

## **ROPER V. SIMMONS: Supreme Court Case Provides Great Introduction to Basic Legal Principles**

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In *Roper v. Simmons* the Supreme Court banned the death penalty for crimes committed by minors. While the facts of the case involve a brutal murder, the legal issues discussed by the Court provide an excellent opportunity to introduce, illustrate or reinforce some basic legal concepts. Among the topics that I will present for discussion are: the Constitution as a basic source of law; our system of federalism and the interplay between federal and state law; the basic structure of our court systems and the concept of judicial review; how law must and does evolve as society changes; and how international law is becoming increasingly important.

In Part I of this article, I will discuss the facts of the case and the several opinions handed down by the Court - the majority opinion, one concurring opinion and two dissenting opinions. In Part II, I will present several questions that can be used to illicit discussion about the decision and some important legal concepts. In Part III, I will explore the answers to those questions.

### **I. THE CASE**

#### **A. Background**

Christopher Simmons was 17 years old when he convinced his 15- and 16- year-old friends to burglarize a house. During the burglary, Shirley Crook, the resident of the house, awoke and asked what was going on. Simmons recognized the woman from a previous car accident between the two of them, and decided to kill her. He and his friends used duct tape to cover her eyes and mouth and bind her hands. They drove her to a bridge over a river, bound her hands and feet with electrical wire, covered her whole face with duct tape and dropped her over the bridge into the river, where she drowned. Simmons later bragged to friends that he had to kill her because she had seen his face.

Simmons was convicted of murder and sentenced to death. After his sentencing, the Supreme Court handed down a decision, *Atkins v. Virginia*,<sup>2</sup> banning the execution of the mentally retarded. Simmons filed a petition for post-conviction relief in state court, arguing that the rationale in *Atkins* should apply as well to a juvenile who was under the age of 18 when the crime was committed.

The Missouri Supreme Court agreed and resentenced Simmons to life in prison without parole or probation.<sup>4</sup> The court held that “a national consensus has developed against the execution of juvenile offenders . . . and that the imposition of

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<sup>1</sup> 543 U.S. 551 (2005).

<sup>2</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>3</sup> For a discussion of the defendant's abusive and dysfunctional home life environment, see the American Bar Association website at <http://www.abanet.org/crimjust/juvjus/simmons.html>.

<sup>4</sup> State *ex rel. Simmons v. Roper*, 112 S.W. 3d 397 (Mo. 2003).

the juvenile death penalty has become truly unusual over the last decade.”<sup>5</sup> The state appealed the decision and the United States Supreme Court granted certiorari.<sup>6</sup>

### B. *The Majority Opinion*

Justice Kennedy wrote the opinion of the Court, in which Justices Stevens, Souter, Ginsburg and Breyer joined.<sup>7</sup> The Court discussed the Eighth Amendment provision prohibiting “cruel and unusual punishments”<sup>8</sup> and stated that, in order to interpret its meaning, it had adopted a framework that refers to “the evolving standards of decency that mark the progress of a maturing society.”<sup>9</sup> The Court then discussed several of its relatively recent decisions involving the death penalty.<sup>10</sup>

In 1988, in *Thompson v. Oklahoma*,<sup>11</sup> a plurality of the Court held that “civilized standards of decency” did not permit the execution of any offender under the age of 16 at the time of the crime. In 1989, in *Stanford v. Kentucky*,<sup>12</sup> the Court, in a 5-4 decision, held that there was not a “contemporary standard of decency” that categorically prohibited executions of 16- and 17-year-old offenders. The *Stanford* Court noted that, of the 37 states that had the death penalty, 22 permitted it for 16- year-old offenders and 25 for 17-year-old offenders.<sup>13</sup> The Court held that this did not amount to a national consensus “sufficient to label a particular punishment cruel and unusual.”<sup>14</sup> On the very same day that the Court handed down the *Stanford* decision, it held, in *Penry v. Lynaugh*,<sup>15</sup> that the Eighth Amendment did not categorically ban the execution of mentally retarded criminals. The *Penry* Court noted that only 2 of the 37 death penalty states banned the execution of the mentally retarded and that this was insufficient evidence of a national consensus.<sup>16</sup>

<sup>5</sup> *Id.* at 399.

<sup>6</sup> *Roper v. Simmons*, 540 U.S. 1160 (2004).

<sup>7</sup> *Roper*, *supra* note 1, at 555.

<sup>8</sup> U.S. CONST. amend. VIII. For a discussion of “cruel and unusual punishments” under the Eighth Amendment, see Shannon D. Gilreath, *Cruel And Unusual Punishment And The Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent*, 25 T. JEFFERSON L. Rev. 559 (2003); Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 Tenn. L. Rev. 41 (2000).

