

SUBJECTIVITY AND THE
AMERICAN COURT:
AN ANALYSIS OF *ROPER V. SIMMONS*

*Benjamin P. Leavitt**

*ABSTRACT: As part of the larger juridical movement of incorporation, the Supreme Court ruled in *Roper v. Simmons* that the application of capital punishment to juveniles is cruel and unusual. The Court based this decision, a reversal of its earlier stance, on interpretational criteria from *Trop v. Dulles* and *Gregg v. Georgia*: “evolving standards of decency” as determined by national consensus and proportionality. Such a basis for justice, however, by its inherent self-contradiction, removes all confidence in the objective morality of law.*

* Benjamin Leavitt is a sophomore double-majoring in History and French with minors in National Security and Legal Studies. A native of Exeter, New Hampshire, he plans to pursue his M.A. and Ph.D. in history upon graduation from Grove City College.

INTRODUCTION

Criminal justice systems have great difficulty handling juvenile offenders. Two objectives compete as lawmakers attempt to secure justice: the first to give juveniles second chances, the second to keep the public safe.² This conflict becomes even more acute when the juveniles involved are guilty of especially heinous or violent crimes. Adults guilty of these crimes could be subject to capital punishment, yet many people have ethical reservations against applying such a sentence to juveniles. Over the past 25 years, the Supreme Court has addressed this issue through a series of cases, notably *Thompson v. Oklahoma* and *Stanford v. Kentucky*. These cases, applying the Eighth Amendment to the states through the Due Process Clause of the Fourteenth Amendment, have sought to determine exactly what “cruel and unusual punishment” means. Influenced by cases addressing capital punishment and the mentally impaired, including *Penry v. Lynaugh* and *Atkins v. California*, the Court established its final decision on juvenile offenders in 2005 with *Roper v. Simmons*. This case affirmed that capital punishment of juveniles *is* cruel and unusual, based on the moral consensus of the nation and the Court’s independent evaluation of proportionality. However, the Court’s flawed insistence on an evolutionary standard of morality compromises the nation’s historical basis of positive law on an objective natural law, thus threatening the stability of the entire legal system. Good laws require a foundation more stable than the turbulent and subjective

2 Lisa Ells, *Juvenile Psychopathy: The Hollow Promise of Prediction*, 105 *COLUM. L. REV.* 158, 158-170 (2005).

whims of the majority.

PRECEDENT FOR *ROPER V. SIMMONS*

Prior to any analysis of *Roper v. Simmons* and its immediate precedents, it is important to note the basis on which the Supreme Court has made decisions regarding capital punishment. These decisions are part of the larger juridical movement of incorporation, which has broadly established the responsibility of the Court to hold states accountable to a number of the protections found in the Bill of Rights. Early in the nation's history, as in the 1833 case of *Barron v. The Mayor and City Council of Baltimore*, the Court rejected the application of these protections to the states. Even after the creation of the Fourteenth Amendment, which had the potential to extend these rights through its Privileges and Immunities and Due Process Clauses, the Court chose in *The Slaughterhouse Cases* of 1873 not to do so. For more than 50 years after *Slaughterhouse*, the Due Process Clause remained a "general guarantee of procedural fairness in the legal process at the state level," until Justice Cardozo's opinion in *Palko v. Connecticut* radically changed the Court's application of that clause. After the *Palko* decision in 1937, the Court began to incorporate the rights found in the first eight amendments based on whether they were "implicit in the concept of ordered liberty." In 1962, the Court used *Robinson v. California* to incorporate the protection against cruel and unusual punishments as found in the Eighth Amendment, providing the key precedent necessary for the Court

to address the issue of capital punishment.³

Additional precedents for *Roper v. Simmons* include *Trop v. Dulles*, *Gregg v. Georgia*, and *Coker v. Georgia*. These cases addressed national consensus and the proportionality of the death penalty, adding to the framework of *Robinson*. *Trop* held in 1958 that the revocation of the citizenship of military deserters is cruel and unusual and thus unconstitutional. Behind this decision was reasoning that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Such evolving standards reappeared in 1976, when the Court produced a “two-pronged test” in *Gregg* to determine whether a particular death sentence was cruel and unusual. The first test sought a “national consensus” within then-current moral values, which had evolved from the values in place at the time of the Eighth Amendment’s ratification. On this count, because a majority of states provided for the death penalty by law, the Court ruled that national consensus supported such punishment. Second, the Court stated that punishments must “accord with the dignity of man,” that punishments must be proportionate to the associated crimes. In this regard, the Court determined that the death penalty is proportionate with first-degree murder. Finally, in 1977, *Coker* addressed the death penalty as a punishment for rape. Building on the logic of *Trop* and *Gregg*, the Court deemed such a punishment excessive because a vast majority of states did not allow it, and in states that did, juries rarely chose to give such

