203} This is precisely what happened to Thompson.\textsuperscript{204} Oklahoma was one of the nineteen states without explicitly drawn minimum age limits.\textsuperscript{205} In addition, Justice Scalia attacked the plurality's analysis of jury determinations, and he found no support for any relevant trend from the mere fact that juveniles are rarely executed.\textsuperscript{206} Rather, Justice Scalia stated that the infrequency was most likely due to individualized sentencing determinations and the decline in public support for the death penalty in general.\textsuperscript{207} Justice Scalia rejected outright the plurality's consideration of the practices of other nations as having any bearing on the fundamental beliefs of this nation.\textsuperscript{208}

In her concurring opinion, Justice Sandra Day O'Connor observed that a national consensus against the death penalty for fifteen-year-olds likely did exist, especially after adding the fourteen abolition states to the eighteen

\textsuperscript{198} Id. at 837.
\textsuperscript{199} Id. at 838.
\textsuperscript{200} Thompson, 487 U.S. at 838.
\textsuperscript{201} Id. (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion)).
\textsuperscript{202} Id. at 865, 867 (Scalia, J., dissenting) (emphasis added).
\textsuperscript{203} See id. at 867--68.
\textsuperscript{204} Id. at 824 (majority opinion), 850 (O'Connor, J., concurring).
\textsuperscript{205} See id. at 824, 850.
\textsuperscript{206} Thompson, 487 U.S. at 869--70 (Scalia, J., dissenting).
\textsuperscript{207} Id.
\textsuperscript{208} Id. at 869.
minimum-age states. Furthermore, Justice O’Connor agreed with the plurality that the dissent relied on misleading statistics in citing the nineteen death-penalty states without minimum age limits as deliberate support for the death-eligibility of this class of offenders. Justice O’Connor added that there was no evidence that these states deliberately considered the effect of how their juvenile certification and capital punishment statutes would interact to make these individuals death-eligible. In other words, since the Oklahoma death penalty statute specified no minimum age, it served to operate in conjunction with the juvenile certification statute—authorizing fifteen-year-olds to be treated as adults—in a way that created the appearance of a less-than-deliberate choice by these state legislatures to render fifteen-year-old defendants death-eligible. Therefore, Justice O’Connor reasoned that there was a risk that the Oklahoma state legislature had not fully considered this statutory interaction. In the absence of more explicit evidence of a national consensus, Justice O’Connor chose not to address the constitutional question.

b. Stanford v. Kentucky

One year after the Court decided Thompson, it granted certiorari to decide whether the Eighth Amendment forbade the imposition of the death penalty for two offenders who committed their crimes when they were sixteen and seventeen-years old. Justice Scalia wrote for the majority, which held that the punishment did not offend the Eighth Amendment’s bar of cruel and unusual punishments. The Court began by observing that the death penalty for sixteen and seventeen-year-old offenders was not considered “cruel and unusual” at the time the Bill of Rights was adopted, and the Court noted the common law rebuttable presumption that theoretically allowed the death penalty for offenders as young as age seven. Next, the

209. Id. at 849 (O’Connor, J., concurring).
210. Id. at 850.
211. Id.
212. Thompson, 487 U.S. at 850.
213. See id. at 851–52.
214. Id. at 855.
216. Id. at 368.
217. Id. at 380. The Court reviewed the consolidated appeals of two offenders from Kentucky and Missouri in which the juvenile courts addressed the individual circumstances in each case and certified the offenders into adult criminal court. Id. at 265–68. Kevin Stanford of Kentucky committed capital murder when he was seventeen, and Heath Wilkins of Missouri committed capital murder when he was sixteen. Id. at 365–66.
218. Id. at 368.
majority addressed the petitioners’ views that the “evolving standards of decency” prohibited the death penalty in their cases.219

The majority cited Coker v. Georgia,220 a case in which the Court observed that Eighth Amendment judgments should never be based on the subjective opinions of the justices but only on objective evidence.221 Also, citing his dissent in Thompson, Justice Scalia emphasized that only American conceptions of decency are dispositive—not the practices in other nations.222

The majority continued the evolving-standards analysis by noting that the best objective indicia of modern trends are the statutes passed by the nation’s elected bodies.223 Justice Scalia then noted previous decisions in which the Court discovered a significant national consensus sufficient to warrant a label of “cruel and unusual.”224 Out of the thirty-seven death-penalty states, the majority counted the fifteen death-penalty states that did not impose the penalty upon sixteen-year-old offenders and the twelve states that did not impose the penalty upon seventeen-year-old offenders.225 With thirty-seven as the denominator, the Court concluded that neither tally was a majority of the death-penalty states.226 The Court stressed that this consensus was insufficient when compared to the Court’s other examples of overwhelming national consensus.227 The majority addressed the dissent’s contention that the non-death-penalty states should be included in the calculus by indicating that those jurisdictions bear only upon whether there was a consensus against the death penalty altogether, and these abolition states said nothing specifically about whether offenders under the age of eighteen should be exempt.228 Justice Scalia analogized that “[t]he dissent’s position [was] rather like discerning a national consensus that wagering on cock-

219. Id. at 369 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).
220. 433 U.S. 584 (1977). Coincidentally, Coker is also the source of the controversial notion that, in the end, the Court will make an independent judgment about whether a particular punishment is appropriate under the Eighth Amendment. Id. at 597.
221. Stanford, 492 U.S. at 369. “Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.” Id. (citing Coker, 433 U.S. at 592).
222. Id.
223. Id. at 370.
224. Id. at 371 (citing Ford v. Wainwright, 477 U.S. 399 (1986) (invalidating the death penalty for the insane because no states allowed it); Enmund v. Florida, 458 U.S. 782 (1982) (invalidating the death penalty for an accomplice who was not the trigger-man in a felony-murder because only eight jurisdictions allowed it); Coker, 433 U.S. at 600 (invalidating the death penalty for rape because Georgia was the sole jurisdiction allowing it).
225. Stanford, 492 U.S. at 370.
226. Id.
227. Id. at 371.
228. Id.
fights is inhumane by counting within that consensus those States that bar all wagering."^{229}

The petitioners argued that the actions of modern district attorneys and sentencing juries showed that juveniles were rarely charged with capital crimes and sentenced to death; thus, society generally condemned the practice.^{230} The majority conceded that only about two percent of executions since 1642 happened to offenders under the age of eighteen at the time of the crime, but the Court stated that it was entirely probable that "the very considerations [that] induce petitioners and their supporters to believe that death should never be imposed on offenders under [eighteen] cause prosecutors and juries to believe that it should rarely be imposed."^{231}

The majority rejected the petitioners' and their supporters' reliance on other state laws that set age minimums at eighteen or more for actions such as voting, driving, and drinking.^{232} The Court observed that maturity bears little on whether a person votes intelligently, drives carefully, or drinks responsibly and that these laws are created from general determinations only.^{233} The Court saw no practical relation between being able to do these things and being mature enough to know that murder is wrong.^{234} The majority noted that individualized consideration of mitigating factors, such as youth, was mandatory in capital cases and that juvenile transfer statutes required consideration of the maturity level and moral responsibility of the juvenile before certification to a criminal court.^{235} Therefore, the Court determined that courts gave sufficient individualized attention to the mitigating factor of age.^{236} The Court also rejected the petitioners' other indicia of national consensus, consisting of opinion polls, views of various interest groups and professional associations, and the psychological and emotional development studies offered by petitioners' amici.^{237} Additionally, the Court dismissed the evidence relied on by petitioners to prove that the retributive and deterrent goals of the death penalty were not served by executing juveniles.^{238}