<sup>9</sup> *Roper*, *supra* note 1, at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion)). For a discussion of the death penalty and “the evolving standards of decency,” see Brian W. Varland, *Marking the Progress of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, 28 HAMLINE L. Rev. 311 (2005); Symposium, *The Honorable James J. Gilvary Symposium on Law, Religion & Social Justice: Evolving Standards of Decency in 2003—Is the Death Penalty on Life Support?*, 29 DAYTON L. Rev. 195 (2004); Phyllis T. Bookspan, *Too Young to Die?: Evolving Standards of Decency and the Juvenile Death Penalty in America*, 21 DEL. Law. 19 (2003/2004).

<sup>10</sup> *Roper*, *supra* note 1, at 561-64.

<sup>11</sup> 487 U. S. 815, 830 (1988) (plurality opinion).

<sup>12</sup> 492 U. S. 361 (1989).

<sup>13</sup> *Id.* at 370-71.

<sup>14</sup> *Id.*

<sup>15</sup> 492 U. S. 302(1989).

<sup>16</sup> *Id.* at 334.

The Court next discussed the *Atkins* case from its 2002 term.<sup>17</sup> In *Atkins*, the Court specifically overruled *Penry* (decided only 13 years earlier), holding that under its “evolving standards of decency,” the death penalty as applied to the mentally retarded was excessive, and therefore, banned by the Eighth Amendment.<sup>18</sup> The *Atkins* Court focused on the dramatic change in state law after *Penry* was handed down, noting that 16 states specifically took action to ban the execution of the mentally retarded.<sup>19</sup>

The Court stated that just as the *Atkins* Court had reconsidered *Penry*, it would now reconsider *Stanford*.<sup>20</sup> The Court examined the evidence of a national consensus regarding the death penalty for juveniles, and concluded that it was similar to the situation in *Atkins* regarding the mentally retarded.<sup>21</sup> It noted that for both categories of offenders 30 states prohibited execution - 12 states banned the death penalty entirely and 18 excluded the mentally retarded and juveniles.<sup>22</sup> The Court acknowledged, however, that the rate of change was more extreme for banning execution of the mentally retarded than for banning execution of juveniles - that 16 states had banned execution of the mentally retarded between *Penry* and *Atkins*, whereas only 5 had banned execution of juveniles between *Stanford* and the instant case.<sup>23</sup>

The Court held that there were objective indicia of a national consensus, as evidenced by the rejection of the juvenile death penalty in a majority of the states, the infrequency of its use even where permitted, and the consistency of the trend towards its abolition.<sup>24</sup> Consequently, the Court held that the juvenile death penalty was prohibited by the Eighth Amendment.<sup>25</sup>

<sup>17</sup> *Roper, supra* note 1, at 563-67.

<sup>18</sup> *Atkins, supra* note 2, at 322.

<sup>19</sup> *Id.* at 314-15.

<sup>20</sup> *Roper, supra* note 1, at 564-67.

<sup>21</sup> *Id.* at 564-65.

<sup>22</sup> *Id.* At the time of the decision, twenty states had statutes permitting the death penalty for crimes committed before the age of eighteen. Ala. CODE §13A62(c) (West 2004) (no express minimum age); Ariz. Rev. STAT. Ann. § 13703(A) (West Supp. 2004) (no express minimum age); ARK. CODE ANN. §54615 (Michie 1997) (no express minimum age); DEL. CODE ANN., Tit. 11 (Lexis 1995) (no express minimum age); FLA. STAT. §985.225(1) (2003) (no express minimum age); GA. CODE ANN. §1793 (Lexis 2004) (no express minimum age); IDAHO CODE §184004 (Michie 2004) (no express minimum age); Ky. Rev. STAT. Ann. §640.040(1) (Lexis 1999) (minimum age of 16); LA. STAT. ANN. §14:30(c) (West Supp. 2004) (no express minimum age); MISS. CODE ANN. §97321 (Lexis 2000) (no express minimum age); Mo. Rev. STAT. Ann. §565.020 (1999) (minimum age of 16); NEV. REV. STAT. §176.025 (2003) (minimum age of 16); N. H. REV. STAT. ANN. §630:1(V) (West 1996) (minimum age of 17); N. C. Gen. STAT. §1417 (Lexis 2003) (minimum age of 17, except that those under 17 who commit murder while serving a prison sentence for a previous murder may receive the death penalty); OKLA. STAT. ANN., Tit. 21, §701.10 (West 2002) (no express minimum age); 18 PA. CONS. STAT. §1102 (2002) (no express minimum age); S. C. CODE ANN. §16320 (West Supp. 2003 and main ed.) (no express minimum age); TEX. PENAL CODE Ann. §8.07(c) (West 2003) (minimum age of 17); UTAH CODE ANN. §763206(1) (Lexis 2002) (no express minimum age); VA. CODE Ann. §18.210(a) (Lexis Supp. 2003) (minimum age of 16).