3 CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION 470-81 (9th ed. 2009).

a sentence.⁴

These considerations of national consensus and proportionality took on a new application in the Court's 1988 and 1989 decisions of *Thompson v. Oklahoma* and *Stanford v. Kentucky*. As explained by Justice Stevens's opinion in *Thompson*, the Court determined that the execution of juvenile criminals under the age of 16 is cruel and unusual. This decision was determined for three reasons: one, no states with established minimum ages for the death penalty allowed it for individuals less than 16 years old, two, "respected professional organizations" opposed such executions, and three, the last execution of a youth of this age had been in 1948. Moreover, Justice Stevens quoted *Enmund v. Florida* to claim authority for the Court "ultimately to judge whether the Eighth Amendment permits imposition of the death penalty," regardless of consensus. Concerning proportionality, the Court decided that juveniles were less culpable for their actions than adults and were unlikely to be deterred by the death penalty, making such punishment without cause. Though the petitioners wished to make the line of acceptable capital punishment at the age of 18, the consensus of various state governments, professional organizations, and foreign governments led the court to establish this age at 16. In many ways, *Thompson* would parallel *Roper v. Simmons*, with the only significant difference being the specific consensuses ascertained by the Court in each case.⁵

Stanford v. Kentucky, decided the year after *Thompson*,

4 Wayne Myers, *Roper v. Simmons: The Collision of National Consensus and Proportionality Review*, 96 J. CRIM. L. & CRIMINOLOGY, 950, 950-52 (2006).

5 *Thompson v. Oklahoma*, 487 U.S. 815, 818-38 (1988).

discarded the proportionality argument, yet maintained this logic of consensus. Justice Scalia, writing the plurality opinion, argued that the Court's judgment of proportionality could not invalidate a punishment but could only accompany and confirm "the objective indicators of state laws or jury determinations," means by which the Court could ascertain the consensus of the nation.⁶

THE FACTS OF *ROPER V. SIMMONS*

With this basic introduction to the constitutional framework found in *Roper v. Simmons*, that case and its narrative become relatively simple, beginning with 17-year-old Christopher Simmons of Missouri, a junior in high school at the time of his crime. For unknown reasons, Simmons wanted to commit a murder, and he plotted to do so with two friends, both of whom were minors. His plan was to "commit burglary and murder by breaking and entering, tying up his victim, and throwing that victim off a bridge."⁷ With the aid of one friend, Simmons executed this plan early on the morning of 9 September 1993. The two boys broke into the home of one Shirley Crook, whom Simmons coincidentally recognized from a previous car accident. The two men bound Mrs. Crook before driving her to a nearby river, where they threw her in and drowned her. After fishermen found the body the next day, Simmons was arrested and quickly confessed to the murder.⁸

As indicated by his conversations with friends during the

6 *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989).

7 *Roper v. Simmons*, 543 U.S. 551, 556–57 (2005).

8 Elizabeth F. Emens, *Aggravating Youth: Roper v. Simmons and Age Discrimination*, SUP. CT. REV. 51-102 (2005).

planning process, Simmons apparently thought they could “get away with” the crime due to their young age. However, in Missouri, Simmons’s age meant that he was not within the jurisdiction of the juvenile court system, and he was thus tried as an adult. During the trial both the prosecutor and defense used Simmons’s age in their closing arguments. The defense stated that Simmons’s age was a mitigating factor, citing a number of legal limitations on the abilities of minors, who “cannot drink, serve on juries, or even see certain movies” due to a lack of responsibility. In contrast, the prosecutor argued that Simmons’s age was actually an aggravating factor, for in the context of the crime it displayed just how “outrageously and wantonly vile, horrible, and inhuman” this man was. The jury reached a verdict of first-degree murder, and recommended the death penalty based on aggravating factors in the crime. The trial judge accepted this recommendation, at which point Simmons obtained new counsel and sought to have his conviction overturned. Simmons claimed that he “had received ineffective assistance at trial” because the trial had not established his youthful immaturity, his susceptibility to bad influence, or his poor home environment. The trial court dismissed the motion for post-conviction relief, which the Missouri Supreme Court affirmed in 1997. Finally, the federal courts denied Simmons’s petition for a writ of *habeas corpus* in 2001, leaving him in prison to await his execution.⁹

INTERVENING CASES

9 543 U.S. 556–59.