Finally, Justice Scalia rejected the dissent's contention that the Court's opinion left to the state legislatures the task of defining the scope of the

229. Id. at 371 n.2.
230. Id. at 373.
231. Stanford, 492 U.S. at 374.
232. Id.
233. Id.
234. Id.
235. Id. at 375.
236. Id.
238. Id.
Eighth Amendment when it is the Court’s task to define the provision.\textsuperscript{239} Justice Scalia responded to the dissent by observing the following:

[w]hen this Court cast loose from the historical moorings consisting of the original application of the Eighth Amendment, it did not embark rudderless upon a wide open sea. Rather, it limited the Amendment's extension to those practices contrary to the “evolving standards of decency that mark the progress of a maturing society.” It has never been thought that this was a shorthand reference to the preferences of a majority of this Court.\textsuperscript{240}

Unlike the plurality in \textit{Thompson}, Justice Scalia considered it unnecessary to apply a proportionality analysis of the culpability of the offender or review whether the penal goals of the death penalty were served.\textsuperscript{241} Rather, the majority believed that state laws and individualized jury determinations adequately addressed proportionality.\textsuperscript{242} The Court concluded that the Eighth Amendment does not forbid the death penalty for sixteen and seventeen-year-old offenders.\textsuperscript{243}

In her concurrence, Justice O’Connor observed that “[t]he most salient characteristic that bears on this case is that every single American legislature that has expressly set a minimum age for capital punishment has set that age at [sixteen] or above.”\textsuperscript{244} For Justice O’Connor, the petitioners fell into a constitutionally permitted class of executable offenders.\textsuperscript{245} Justice O’Connor disagreed with the majority’s conclusion that a proportionality analysis was unnecessary and, instead, supported the consideration of other state statutes that distinguished juveniles from adults.\textsuperscript{246}

Justice Brennan wrote for the dissent and concluded that the Eighth Amendment prohibits the capital punishment for an offender under eighteen at the time of the crime.\textsuperscript{247} The dissent tracked the plurality in \textit{Thompson} by employing (1) an evolving-standards analysis of the state statutes, (2) con-
sideration of jury determinations, (3) social scientific evidence of various organizations, (4) practices of other nations, and (5) a proportionality analysis of the culpability level of the juvenile weighed against the death-penalty goals of retribution and deterrence. The dissent rejected the Court's "distorted view" of how the states fell in the national consensus analysis by observing that when the fifteen non-death-penalty states were added to the twelve states that set a minimum of eighteen, twenty-seven states were against the death penalty for the eighteen-year-old Stanford. Similarly, when the fifteen non-death-penalty states were added to the fifteen states that set a minimum age of seventeen, thirty states were against the penalty for Wilkins.

The dissent also reiterated the Thompson plurality's point that there was no evidence that the nineteen states that permitted the death penalty deliberately authorized the death penalty for juveniles simply by having a death-penalty statute and a juvenile-certification statute. Justice Brennan cited Justice O'Connor's statement in her concurrence that the issue is too important to assume that these states implicitly condoned the execution of juveniles without having carefully considered the possibility of how these statutes interact. Therefore, the dissent determined that twenty-seven states were against the death penalty for Stanford, thirty were against the penalty for Wilkins, and nineteen had not directly faced the question. The dissent continued the remainder of its analysis in much the same way as the plurality in Thompson.

2. Atkins v. Virginia: Exempting the Mentally Retarded

In order to fully understand how the Court exempted juveniles from capital punishment in Roper, it is necessary to review how the Court exempted the mentally retarded from capital punishment because the Court took nearly identical approaches to these cases. The Court's jurisprudence regarding the execution of the mentally retarded began in Penry v. Lyon and ended thirteen years later in Atkins. In Penry, the majority—comprised of Justices O'Connor, Brennan, Blackmun, and Stevens—

248. Id. at 383–84.
250. Id. at 384.
251. Id. at 385.
252. Id.
253. Id.
254. Id. at 385–405; see supra Part III.C.l.a.
255. 536 U.S. 304 (2002). The Court's decision in Atkins created a new avenue for Simmons to appeal his sentence by arguing that a similar national consensus had developed in the states against the imposition of the death penalty on juvenile offenders. See supra Part II.B.4.
256. 492 U.S. 302 (1989); see infra note 258.
employed an evolving-standards analysis and discovered no national consensus against the death penalty for this class of offenders. The Court held that no prophylactic rule was appropriate and that juries were able to consider the condition of mental retardation as a mitigating factor in capital cases. In Atkins, the majority—comprised of Justices Stevens, O’Connor, Kennedy, Souter, Ginsburg, and Breyer—employed an evolving-standards analysis and discovered that a national consensus had developed against the execution of the mentally retarded. Also, the Court determined that sentencing the mentally retarded to the death penalty was a disproportionate punishment because of the diminished culpability and cognitive deficiencies of the class. The following section explores the Court’s use of the evolving-standards test in Atkins, in which the Court concluded that the mentally retarded are a class of individuals deserving special protection from the death penalty.

Thirteen years after Penry, the Court reconsidered the issue of whether the Eighth Amendment’s evolving-standards analysis would uncover any legislative change with regard to the execution of mentally retarded offenders. Finding a new consensus, the Court overruled Penry in a six-three decision and held that the provision prohibited the execution of the mentally retarded. At trial, the jury considered evidence of the offender’s mental

258. Id. In Penry, the defendant confessed to raping and killing a woman with a pair of scissors. Id. at 307. The twenty-two-year-old defendant had an IQ of fifty-four and the mental age of a six and a half-year-old. Id. The Court employed an evolving-standards analysis and uncovered no national consensus opposing the death penalty for mentally retarded offenders. Id. at 340. Justice O’Connor began by noting that the provision’s modern jurisprudence was guided by the “evolving standards of decency that mark the progress of a maturing society.” Id. at 330–31. Citing Thompson, the Court observed that the best objective indicators of evolving standards are the nation’s legislatures. Id. at 331. The Court analogized that mental retardation was akin to the common law notion of “idiocy,” which was thought to be a congenital condition used to describe a lack of any understanding of the differences between good and evil. Id. at 331–32. The Court discovered only two states that banned the execution of a retarded person for a capital crime, and when these states were added to the fourteen non-death-penalty states, there was still no national consensus. Id. at 334. The petitioner argued under Thompson that, if a juvenile is less culpable than an adult for certain crimes, then it follows that mentally retarded persons are less culpable too; Simmons would later successfully argue, under Atkins, the reverse of this reasoning. Id. at 336. In response, the Court referred to its other holding in Penry that sentencing bodies must consider mental retardation as a mitigating factor, and therefore, the majority was not persuaded that a categorical prohibition was appropriate at the time. Id. at 337–38.
259. Atkins, 536 U.S. at 316.
260. Id. at 321.
261. Id. at 307.
262. Id. at 321.
retardation but still sentenced him to death. Following the Court's decision in *Penry*, the Virginia Supreme Court affirmed the conviction.

Justice Stevens began the majority opinion by noting the requirement that the punishment be proportional to the offense. The majority then dismissed the notion that the Eighth Amendment requires an analysis of what was considered excessive punishment at the time the Bill of Rights was adopted. Instead, the Court decided that the "evolving standards of decency" were the source of the provision's meaning. Like the Court in *Thompson*, the majority laid out the analytical framework, which consisted of (1) an evaluation of the objective indicia of national consensus found in the nation's legislatures, (2) jury determinations, (3) views of professional organizations and other nations, and (4) the Court's own judgment "on the question of the acceptability of the death penalty under the Eighth Amendment." In other words, the majority stated that the Court would decide if it had "reason to disagree with the judgment reached by the citizenry and its legislators."