<sup>23</sup> *Roper, supra* note 1, at 566-67. Four states banned execution legislatively and one by judicial decision. *Id.*

<sup>24</sup> *Id.* at 567.

<sup>25</sup> *Id.* See Arline Kaplan, *When Is It ‘Cruel and Unusual Punishment’? Supreme Court Bans Juvenile Death Penalty*, PSYCHIATRIC TIMES, May 2005, at 1; John R Crook, *U.S. Supreme Court Holds Juvenile*

In the final section of its opinion, the Court examined international law and noted that the United States was the only country in the world that continued to give sanction to the juvenile death penalty.<sup>26</sup> It noted that every country except the United States and Somalia had ratified Article 37 of the United Nations Convention on the Rights of the Child,<sup>27</sup> which expressly bans execution of those who committed crimes under the age of 18.<sup>28</sup> The Court stated as uncontested on the record that since 1990 juveniles had been executed in only seven countries other than the United States - Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China - and that all seven had since abolished or publicly disavowed the practice.<sup>29</sup> The Court stated that “it is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”<sup>30</sup>

### C. Justice Stevens’s Concurring Opinion

Justice Stevens wrote a concurring opinion, in which Justice Ginsburg joined.<sup>31</sup> He stated:

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

Death Penalty Unconstitutional, *Citing Treaties and Foreign Practice*, 99 Am. J. Int’l L. 487 (2005); Linda Greenhouse, *The Supreme Court: The Overview; Supreme Court, 5-4, Forbids Execution in Juvenile Crime*, N.Y. TIMES, March 2, 2005, at A1; Jeffrey Fagan & Valerie West, *The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms*, 95 J. CRIM. L. & CRIMINOLOGY 427 (2005).

<sup>26</sup> *Id.* at 575. For a discussion of the juvenile death penalty in international law, see John R. Crook, *Contemporary Practice Of The United States Relating To International Law: U.S. Supreme Court Holds Juvenile Death Penalty Unconstitutional, Citing Treaties and Foreign Practice*, 99 A.J.I.L. 487 (2005); Carly Baetz-Stangel, *The Role Of International Law In The Abolition Of The Juvenile Death Penalty In The United States*, 16 Fla. J. INT’L L. 955 (2004); Lori Edwards, *Critique of the Juvenile Death Penalty in the United States: A Global Perspective*, 42 DUQ. L. Rev. 317 (2004); Rachel J. Avery, Comment, “Killing Kids Who Kill ” — *An International Perspective On The Juvenile Death Penalty In The United States*, 7 UCLA J. INT’L L. & FOR. Aff. 303 (2002/2003); Allyssa D. Wheaton-Rodriguez, Note, *The United States’ Choice To Violate International Law By Allowing The Juvenile Death Penalty*, 24 Hous. J. INT’LL 209 (2001).

<sup>27</sup> Nov. 20, 1089, entered into force Sept. 2, 1990, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).

<sup>28</sup> *Roper*, *supra* note 1, at 576.

<sup>29</sup> *Id.* *But see* Nazila Fathi, *Rights Advocates Condemn Iran for Executing 2 Young Men*, N.Y. Times, July 29, 2005, at A3.

<sup>30</sup> *Roper*, *supra* note 1, at 578.

<sup>31</sup> *Id.* at 587 (Stevens, J., concurring).

Rights foreclose any such reading of the Amendment. In the best tradition of the common law, the pace of that evolution is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day— Alexander Hamilton, for example—were sitting with us today, I would expect them to join Justice Kennedy’s opinion for the Court. In all events, I do so without hesitation.<sup>32</sup>

#### D. Justice O’Connor’s Dissenting Opinion

Justice O’Connor wrote a dissenting opinion, in which she discussed her two basic problems with the majority opinion.<sup>33</sup> First O’Connor did not believe that there was sufficient evidence of a national consensus to overturn *Stanford*. She stated that the objective evidence of a national consensus was weaker both in *Atkins* and in the instant case than in previous Eighth Amendment decisions, but that, at least, in *Atkins*, there was a “compelling moral proportionality argument against capital punishment of mentally retarded offenders.”<sup>34</sup> In this case, she did not believe that the argument against the juvenile death penalty was strong enough to “resolve the lingering ambiguities in the objective evidence of legislative consensus or to justify the Court’s categorical rule.”<sup>35</sup>