However, two subsequent cases had a significant, though perhaps unexpected, impact on the cases of Simmons and others like him: *Penry v. Lynaugh* and *Atkins v. California*. Both cases dealt with capital punishment and the mentally retarded and through a strange turn of events altered the fate of Christopher Simmons. Decided in 1989, *Penry* essentially paralleled *Stanford*, for in it the Court decided that the execution of mentally retarded criminals was not cruel and unusual.¹⁰ The Court did not make a broad statement on the issue because no national consensus against executions of the mentally retarded existed. Instead, it stated that “individualized inquiry” was necessary to determine the accountability of each individual in question, in order to account for differing degrees of mental retardation.¹¹ While the Court did not make a broad judgment, it nevertheless found *Penry*’s sentence unconstitutional; according to Texas law, the jury could not count *Penry*’s mental condition as a mitigating factor.¹²

In 2002, more than a decade after *Penry*, *Atkins* overturned the previous case, ruling that at this time, the death penalty was cruel and unusual punishment for the mentally retarded. The Court generally structured this decision around the two-pronged principles of *Gregg*. The Court first points to a significantly increased national consensus, for since *Penry* 18 states had created laws preventing the execution of the mentally retarded.¹³ Though this number did not yet represent a majority of the states, Justice

10 Emens, *supra* note 7, at 57.

11 Myers, *supra* note 3, at 955.

12 Emens, *supra* note 7, at 57.

13 Myers, *supra* note 3, at 955–6.

Stevens's opinion notes that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change," that shows a national consensus in this area.¹⁴ The Court also found that the death penalty failed the standard of proportionality, citing external authorities as in *Thompson*. There could be no legitimate retribution against the mentally retarded, and society could expect no deterrent value from the death penalty because the mentally retarded cannot understand the results of their actions.¹⁵ Thus, in a space of only 13 years, the Court used a shift in national consensus and proportionality arguments to change the definition of "cruel and unusual," tying evolving legal standards with evolving societal norms.

After the *Atkins* ruling, Simmons filed again for state post-conviction relief, arguing that the Court's reasoning concerning the mentally retarded applied to juveniles as well. The Missouri Supreme Court agreed, stating in *State ex rel. Simmons v. Roper* that "a national consensus has developed against the execution of juvenile offenders." This new opposition was indicated by a ban on juvenile executions in 18 states, a total ban on executions in 12 states, and a raised or established minimum age of 18 in 5 states. The Missouri Supreme Court thus resentenced Simmons to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor," upon which the U.S. Supreme Court granted certiorari.¹⁶

14 *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

15 *Myers*, *supra* note 3, at 955–6.

16 543 U.S. 559–60.

JUSTICE KENNEDY'S OPINION

Making key references to cases such as *Robinson*, *Trop*, *Thompson*, *Stanford*, *Penry*, and *Atkins*, the Court reviewed both the “objective indicia of consensus” as expressed by state laws and the proportionality of the punishment of execution for juveniles. Concerning national consensus, the Court found that, with numbers similar to those in *Atkins*, a wave of states had come to oppose the juvenile death penalty. Many people across the nation believed, like the then-governor of Kentucky, that “[w]e ought not be executing people who, legally, were children.” In his opinion, Kennedy overlooked the “less dramatic” change from *Stanford* to *Roper* compared to *Penry* and *Atkins*, stating that “the same consistency of direction of change has been demonstrated.”¹⁷

Concerning proportionality, Kennedy referenced *Atkins*, arguing that capital punishment must be limited to individuals who commit “a narrow category of the most serious crimes” and are thus “the most deserving of execution.” Three general differences between minors and adults diminished juvenile culpability below the standard required for the death penalty and lowered the deterrent force of the death penalty on the actions of youths. First, juveniles possessed with a greater frequency than adults a “lack of maturity and an underdeveloped sense of responsibility.” Second, juveniles were more susceptible to “negative influences and outside pressures,” because of their decreased control over their environments. Third, the character of juveniles was less complete than the character of adults. Consequently, the requirement of pro-

17 *Id.* at 561–67.

portional retribution meant that the death penalty, the worst penalty possible, could not be imposed “on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” Likewise, due to the above characteristics, youths were less likely to weigh the consequences of an action against its benefits, meaning that the deterrence value of the death penalty would be minimal.

Justice Kennedy stated, moreover, that despite the potential for a juvenile who does not match these descriptions, a “categorical rule” against the death penalty is necessary because juries might too easily count a defendant’s age against him, as happened in the trial of Simmons. While 18 years of age might seem like an arbitrary line, the Court stated that it was “the point where society draws the line for many purposes between childhood and adulthood,” and since “a line must be drawn,” this choice would be the most logical and reasonable one. Justice Kennedy closes the opinion with a discussion of foreign agreement with such treatment of juveniles, particularly highlighting the United Kingdom, which shares historic legal ties with the United States. Though the judgment of the international community does not control American jurisprudence, Justice Kennedy argues that it can confirm the independent conclusions of the Court.¹⁸