The majority noted that, since *Penry*, sixteen states joined the two states from *Penry*’s era by enacting legislation barring the execution of the mentally retarded. Despite these numbers, the Court observed that "[i]t is not so much the number of these states that is significant, but the consistency of the direction of change." Also finding that the practice was uncommon in the states that still permitted it, the majority reasoned that the legislatures of these states were probably in no hurry to change the laws. Then, the Court cited amici curiae from various organizations, other nations, and American opinion polls in support of the conclusion that the practice of executing the mentally retarded had become an unusual occurrence and that a national consensus had developed against it.

263. *Id.* at 308–09. The defendant and an accessory kidnapped, robbed, and shot a man eight times, killing him. *Id.* at 307. The defendant had an IQ of fifty-nine and a mental age between ages nine and twelve. *Id.* at 309–10.

264. *Id.* at 310.


266. *Id.* at 311–12 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality)).

267. *Id.* at 312.

268. *Id.* at 313.

269. *Id.* at 314–15. The Court observed that Virginia and Nevada passed similar bills in the House. *Id.* at 315. A bill passed both chambers in Texas, but it was vetoed by the governor. *Id.*

270. *Atkins*, 536 U.S. at 315. The Court emphasized that no states since *Penry* had reversed course and enacted laws permitting the execution of the mentally retarded. *Id.* at 315–16.

271. *Id.* at 316.

272. *Id.* The Court emphasized that, although this data was not dispositive, it was consistent with the legislative data. *Id.*
Having found a consensus, the Court reviewed the general cognitive deficiencies of the mentally retarded and the ability of capital punishment of this class to serve the twin penological goals of retribution and deterrence.\(^\text{274}\) The Court did not suggest that this class of offenders should be exempt from criminal sanctions, but the majority did conclude that the mentally retarded are less culpable because they have a diminished capacity to learn, communicate, reason, and control impulses.\(^\text{275}\) The Court reasoned that, because the average murderer was rarely sentenced to death, the average mentally retarded individual with lesser culpability should not be sentenced to death.\(^\text{276}\) Furthermore, because capital punishment is primarily an appropriate sanction for premeditated and deliberate crimes, the Court concluded that it is not an appropriate sanction for the mentally retarded because of their cognitive deficiencies and impulsivity.\(^\text{277}\) The Court observed that, although mental retardation is used as a mitigating factor in sentencing determinations, prosecutors have used the condition as an aggravating factor because the mentally retarded are often poor witnesses and are poor at showing remorse or sympathy.\(^\text{278}\) As a result, the Court reasoned that the mentally retarded are generally at special risk of wrongful execution.\(^\text{279}\) In conclusion, the Court held that execution of the mentally retarded did not further the penal goals of capital punishment, and, therefore, the Eighth Amendment prohibits such excessive punishment for this class of offenders.\(^\text{280}\)

Chief Justice Rehnquist wrote a separate dissent, joined by Justices Scalia and Thomas, in which he criticized the Court’s finding of a consensus from a mere eighteen states, and the majority’s reliance on amici curiae, opinion polls, and the practices of other countries.\(^\text{281}\) Chief Justice Rehnquist observed that these sources were irrelevant to the constitutional question at hand and that the evolving-standards analysis should be based only on the conclusions of legislatures and sentencing juries.\(^\text{282}\) Preferring Penry’s rejection of such data, Chief Justice Rehnquist stated the following:

> [f]or the Court to rely on such data today serves only to illustrate its willingness to proscribe by judicial fiat—at the behest of private organiza-

\(^\text{274}\) Id. at 318–19.
\(^\text{275}\) Id. at 318.
\(^\text{276}\) Id. at 319.
\(^\text{277}\) Atkins, 536 U.S. at 319–20.
\(^\text{278}\) Id. at 320–21. The Court noted that the mentally retarded are more likely to give false confessions and are less able to effectively assist counsel in their defense. Id.
\(^\text{279}\) Id. at 321.
\(^\text{280}\) Id.
\(^\text{281}\) Id. at 321–22 (Rehnquist, C.J., dissenting). Neither Chief Justice Rehnquist’s nor Justice Scalia’s dissent counted the non-death-penalty states in the evolving-standards analysis. See id. at 321–22, 342 (Scalia, J., dissenting).
\(^\text{282}\) Id. at 322–24 (Rehnquist, C.J., dissenting).
tions speaking only for themselves—a punishment about which no across-the-board consensus has developed through the workings of normal democratic processes in the laboratories of the States.283

Justice Scalia began his dissent by noting not only the absence of any textual basis for the majority's decision but also the absence of real evidence of a national consensus.284 After restating the facts of the case, Justice Scalia addressed the two categories of Eighth Amendment jurisprudence: those punishments that were considered "cruel and unusual" at the time the Bill of Rights was adopted and those that are inconsistent with the evolving standards of decency.285

Like the Court in Penry, Justice Scalia analogized that the severely mentally retarded were known as "idiots" in 1791 and that less severe cases of retardation qualified for capital punishment during that era.286 As for evolving standards, Justice Scalia criticized the majority for "miraculously extract[ing] a 'national consensus' . . . from the fact that [eighteen] States—less than half ([forty-seven percent]) of the [thirty-eight] States that permit capital punishment [ ]—have very recently enacted legislation barring execution of the mentally retarded."287 Scalia emphasized that, because forty-seven percent of death penalty states did not yield a consensus, it was no wonder that the majority did not emphasize the number of states but, instead, noted a trend toward abolition.288 Justice Scalia reasoned that the infrequent execution of the mentally retarded was not reliable evidence for the majority's national consensus analysis; instead, he argued that the infrequency was most likely due to the mentally retarded comprising only a fraction of the population and to sentencing juries' uses of mental retardation as a mitigating factor.289

In complete agreement with Chief Justice Rehnquist, Justice Scalia noted that "the [p]rize for the Court's [m]ost [f]eble [e]ffort" to create a national consensus went to the majority's footnoted appeal to various professional organizations, the practices of other nations, and opinion polls.290 Next, Justice Scalia cited his dissent in Thompson to address his view that the real basis of the majority opinion was the subjective beliefs of the majority.291 Justice Scalia attacked the two premises of the Court's opinion, observing that the Eighth Amendment had never been concerned with exces-

283. Atkins, 536 U.S. at 326.
284. Id. at 337–38 (Scalia, J., dissenting).
285. Id. at 339–40.
286. Id. at 340–41.
287. Id. at 342.
288. Id. at 343, 344 (emphasis added).
289. Atkins, 536 U.S. at 347.
290. Id. at 348.
291. Id.
sive punishments but with torturous and barbaric practices like "the rack and the thumbscrew."\(^{292}\) Furthermore, Justice Scalia criticized the Court’s presumption that judges and juries are unable to properly use mental retardation as a mitigating factor in sentencing.\(^{293}\)

As for retribution, Justice Scalia uncovered no evidence for the general proposition that mentally retarded offenders were categorically no more culpable than the average murderer.\(^{294}\) Similarly, Justice Scalia discovered no basis for the Court’s deterrence analysis because the majority stated that the mentally retarded were only "less likely" to weigh the consequences of their actions.\(^{295}\) Thus, if at least some of the mentally retarded were deterred by the possibility of capital punishment, then the practice was adequately vindicated.\(^{296}\)

