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## Supreme Court Watch

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# SUPREME COURT WATCH



By Reginald C. Oh

**O**n March 1, 2005, the U.S. Supreme Court issued an important and controversial decision regarding the constitutionality of the death penalty in *Roper v. Simmons*, 125 S. Ct. 1183 (2005). The Court held that the death penalty cannot be applied to individuals under the age of eighteen at the time the crime was committed without violating the Eighth Amendment's prohibition against cruel and unusual punishment.

The respondent, Christopher Simmons, committed a murder at the age of seventeen. He was tried and sentenced to death nine months after the murder, when he had turned eighteen years old. The Missouri Supreme Court initially denied Simmons' postconviction appeal, and the federal courts subsequently denied his petition for writ of habeas corpus. However, after the United States Supreme Court in 2002 rendered a decision holding that the Eighth and Fourteenth Amendments prohibited the execution of mentally retarded persons, see *Atkins v. Virginia*, 536 U.S. 304 (2002), Simmons filed a new petition for postconviction relief. He argued to the Missouri Supreme Court that the reasoning in *Atkins* also prohibits the execution of juveniles who were under the age of eighteen when they committed the crime. The Missouri Supreme Court agreed and set aside Simmons death sentence. The state appealed the decision to the U.S. Supreme Court, and the Court granted certiorari.

The Court, in a 5-4 decision authored by Justice Anthony Kennedy, upheld the Missouri Supreme Court and held that the Eighth Amendment prohibited the execution of juveniles under the age of eighteen. The critical issue for the Court was whether the earlier *Atkins* decision prohibiting the execution of the mentally retarded also applies to prohibit the execution of juveniles. The Court answered in the affirmative.

In conducting its Eighth Amendment analysis, the Court reasoned that, in order to determine whether "punishments are so disproportionate as to be cruel and unusual," 125 S. Ct. at 1190, the Court must look to the "evolving standards of

decency that mark the progress of a maturing society. . . ." *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)). The Court evoked the "evolving standards of decency" standard to defeat the standard originalist argument that the death penalty cannot be considered cruel and unusual since the death penalty was practiced when the Eighth Amendment was enacted. For the Court, the critical question is not to determine what practices were considered cruel and unusual in 1789, but to determine what practices are considered cruel and unusual in the present. For Justice Stevens, the Court's reaffirmation of the evolving standards of decency principle is "[p]erhaps even more important than our specific holding today," and he asserted that it is now well settled that "our understanding of the Constitution does change from time to time. . . ." *Id.* at 1205.

Of course, the task of ascertaining the moral standards of our time is a difficult one, a task that on first blush does not seem to provide objectively clear criteria for its determination. How exactly does the Court go about discerning current societal standards of decency? The Court answered the question by stating that the Eighth Amendment, "like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design." *Id.* at 1190.

In *Roper*, the Court examined three different sources in determining whether the evolving standards of decency prohibited the execution of juveniles: the Court examined (1) national trends in the death penalty practices of the states, (2) its own independent judgment about the proportionality of the death penalty as a punishment for the crimes of juveniles, and (3) the laws of other countries and international sources regarding the death penalty.

First, the Court concluded that the laws of the nation's legislatures show a clear national consensus morally disapproving of execution of juveniles. Based on precedent, the Court engaged in an objective analysis into the state of contemporary moral values regarding the death penalty. The Court examined the death penalty laws of state legislatures, which the Court considers as the "clearest and most reliable objective evidence of contemporary values" to ascertain if there is a national consensus on the morality of executing juveniles. *Id.* at 1207.

Specifically, the Court examined the number of states that prohibited the application of the death penalty to juveniles, the trends in the rates of abolition, and the number of juvenile executions in those states that permit execution of juveniles. The Court observed that thirty states prohibited the death penalty for juveniles. The thirty states included twelve states that have abolished the death penalty altogether and eighteen states that maintain the death penalty but prohibit its application to juveniles. *Id.* at 1192. For the Court, such



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statistics provided clear evidence of a national consensus against the application of the death penalty to minors.