DISSENTS: JUSTICES O’CONNOR AND SCALIA

The two dissents to Justice Kennedy’s opinion, penned by Justices O’Connor and Scalia, take very different positions on

18 *Id.* at 568–79.

this case. Justice O'Connor's dissent did not depart from the principles behind the majority opinion but argued that the evidence of national consensus was not yet sufficient to merit a decision limiting all of the states to the standards created by one legal body. Beyond the issue of consensus, Justice O'Connor also affirmed that the Court's "independent moral judgment" with regard to proportionality was justified. She harshly criticized the Missouri Supreme Court for its choice in *State ex rel. Simmons v. Roper* to proclaim a new national consensus replacing that of *Gregg*. Determining such a consensus was the sole responsibility of the nation's highest court, and the interference of any other body created a dangerous and disruptive precedent. After critiquing the majority's lack of evidence for its opinion and stating that discussion in the international community is constructive in these contexts, Justice O'Connor closed the dissent with an excellent quote from her own concurrence to *Thompson*. She wrote that "this Court should not substitute its own 'inevitably subjective judgment' on how best to resolve this difficult moral question for the judgments of the Nation's democratically elected."¹⁹ Such a decision would overreach the proper authority of the Court and compromise the balance of power between the federal government and the states.

Justice Scalia's dissent was very different; while he maintained some support for the idea of a national consensus, he rejected both the majority's claim to have found that consensus and its proportionality analysis, which he suggested took the "subjective views of five Members of this Court," and used them

19 *Id.* at 587-607.

alone to interpret the meaning of the Constitution. Justice Scalia first picked apart the majority's 'consensus,' arguing that the logic behind its construction was flawed on a fundamental level. Moreover, he questioned whether state legislators would have changed their juvenile death penalty laws if they had known their decisions would be used to cause a significant permanent change in the nation's legal system. In evaluating the Court's proportionality analysis, Justice Scalia also pointed out the majority's meager evidence and a failure to back up broad generalizations with any kind of fact. He also harshly criticized the choice to cite foreign legal authorities in relation to this case. Finally, Scalia stated that the meaning of the Constitution does not change over time at all, never mind over the course of the 15-year period between *Stanford* and *Roper*. Such constant "updating" was a threat to the stability and reliability of the courts and consequently must not continue.²⁰

ROPER'S PROBLEMS AND IMPLICATIONS

Even beyond those flaws noted by Justices O'Connor and Scalia, *Roper* and its aforementioned precedents are in error because they share two incorrect premises: that "standards of decency" change over time and that at any given point the "national consensus" should determine what the Constitution means. In his concurrence, Justice Stevens inadvertently pointed out this failure of evolutionary standards and consensus, stating the following:

Perhaps even more important than our specific holding today is our reaffirmation of the basic

20 *Id.* at 607–30.

principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. . . . The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment.²¹

The Court ostensibly claims that the consensus of society, at any given time, provides a good and right standard on which to base justice at that time. However, Justice Stevens also implies that the execution of seven-year-olds is, and always has been, objectively wrong. In short, the evolutionary, consensus-based standard existing 300 years ago was *not*, even then, a just standard. This contradiction is not so easily reconciled and poses an ongoing threat to the American legal system by undermining its historical foundation.

The loss of this foundation, then, is the most concerning implication of *Roper v. Simmons*. At one time, the American legal tradition made a firm connection between natural law and positive law. At least in principle, this legal system derived its authority from a higher power; its laws were those "of Nature and of Nature's God." However, with the secularization of American society as a whole and consequently of the legal system, the existence of any kind of natural law was abandoned in favor of a subjective law based upon the whims of individuals. This develop-

21 *Id.* at 587.

ment is dangerous because it removes any certainty that the law is right. If Justice Stevens can reach back to reprimand the first Americans for their bad laws, what is to prevent future Americans from doing the same to those now living? Consensus changes and today's lawgivers and law keepers may become for future generations a morally repulsive memory. In the interim, individuals struggle to direct their personal behavior in truly good and right ways, threatening the order and stability of the nation such that it may soon become unrecognizable.

SUMMARY

Based originally upon the doctrine of incorporation, the Supreme Court's reasoning in *Roper v. Simmons* and its precedents established the principle that criminals under the age of 18 may not receive the death penalty, regardless of any extenuating circumstances. This principle was based upon flawed proportionality analysis and objective indices of national consensus as critiqued by Justices O'Connor and Scalia in their bold dissents. However, the greatest problem with these decisions was their insistence upon evolutionary standards. While government may adapt positive law to fit new social realities, the meaning and essence of the law must not be changed or altered by the whims of a majority, whether within or without the Supreme Court. To do so would be to remove the very foundation of the American legal structure, condemning it to contradiction and confusion.