IV. REASONING

In \textit{Roper v. Simmons},\(^{297}\) the United States Supreme Court held that the Eighth Amendment’s prohibition of cruel and unusual punishments included the execution of juvenile offenders who were under the age of eighteen at the time they committed their capital crime.\(^{298}\) Justice Anthony Kennedy wrote for the majority, which also consisted of Justices Stevens, Souter, Ginsburg, and Breyer.\(^{299}\) The Court largely mirrored its approach in \textit{Atkins}, finding that a national consensus had emerged since \textit{Stanford} and also that the death penalty was a disproportionate punishment for juveniles as a class.\(^{300}\) Furthermore, the majority discussed the danger of having juries make determinations about culpability when the offender was in such a transient period of psychological and cognitive development.\(^{301}\) Finally, the majority emphasized that the United States was the only country in the world that continued to officially sanction the juvenile death penalty.\(^{302}\)

Justice Stevens filed a short concurring opinion in which he championed the evolving-standards test over an original-intent approach to the Eighth Amendment.\(^{303}\) Justice O’Connor filed a dissent in which she condemned the majority’s approach to the constitutional question but not the ma-
majority's application of the approach or the outcome. Justice Scalia filed a separate dissenting opinion in which he disputed that a national consensus against the practice existed, and he argued that juries are fully capable of making individualized determinations about the proportionality of punishment. Justice Scalia also rejected the scientific evidence relied on by the majority, and he stated that the practices of other nations were irrelevant.

A. Majority Opinion

Justice Kennedy delivered the opinion of the Court and began the analysis by discussing the relevant, controlling authority from the Court's Eighth Amendment jurisprudence. The majority cited the plain language of the Eighth Amendment and the modern doctrinal rules for Eighth Amendment analysis from Weems and Trop. Then, the Court discussed how it had applied these principles in Thompson, Stanford, Penry, and Atkins. The majority emphasized that the Atkins Court returned to the rule predating Stanford that "the Constitution contemplates that in the end [the Justices'] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."

Having set the stage for considering the present case, the majority reasoned that evidence of a national consensus against the juvenile death penalty largely paralleled the evidence used by the Atkins Court to determine whether a national consensus existed against the death penalty for the mentally retarded. The majority observed that Atkins discovered eighteen states against the death penalty for the mentally retarded and that a similar eighteen states currently prohibited the execution of juveniles. When the Court added the twelve abolition states to these eighteen, a total of thirty states prohibited the death penalty for both classes of offenders. Next, the majority noted the infrequency with which the remaining twenty states had

304. Id. at 587–607 (O'Connor, J., dissenting).
305. Id. at 609, 620 (Scalia, J., dissenting).
306. Id. at 617, 622.
307. Id. at 560–64 (majority opinion).
308. See supra notes 133–45.
309. Roper, 543 U.S. at 560–61; see supra notes 146–57.
310. See supra notes 167–214.
311. See supra notes 215–54.
312. See supra note 258.
313. Roper, 543 U.S. at 561–63.
314. Id. at 563 (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality)).
315. Id. at 564.
316. Id.
317. Id.
executed the mentally retarded and compared this fact to the similar infrequency of these states in executing juveniles.\textsuperscript{318}

The Court did note, however, one difference regarding the rate of abolition between the execution of the mentally retarded and juveniles.\textsuperscript{319} Atkins observed that sixteen additional states enacted legislation barring the execution of the mentally retarded since the Court decided Penry.\textsuperscript{320} In contrast, only five states had ceased executing juveniles since the Court decided Stanford.\textsuperscript{321} The Court suggested that the reason for this change was that many states had recognized the inappropriateness of executing juveniles before the Court decided Stanford.\textsuperscript{322} Also, the Court noted that no state since either Penry or Stanford had reinstated the death penalty for mentally retarded or juvenile offenders, respectively.\textsuperscript{323} In support of its reasoning, the Court cited Atkins for the proposition that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”\textsuperscript{324}

The majority concluded its national-consensus analysis by noting three facts: (1) a majority of states have rejected the death penalty for juveniles; (2) the practice is infrequent where it remains in effect; and (3) a trend has developed in the direction of abolition.\textsuperscript{325} Therefore, the Court concluded that society viewed juveniles as generally less culpable than adults.\textsuperscript{326}

The majority cited its death-penalty jurisprudence for the well-settled proposition that a sentence of death has always been reserved for a narrow category of crimes and imposed on a narrow class of offenders.\textsuperscript{327} After reviewing scientific data, the Court cautioned against characterizing juveniles as the worst offenders because of the following: (1) juveniles are more immature and irresponsible than adults; (2) they are more susceptible to negative influences; and (3) their personalities are less fixed than the personalities of adults.\textsuperscript{328} In Thompson, the Court recognized these same principles and applied them to its prohibition of the death penalty for offenders under

\begin{itemize}
\item \textsuperscript{318} Id.
\item \textsuperscript{319} Roper, 543 U.S. at 565.
\item \textsuperscript{320} Id. at 565.
\item \textsuperscript{321} Id.
\item \textsuperscript{322} Id. at 566–67.
\item \textsuperscript{323} Id. at 566.
\item \textsuperscript{324} Id.
\item \textsuperscript{325} Roper, 543 U.S. at 567; see generally Jeffrey Fagan et al., The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms, 95 J. CRIM. L. & CRIMINOLOGY 427 (2005). Fagan employed empirical models to explain why the juvenile death penalty is such a rare occurrence, and he used this data to prove the emergence of a societal norm against the juvenile death penalty. Fagan et al., supra, at 429–31.
\item \textsuperscript{326} Roper, 543 U.S. at 567.
\item \textsuperscript{327} Id. at 568–69.
\item \textsuperscript{328} Id. at 569–70.
\end{itemize}
the age of sixteen at the time of the crime. The majority held that this same reasoning applies to all juvenile offenders under the age of eighteen.

Once the Court established the diminished culpability of juveniles in general, it addressed whether the penal justifications of retribution and deterrence applied to juveniles. In Atkins, the Court held that the diminished capacity of the mentally retarded made them less culpable and, therefore, inappropriate candidates for the death penalty. Similarly, the Roper majority reasoned that this form of retribution was not appropriate as applied to the lesser culpability of juvenile offenders. As for deterrence, the Court followed its reasoning in Thompson in which the plurality surmised that juveniles generally do not conduct a cost-benefit analysis of their actions. Therefore, the Court concluded that neither penal goal provided adequate justification for the juvenile death penalty.