Moreover, the Court also emphasized that in a span of fifteen years, five states had abandoned the death penalty for juveniles, and that in the past ten years, there have only been three executions of juveniles carried out in death penalty states.

Second, the Court then went on to make its own independent judgment on the cruel and unusual nature of executing juveniles. The Court essentially held that given the lack of maturity and underdeveloped sense of responsibility of juveniles, the death penalty effectively does not serve the goals of deterrence or retribution when applied to minors. Given "the susceptibility of minors to immature and irresponsible behavior," the Court reasoned that their actions are not as morally reprehensible as that of an adult. *Id.* at 1195. In addition, the Court concluded that it is not clear that the death penalty serves as a deterrent to juveniles who are not likely to engage in a rational, cost-benefit analysis about whether their actions may result in their execution. *Id.* at 1196.

Finally, and perhaps most controversially, the Court then examined international sources in supporting its conclusion that execution of minors violates the Eighth Amendment. The Court noted that, presently, the United States is the only nation in the world that officially sanctions the execution of minors. It then emphasized that there is overwhelming international consensus that execution of minors is against contemporary international values and norms, to show how the practice of the United States is out of step with the rest of the international community.

Whether one agrees with the Court's ultimate ruling, its rationale for holding that the execution of minors violates the Eighth Amendment is subject to criticism. First, the Court's evolving standards of decency criteria fails to account for the possibility that our standards of decency may *devolve* in the future. For example, a significant rise in the juvenile crime rate may create a strong demand for reinstitution of the death penalty for juveniles. If public opinion polls in several states strongly show support for execution of juveniles, must the

Court then reconsider its conclusion in *Roper* that national consensus exists on the impropriety of executing juveniles? Should the interpretation of the Eighth Amendment depend on the changing shifts and tides in the political climate of the several states? The Court seems to be under the presumption that "evolving standards of decency" will always evolve towards supporting more limitations on the death penalty, when there always is the chance that the standards of decency may devolve towards greater support of death penalty measures, especially in the post 9/11 world. Reliance on an ever-shifting assessment of national morals is a tenuous basis upon which to render a constitutional decision.

Second, the Court's reliance on international sources is highly questionable as a source of binding precedent. The Court similarly relied on international sources in striking down sodomy laws in *Lawrence v. Texas*, an opinion also authored by Justice Kennedy. However, the question also remains, should international law and morality influence American constitutional decision-making? The dissent, authored by Justice Scalia, excoriated the majority for relying on international sources, accusing it of relying on illegitimate sources in interpreting the Constitution. Justice Scalia's argument has merit, although in actuality, the reliance on international sources is probably there mostly for rhetorical effect rather than as legal precedent. The Court's opinion has greater persuasive force in the realm of public discourse when it points out that the United States was, up until the *Roper* decision, the only nation in the world that still officially sanctioned the execution of juveniles.

What, then, is the real constitutional basis for the Court's decision? Leaving aside the reliance on what state legislatures are doing about the death penalty and on international opinion, what is left of the Court's opinion is its independent judgment that the execution of minors is disproportionate punishment given the emotional and mental capacity of minor offenders. In making its judgment, the Court relied on psychological evidence confirming the conclusion that minors have different emotional and mental capacities when compared to adults. Moreover, that analysis is supported by precedent, given the Court's recent ruling in *Atkins* prohibiting the execution of the mentally retarded.

The question left wide open after *Roper* is the constitutionality of the death penalty itself. The *Roper* Court has basically provided an analytic framework that could eventually justify the conclusion that the death penalty as a whole violates the Eighth Amendment. That decision will likely not occur for some time, since a majority of states still practice the death penalty. However, international opinion is clearly against the death penalty, and the same analysis used to conclude that the death penalty is a disproportionate punishment for minor offenders actually could be used to conclude that the death penalty is a disproportionate punishment for adult offenders. Both *Atkins* and *Roper* have set up the possibility for the eventual abolition of the death penalty via a Court decision. The question is, if and when five Justices will use those cases to conclude that the death penalty itself is offensive to the norms and standards underlying the Eighth Amendment.

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