The majority recognized but disagreed with the petitioner's argument that at least some juveniles exhibit sufficient maturity and depravity of mind to qualify for the death penalty. The majority observed that the differences between juveniles and adults are too substantial to risk the death penalty. The Court noted the danger that juries could sentence juvenile offenders to death for cold-blooded murder without giving appropriate consideration not only to the mitigating factor of youth but also to the juvenile's lesser culpability in general. Similarly, the Court highlighted the danger of prosecutors using the mitigating factor of youth as an aggravator, as it was used in this case. The Court also pointed out that the practice of the American Psychiatric Association prohibited psychiatrists—with all of their clinical expertise—from diagnosing juveniles under eighteen with antisocial personality disorder. Thus, the majority reasoned that if psychologists and psychiatrists could not agree on whether a juvenile crime was the result of tran-

329. Id. at 570-71.
330. Id. at 571.
331. Id.
332. Roper, 543 U.S. at 571.
333. Id.
334. Id.
335. Id. at 571-72.
336. Id. The petitioners asserted that the penalty was normally sought on a case-by-case basis and that jurors already appropriately considered age as a mitigating factor. Id. Furthermore, in arguing against a categorical rule, the petitioners pointed to the Court's own cases in which aggravating and mitigating factors must be considered in death-penalty cases. See id. at 572.
337. Id. at 572-73.
338. Roper, 543 U.S. at 573.
339. Id.
340. Id.
sient immaturity or irreparable corruption, then juries should not be asked to consider the death penalty for juveniles.\textsuperscript{341}

The majority overruled \textit{Stanford} and concluded that the logic of \textit{Thompson} extended to those offenders who were under eighteen at the time of their crimes.\textsuperscript{342} Furthermore, the majority stated that \textit{Stanford}’s national consensus analysis was incomplete because it did not consider the twelve states that prohibited the death penalty outright.\textsuperscript{343} As an additional justification for overruling \textit{Stanford}, the majority observed that \textit{Stanford} rejected the principle from earlier Eighth Amendment cases that the Court must “bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders.”\textsuperscript{344}

Finally, the Court recognized that the United States remained the only country in the world that officially sanctioned the juvenile death penalty.\textsuperscript{345} The majority was careful to point out that this fact, while not dispositive, was a stark reality.\textsuperscript{346} In addition, the majority cited several previous cases in which the Court referred to the laws of other nations to guide its decision in interpreting the Eighth Amendment.\textsuperscript{347} The majority emphasized that virtually all European nations prohibited the death penalty for juveniles and that the United States joined Somalia as the only two states that had not ratified the United Nations Convention on the Rights of the Child.\textsuperscript{348} The majority noted that only seven other countries had executed juvenile offenders: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China.\textsuperscript{349} The majority added that all of these nations had either abolished the juvenile death penalty or publicly disavowed the practice since 1990.\textsuperscript{350}

In conclusion, the Court observed that there are certain fundamental rights preserving the dignity of man inherent in our Constitution, and it is important to recognize how other nations demonstrate these rights.\textsuperscript{351} The majority held that the Eighth Amendment prohibits the imposition of the
death penalty on juvenile offenders who were under eighteen at the time of their capital crime.\footnote{352}

B. Justice Stevens’s Concurring Opinion

Justice Stevens’s concurrence comprised only a few sentences.\footnote{353} He emphasized that the Court’s holding reaffirmed the principle that the interpretation of the Eighth Amendment is guided by the evolving standards of decency.\footnote{354} Citing \textit{Stanford}, Justice Stevens added that if the meaning of the provision was frozen in the common law of 1791, then it would theoretically allow the execution of a seven-year-old.\footnote{355} Justice Stevens concluded by noting that the principle that “the Constitution does change from time to time has been settled since [Chief Justice] John Marshall breathed life into its text [in \textit{Marbury v. Madison}].”\footnote{357}

C. Justice O’Connor’s Dissenting Opinion

Justice O’Connor determined that neither the evidence of national consensus nor the proportionality analysis sufficed to justify the Court’s new categorical rule.\footnote{358} Justice O’Connor demanded a clearer showing of national consensus before she would accept a new rule forbidding the practice.\footnote{359} Also, Justice O’Connor noted that the Court did not sufficiently address the argument that at least some seventeen-year-old murderers are mature enough to be death-penalty eligible.\footnote{360}

Justice O’Connor did not take issue with the majority’s general principles of Eighth Amendment interpretation.\footnote{361} Furthermore, she supported the Court’s reaffirmation of the notion that the Court must ultimately decide whether the death penalty is appropriate for a particular class of offenders.\footnote{362} Justice O’Connor cited her concurrence in \textit{Thompson} in which she conceded that a national consensus existed, but she was reticent to impose a categorical rule without a clearer showing from the states.\footnote{363} Similarly, Justice O’Connor reiterated her general criticism of the Court’s moral proportional-

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\begin{itemize}
\item \footnote{352}{Id. at 578.}
\item \footnote{353}{Id. at 587 (Stevens, J., concurring).}
\item \footnote{354}{Id.}
\item \footnote{355}{Id.}
\item \footnote{356}{5 U.S. (1 Cranch) 137 (1803).}
\item \footnote{357}{\textit{Roper}, 543 U.S. at 587 (Stevens, J., concurring).}
\item \footnote{358}{Id. (O’Connor, J., dissenting).}
\item \footnote{359}{Id at 588.}
\item \footnote{360}{Id.}
\item \footnote{361}{Id.}
\item \footnote{362}{Id. at 590.}
\item \footnote{363}{\textit{Roper}, 543 U.S. at 591.}
\end{itemize}}
ity analysis because the Court did not show in Thompson or in the case at bar that at least some of these offenders are capable of the culpability required for the death penalty.364

Justice O’Connor pointed out that the persuasive wave of legislation between Penry and Atkins barring the death penalty for the mentally retarded led the Court to conclude that a national consensus existed against the practice.365 More importantly, Justice O’Connor stated that the Court’s moral-proportionality analysis was dispositive in Atkins because the Court reviewed convincing evidence that showed the sub-average cognitive and intellectual functioning of the mentally retarded.366 The Court, therefore, concluded in Atkins that the death penalty was disproportionate when applied to the mentally retarded.367

Justice O’Connor criticized the Court’s failure to even acknowledge the Missouri Supreme Court’s refusal to follow Stanford, and she stated that this failure was “clear error” apart from the constitutional issue.368 Furthermore, she emphasized that it is “this Court’s prerogative alone to overrule one of its precedents.”369 Justice O’Connor observed that by simply affirming the lower court, the decision may invite more “disruptive reassessments of our Eighth Amendment precedents.”370

Next, Justice O’Connor agreed that the evidence of national consensus was similar to Atkins in regard to the numbers, but she determined that the evidence of national consensus was weaker in other respects.371 Specifically, Atkins noted significant evidence of opposition to the practice of executing the mentally retarded and the absence of any actual support for the practice.372 In the case at bar, there were some states that had specifically set sixteen or seventeen as the minimum age for death-penalty eligibility and other states that qualified these offenders for the death penalty through juvenile transfer statutes.373 Thus, the same trend in Atkins toward abolition of capital punishment for the mentally retarded was not present in the states’ treatment of juvenile offenders.374 Furthermore, Justice O’Connor noted that the Court’s evidence of national consensus was weaker than in other cases

364. Id.
365. Id. at 592.
366. Id. at 593.
367. Id.
368. Id. at 593–94.
369. Roper, 543 U.S. at 594.
370. Id.
371. Id. at 595.
372. Id.
373. Id. at 596–97.
374. Id. at 596.
in which the Court prohibited certain punishments under the Eighth Amendment.\textsuperscript{375}

Justice O'Connor also reasoned that the moral proportionality argument in the current case was not persuasive.\textsuperscript{376} She addressed the premise of the majority's proportionality analysis, seeing no solid evidentiary basis for the categorical exemption of this class of offenders.\textsuperscript{377} First, the premise that all juveniles are generally less culpable than adults would not mean that certain seventeen-year-olds could never be mature enough to qualify for the death penalty.\textsuperscript{378} Second, Justice O'Connor found unpersuasive the Court's deterrence argument because the broad conclusion that juveniles are less likely to be deterred by the threat of death implied that at least some of these offenders would be deterred.\textsuperscript{379} In fact, Justice O'Connor considered the case at bar to be just such a case because Simmons declared that he could murder and get away with it because of his age.\textsuperscript{380} Simmons's calculation suggested that he did indeed weigh the risks involved, and this is precisely the type of individualized consideration appropriate for a sentencing jury.\textsuperscript{381} Another problem that Justice O'Connor had with the majority's proportionality argument was that the difference in maturity between adults and juveniles was premised in the aggregate, and this universal difference fell apart when comparing individuals.\textsuperscript{382}

Justice O'Connor also found troublesome the Court's comparison of the juvenile's culpability level to that of the mentally retarded individual.\textsuperscript{383} 

\textit{Atkins} held that the mentally retarded were cognitively and behaviorally deficient by definition.\textsuperscript{384} In addition, the mentally retarded are not merely less blameworthy or less deterred, as the Court concluded for juveniles.\textsuperscript{385} Rather, the mentally retarded have such demonstrated impairments that the death penalty will not fit their culpability level.\textsuperscript{386} As for juveniles, Justice O'Connor stated that they do not suffer from the same mental impairments

\begin{thebibliography}{9}
\bibitem{375} \textit{Roper}, 543 U.S. at 597.
\bibitem{376} \textit{Id.} at 598.
\bibitem{377} \textit{Id.} at 599.
\bibitem{378} \textit{Id.} In fact, the majority conceded this point but still considered the categorical rule necessary because it was persuaded that the differences between juveniles and adults were too well established. \textit{Id.}
\bibitem{379} \textit{Id.} at 600.
\bibitem{380} \textit{Id.} 600--01.
\bibitem{381} \textit{Roper}, 543 U.S. 601.
\bibitem{382} \textit{Id.} at 601, 607.
\bibitem{383} \textit{Id.} at 602.
\bibitem{384} \textit{Id.}
\bibitem{385} \textit{Id.}
\bibitem{386} \textit{Id.}
\end{thebibliography}
as the mentally retarded and that comparing the two classes "defies common sense." 387

Justice O'Connor concluded that the national consensus was "marginally weaker" here and required a clearer showing before a new rule would be appropriate. 388 For Justice O'Connor, the proportionality argument in Atkins supported a categorical rule because the proven impairments of the mentally retarded made it "highly unlikely" that they could act with a level of culpability sufficient to deserve death. 389 Here, a bright-line rule for juveniles was not required because the state legislatures could reasonably conclude that certain sixteen and seventeen-year-olds would be mature enough to be eligible for the death penalty. 390 Furthermore, the majority cited no evidence to support the proposition that sentencing juries are incapable of weighing the mitigating factor of youth. 391

D. Justice Scalia's Dissenting Opinion

Justice Scalia began by noting that the majority ignored the first step in an Eighth Amendment analysis: to determine whether the punishment in dispute was one of the "modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." 392 Justice Scalia reasoned, therefore, that the original meaning of the provision did not prohibit the execution of sixteen and seventeen-year-olds. 393 Furthermore, Justice Scalia noted the common law rebuttable presumption that theoretically permitted the execution of offenders as young as age seven. 394

Justice Scalia's dissent quickly pointed out how the majority turned its minority consensus into a "faux majority." 395 His dissent determined that the eighteen states that had set the minimum age at eighteen comprised only forty-seven percent of the thirty-eight jurisdictions that allowed the death penalty. 396 His dissent also reasoned that the twelve states that had abolished the death penalty altogether shed no light on whether juvenile offenders should be categorically exempt. 397 Justice Scalia pointed out that the Court

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387. Roper, 543 U.S. at 602.
388. Id. at 606.
389. Id.
390. Id.
391. Id. at 606–07. Justice O'Connor recognized that, although the prosecution used youth as an aggravating factor at sentencing, the conduct was not specifically challenged in the lower courts or raised in certiorari to the Court. Id. at 603.
392. Id. at 609 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (Scalia, J., dissenting)).
393. Roper, 543 U.S. at 609.
394. Id.
395. Id. at 611.
396. Id. at 611.
397. Id. at 611.
did not count the abolition states in any of the previous cases in which the Court exempted a category of crimes or offenders from capital punishment. 398

Next, Justice Scalia compared the pronounced shift in legislative action from Penry to Atkins in which sixteen states banned the execution of the mentally retarded to the mere four states that abolished the death penalty for juveniles since Stanford. 399 Justice Scalia reasoned that the reliance on these numbers was undermined by the fact that many state legislatures had expressly affirmed their support for the juvenile death penalty since the Court decided Stanford. 400 Furthermore, he was not persuaded by the infrequency of juvenile executions because juveniles commit a fraction of capital crimes, and sentencing juries are required, under the Court’s rulings, to consider youth as a mitigating factor. 401

Next, Justice Scalia rejected the majority’s pronouncement that the Court had returned to the pre-Stanford rule in which the Court must ultimately judge whether a particular punishment is proportional to the culpability level of the offender. 402 Justice Scalia observed that this “supposed rule” was previously reflected only in dicta and never in holding. 403 Further, he noted that this notion was flatly repudiated in Stanford because there was no foundation in law or logic that members of the Court should prescribe the appropriate standards for society. 404 Justice Scalia adhered to principles of legislative primacy and rejected the majority’s and Justice O’Connor’s view that a moral-proportionality argument can ultimately override legislative judgments. 405

Justice Scalia suggested that the Court simply picked scientific and sociological studies that opposed the juvenile death penalty without explaining the methodology used or why such evidence was appropriate on certiorari when it was not tested as evidence in the trial court. 406 In fact, Justice Scalia noted two separate studies authored by the American Psychological Association: one, relied on by the petitioner, detailed the juvenile’s general lack of moral responsibility, and the other study, from a previous case before the

398. Id.
399. Roper, 543 U.S. at 611–12. Justice Scalia did not count the state of Washington as part of the majority’s five-state tally because the ban in Washington was a result of the Washington Supreme Court’s construction of the state’s death-penalty statute, not the result of a legislative action. Id. at 612. The state court found the statute unconstitutional because it did not specify a minimum age. Id.
400. Id. at 613.
401. Id. at 614.
402. Id. at 615.
403. Id.
404. Id. at 615–16.
405. Roper, 543 U.S. at 616.
406. Id. at 617.
Court, took the opposite position.\textsuperscript{407} He was not persuaded that these studies trumped the individualized attention that state legislatures and sentencing juries gave to the juvenile death-penalty issue.\textsuperscript{408}

Echoing Stanford, Justice Scalia observed that society's statutes defined age limitations in gross and that individualized tests were not conducted for these laws.\textsuperscript{409} The criminal justice system did, however, conduct such individual analysis for each defendant in capital cases.\textsuperscript{410} Furthermore, the majority's conclusion that juries are not capable of weighing a defendant's youth against his offense undermined the foundations of the capital-sentencing system.\textsuperscript{411} Moreover, Justice Scalia observed that the system trusts juries to make difficult human judgments that are not suitable for codification into statute and to build discretion and flexibility into the legal system.\textsuperscript{412} Justice Scalia dismissed the majority's conclusion that the penal goals of the death penalty were not served by executing juveniles because the very case at bar demonstrated that Simmons calculated the risks involved.\textsuperscript{413}

Justice Scalia noted that while the views of American legislatures and juries were almost irrelevant to the majority, the views of the international community "[took] center stage."\textsuperscript{414} He observed that the majority seemed willing to believe that these nations, despite their possible tyrannical political make-up or incompetent court systems, actually adhered to their bans on juvenile executions.\textsuperscript{415} In addition, the majority did not analyze the other crimes that elicit mandatory death sentences in the nations that still have the

\begin{thebibliography}{9}
\bibitem{407} Id.
\bibitem{408} Id. at 619.
\bibitem{409} Id. at 620.
\bibitem{410} Id.
\bibitem{411} Roper, 543 U.S. at 620.
\bibitem{412} Id.
\bibitem{413} Id. at 621; see generally Mitchel Brim, A Sneak Preview into How the Court Took Away a State's Right to Execute Sixteen and Seventeen-Year-Old Juveniles: The Threat of Execution Will No Longer Save an Innocent Victim's Life, 82 Denv. U. L. Rev. 739 (2005). This author attacked the scientific data relied on by the Roper majority as being inconclusive and irrelevant to the question of whether the penal goals of the death penalty are adequately served by executing juveniles. Brim, supra, at 744. Brim proposed that the evolving-standards test is arbitrary, and, echoing Justice Scalia's dissent in Roper, that the Roper majority failed to inquire whether the punishment was one of the "modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." Id. at 749, 752 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).
\bibitem{414} Roper, 543 U.S. at 622 (Scalia, J., dissenting).
\bibitem{415} Id. at 623.
\end{thebibliography}
adult death penalty.\textsuperscript{416} Justice Scalia reiterated his position that foreign law has no place in American Eighth Amendment jurisprudence.\textsuperscript{417}

Finally, Justice Scalia's dissent took issue with the majority's failure to admonish the Missouri Supreme Court for blatantly disregarding the Court's precedent in \textit{Stanford}.\textsuperscript{418} He stated that it is this Court's duty alone to overrule precedent.\textsuperscript{419} Furthermore, Justice Scalia reasoned that allowing lower courts to reinterpret the Eighth Amendment when they decided that enough time had passed undermines the force of the Court's opinions.\textsuperscript{420}

V. SIGNIFICANCE

\textit{Roper v. Simmons} was a controversial decision even though the practice of executing juveniles was already a very rare occurrence.\textsuperscript{421} The holding simply added two years to the decision in \textit{Thompson}; thus, it is now unconstitutional to execute any juvenile offender who was under eighteen at the time of the crime. The decision is considered to be exactly right by some but completely arbitrary by its opponents—a case of the ends justifying the means for anti-death penalty advocates.\textsuperscript{422}

A. \textit{Roper} Criticism

One critic observed that, instead of referring to international practice as a mere indicator as in \textit{Thompson}, the \textit{Roper} majority changed course and cited foreign practice as confirmation of what human dignity requires in the United States.\textsuperscript{423} Thus, aside from the challengeable national consensus analysis and trend toward abolition, the critic suggested that the Court set the stage to render the death penalty unconstitutional based not only on legislative trends but also on the Court's new objective indicia of the infrequency of execution and general consensus abroad.\textsuperscript{424}

\begin{footnotesize}
\begin{enumerate}
\item[416.] \textit{Id.}
\item[417.] \textit{Id.} at 624. Still on the subject of foreign laws, Justice Scalia pointed to the inconsistency of the Court's abortion jurisprudence because the United States is one of six countries that retains "abortion on demand" until the fetus is viable. \textit{Id.} at 625.
\item[418.] \textit{Id.} at 628–29.
\item[419.] \textit{Id.} at 629. The dissent also stated that the majority's decision is nothing more than the current Justices' views of a snapshot of American public opinion. \textit{Id.}
\item[420.] \textit{Roper}, 543 U.S. at 630.
\item[421.] \textit{Id.} at 564–65 (majority opinion). The Court observed that only six juvenile offenders were executed since \textit{Stanford}—three in the last ten years. \textit{Id.}
\item[424.] \textit{Id.} at 20.
\end{enumerate}
\end{footnotesize}
An infuriated Alabama Supreme Court judge wrote an opinion piece in a Birmingham newspaper in which he beseeched his colleagues to "actively resist" the ruling and lambasted the Roper majority for its "blatant judicial tyranny." Some judges and prosecutors in Texas argued that—despite the clear chronological-age rule—the holding would not apply in the state because its criminal law deemed all seventeen-year-olds to be adults, and the state’s death-penalty law explicitly made seventeen-year-olds death-penalty eligible. Is the evolving-standards test an unprincipled method, or is it the best way to approach Eighth Amendment claims?

B. Academic Discussion

For legal scholars and Supreme Court groupies, the decision is a great demonstration of the Court’s struggle to interpret textually vague provisions of the Constitution. Beneath the majority and dissenting opinions in Roper lie primarily two differing approaches to interpreting the Eighth Amendment’s prohibition of cruel and unusual punishments: historicism and originalism. Generally, originalists address the problem of vague constitutional text by considering the Framers' intentions in adopting the language. An originalist adheres to the idea that a constitutional provision is a command from the legislative body that should be properly superseded only by that legislative body. In contrast, historicists address textual vagueness by reviewing the changing social values that are relevant to the text at issue, rejecting mere transient changes, and giving constitutional endorsement to those changes that have achieved wide consensus. The evolving-standards test falls squarely within the latter category.

In contemporary jurisprudence, the Court interprets the provision based on the evolving-standards test set forth in Trop. Justice Scalia applied the evolving-standards principle in writing for the majority in Stanford, but when writing for himself in Roper, he criticized the majority’s use of the test

427. Heffernan, supra note 132, at 1367. Heffernan defines "historicism" as viewing the provisions of the Constitution as enduring principles to be applied in light of historical change and present practice. Id. at 1361. Heffernan distinguishes historicism from the advocates of a "living constitution," although the two theories are obviously similar. See id. at 1369.
428. Id.
429. Id. at 1370.
430. Id. at 1367. Heffernan cited Weems and Trop as the “historicist framework” that guides modern interpretation of the provision. Id. at 1378–80.
431. Id. at 1355, 1371–72.
because it deviated from the original meaning.\textsuperscript{432} One must keep in mind that the paucity of evidence regarding the Framers' intent in adopting the provision ensures that an originalist interpretation basically endorses any punitive practice short of torture that was common in 1791, including the theoretical execution of seven-year-olds.\textsuperscript{433} Thus, the evolving-standards test runs counter to originalism in the Eighth Amendment context because the principle does not account for any possible \textit{devolving} standards of decency in American society and does not allow for the possible discovery of scientific evidence that may be contrary to what the majority considered persuasive in \textit{Roper}. To illustrate, Justice Scalia asked the following to Simmons's counsel in oral argument: If new scientific evidence shows that seventeen-year-olds are as mature as their adult counterparts, could the "constitutional calculus ever move in the other direction?"\textsuperscript{434} Justice Scalia commented that "[i]t's sort of a one-way ratchet. Isn't it?"\textsuperscript{435}

State death-penalty laws form the foundation of the evolving-standards test. Thus, the majoritarian notion of national consensus is crucial in determining constitutionality under the test. The \textit{Roper} decision's national consensus fails without the support of the twelve states that ban the death penalty altogether. As both dissenting opinions demonstrated, the majority's national consensus is easily challengeable. The \textit{Roper} majority itself recognized this fact when it stood upon \textit{Atkins}'s observation that "[i]t is not so much the number of these states that is significant, but the consistency of the direction of change."\textsuperscript{436}

The propriety of using the non-death-penalty states in the national-consensus calculus may be a negative for the \textit{Roper} decision; however, Justice Scalia—in writing for himself in \textit{Thompson} and for the majority in \textit{Stanford}—used the nineteen death-penalty states that do not set minimum ages for the juvenile death penalty as implied support for it.\textsuperscript{437} As Justice Brennan pointed out in his \textit{Stanford} dissent—like Justice Stevens in \textit{Thompson}—there was no evidence that these legislatures explicitly authorized the execution of juveniles simply by the interplay between their capital statutes and juvenile-transfer statutes.\textsuperscript{438} Consequently, if the use of the twelve non-death-penalty states says nothing explicitly about the propriety of executing juveniles in those states and if the use of the nineteen non-minimum-age


\textsuperscript{433} \textit{See supra} Part III.B.2.

\textsuperscript{434} Transcript of Oral Argument at 18, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633).

\textsuperscript{435} \textit{Id}.


\textsuperscript{437} \textit{Stanford}, 492 U.S. at 372 n.3.

\textsuperscript{438} \textit{Id}. at 385 (Brennan, J., dissenting).
states says nothing affirmatively about the state legislatures' official positions on the juvenile death penalty, then perhaps the statistics cancel each other out and render *Roper* a "premature" decision.

The problem is that the national consensus in *Roper* is open to challenge because of the disagreement over which states to count, and the Court struggles to compensate for this by citing not only empirical data but also opinion polls and foreign practice—evidence previously not found in evolving-standards cases. Indeed, Justice Marshall stated in *Furman* that opinion polls are weak indicators because the interviewee is not usually making a fully-informed opinion on the matter.

C. The Weaknesses of an Originalist Interpretation of the Punishments Clause

Originalism is not a better alternative. Early in the twentieth century, the Court rejected the originalist approach in *Weems* and *Trop*—an interpretation that *Furman* and subsequent cases would continue to affirm decades later. For example, in one case, Justice Scalia searched the documentary record and discovered that some state constitutions that were adopted before ratification of the Bill of Rights placed the phrase in the disjunctive: "nor cruel or unusual punishments inflicted." In his attempt to find the most "plausible" reading of the clause, he reasoned that the Framers must have considered that the clause established two independent conditions by use of the word "or." Under this reading of the clause, innovations in punishment that minimized pain, like the electric chair in *Kemmler*, would be "unusual," even if not cruel. Thus, employing this approach, an originalist interpretation of *Kemmler* may have rendered electrocution unconstitutional. Furthermore, there is debate in the record—from both opponents and defenders of the phrase—that "cruel and unusual" is not a term of art, but a vague and perhaps unnecessary phrase. Therefore, for Eighth Amendment purposes, the previous example demonstrates that an originalist

439. In *Roper*, Justice Scalia pointed out that the states of Missouri and Virginia explicitly set sixteen as the minimum age after *Stanford*, and he also argued that Arizona and Florida essentially did the same by ballot initiative. *Roper*, 543 U.S. at 613–14.
443. *Id.* at 1373.
444. See *supra* Part III.B.1.
446. *Id.* at 1375.
risks error in attempting to deduce plausible meanings from a complex and inconclusive historical record that can easily be subject to a one-sided analysis.\footnote{448}

In his \textit{Roper} dissent, Justice Scalia advocated his originalist position and then proceeded to argue why the majority’s evolving-standards test was half baked. In addition to tolerating the theoretical execution of a seven-year-old, an originalist resolution to the constitutional issue in \textit{Roper} is problematic for another reason. Legislative primacy is a fundamental principle of originalism, as Justice Scalia noted in his dissent.\footnote{449} Indeed, Justice Scalia addressed the “mistaken” evolving-standards jurisprudence at the outset of his dissent.\footnote{450} Thus, he would defer to Congress the moral question of whether the juvenile death penalty is acceptable to society. Who could argue against this patently democratic proposition in the abstract? From a practical perspective, however, this deferral to Congress would essentially render the juvenile-execution issue unresolved. The constitutional amendment process requires a bill to be passed by both houses of Congress by a two-thirds majority and then requires approval by three-fourths of the states.\footnote{451} Accordingly, in the context of interpreting the meaning of the Eighth Amendment’s prohibition of cruel and unusual punishments, an originalist approach not only contemplates an absurd possibility, it also allows its proponents to defer to Congress a question that would never realistically be resolved through the Article V amendment process, while allowing its proponents to criticize the evolving-standards alternative as unprincipled. Interestingly, a constitutional amendment, if it made it to the states, would obviously include the twelve abolition states that have caused so much disagreement in the Court’s evolving-standards jurisprudence.

Assuming that a constitutional amendment could survive both houses of Congress, the states would ultimately decide the fate of the amendment under Article V. The Court’s evolving-standards test seems to be an attempt to do the same thing by counting the states, except in a much more realistic way. The standard allows the Court to decide the legal question, instead of deferring the question to Congress in which case the issue would likely die on a moral battlefield.

\footnote{448}{Heffernan, \textit{supra} note 132, at 1375.}
\footnote{449}{\textit{Roper} v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting).}
\footnote{450}{\textit{Id.} at 608.}
\footnote{451}{UNITED STATES \textit{CONST.} art. V.}
D. The Better Approach to the Eighth Amendment: Evolving Standards

Morality is at the heart of the Roper decision. Not only did the Court employ a legal standard that attempted to rest upon the moral calculations of state legislatures, the Court also engaged in a controversial moral-proportionality analysis of the deterrent and retributive goals of the death penalty—an analysis that prompted Justice Scalia to criticize the majority’s role as moral arbiter for American society. Moreover, the Court looked to foreign practices as confirmation of its decision. It is not a focus of this note to address either of these controversial issues. As noted above, however, perhaps less criticism of the Court’s use of these other arguments would have accrued if the evolving-standards’ indicia of national consensus was solidly against the practice. These other arguments could have played a more supportive, rather than central, role.

But, the Court did invite controversy by attempting to decide a legal question that was inextricably linked to a moral issue. Accordingly, the evolving-standards test became a part of the moral controversy itself. From a contemporary perspective, it is arguably a non-controversial assumption to conclude that American death-penalty proponents would view the execution of a seven-year-old murderer as unacceptable or immoral. On the other hand, it is probably a safe assumption to conclude that it would be unacceptable to take the death penalty off the table for an eighteen-year-old capital murderer. Logically, then, the answer must be somewhere in the middle. This middle-ground is the realm of the evolving-standards test, while an originalist interpretation remains frozen in 1791.

The question remains as follows: which states should be counted in the evolving-standards analysis besides the eighteen states that set a minimum age for execution? The answer depends on the inclusion or exclusion of the twelve abolition states. Roper marked the first time that the Court used the twelve abolition states in the calculation as opposition to the practice. Either the dissent in Roper is right—that these abolition states shed no light on the propriety of the juvenile death penalty—or the majority is right in concluding that juveniles are included within the general ban of capital punishment in these states. Whether it is the Court that interprets a constitutional provision or Congress that amends the Constitution, the latter process would count all of the states in the Article V vote, so perhaps it does make sense to include the abolition states in the tally.

The Supreme Court created the evolving-standards test to interpret the Eighth Amendment’s vague constitutional language, which becomes in-

452. “Morality” has been defined as “[t]he quality of being in accord with standards of right or good conduct.” AM. HERITAGE DICTIONARY 814 (2d College ed. 1985) (emphasis added).
creasingly abstract as our Nation grows and society’s conceptions of criminal punishment change. In the Eighth Amendment context, the evolving-standards test is simply a more realistic alternative to an original meaning interpretation and its premise of legislative primacy.

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