O’Connor’s other problem with the majority opinion was that she did not believe that the Court should substitute its opinion for the judgments of the various state legislatures. She stated that “[a]dolescents as a *class* are undoubtedly less mature, and therefore less culpable for their acts, than adults,”<sup>36</sup> but was reluctant to override the “seemingly reasonable conclusion reached by many state legislatures: that at least some 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case.”<sup>37</sup> O’Connor stated that, if she were a legislator, she “would be inclined to support legislation setting a minimum age of 18 in this context.”<sup>38</sup> However, because a number of states have decided to make the death penalty an option for crimes committed by a juvenile, she was reluctant, as a judge, to

<sup>32</sup>*Id.* (citation omitted).

<sup>33</sup>*Roper*, *supra* note 1, at 587 (O’Connor, J., dissenting).

<sup>34</sup>*Id.* at 597-98.

<sup>35</sup>*Id.* at 598.

<sup>36</sup>*Id.* at 588.

<sup>37</sup>*Id.* “The fact that juveniles are generally *less* culpable for their misconduct than adults does not necessarily mean that a 17-year-old murderer cannot be *sufficiently* culpable to merit the death penalty.” *Id.* at 599. “It follows that a legislature may reasonably conclude that at least *some* 17-year-olds can act with sufficient moral culpability, and can be sufficiently deterred by the threat of execution, that capital punishment may be warranted in an appropriate case.” *Id.* at 600. Indeed, this appears to be just such a case. Christopher Simmons [s] murder of Shirley Crook was premeditated, wanton, and cruel in the extreme. Well before he committed this crime, Simmons declared that he wanted to kill someone. On several occasions, he discussed with two friends (ages 15 and 16) his plan to burglarize a house and to murder the victim by tying the victim up and pushing him from a bridge. Simmons said they could get away with it’ because they were minors.” *Id.*

<sup>38</sup>*Id.* at 607.

foreclose that choice. “Without a clearer showing that a genuine national consensus forbids the execution of such offenders, 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 legislatures.”<sup>39</sup>

#### E. Justice Scalia’s Dissenting Opinion

Justice Scalia wrote a dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined.<sup>40</sup> Scalia objected foremost to the Court’s substitution of its judgment for that of elected state legislators and the overturning of a Constitutional interpretation made just 15 years earlier. He also condemned the mathematical analysis used by the majority to find a national consensus. Finally, he objected to the Court’s use of international law.

First, Scalia quoted the words of Alexander Hamilton, who, in urging the “approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people’s representatives,”<sup>41</sup> stated that there was little risk in this since the “judiciary . . . has neither FORCE nor WILL but merely judgment.”<sup>42</sup> Scalia stated that the majority opinion made a mockery of Hamilton’s expectation, particularly since the same question had just been decided by the Court 15 years earlier.<sup>43</sup> He criticized the majority for looking to “the evolving standards of decency,” rather than to the original meaning of the Eighth Amendment.<sup>44</sup> He stated that “[b]ecause I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court... I dissent.”<sup>45</sup>

Scalia questioned how the majority could find the emergence of a national consensus when only five states had changed their positions on the juvenile death penalty since *Stanford* and 20 states still authorized some form of the juvenile death penalty. Scalia noted that only 47<sup>46</sup> of those states that permitted capital punishment prohibited the juvenile death penalty. Scalia criticized the majority’s inclusion of the 12 states that had abolished execution completely in the statistical analysis, likening it to “including old-order Amishmen in a consumer preference poll on the electric car. Of *course* they don’t like it.”<sup>47</sup>

Finally, Scalia contended that “the basic premise of the Court’s argument - that American law should conform to the laws of the rest of the world - ought to be rejected out of hand.”<sup>48</sup> Scalia cited several examples of Constitutional rights that

<sup>39</sup> *Id.*

<sup>40</sup> *Roper, supra* note 1, at 607 (Scalia, J., dissenting).

<sup>41</sup> *Id.* (quoting The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). *Id.*

<sup>43</sup> *Id.* at 608. *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 609.

<sup>47</sup> *Id.* at 610-11.

<sup>48</sup> *Id.* at 624.

would be curtailed if the Supreme Court followed the lead of other countries: the exclusionary rule, as modified by England, Canada, and the European Court of Human Rights; the double jeopardy prohibition, as relaxed by England; and the right to a jury trial in criminal cases, as drastically limited in England.<sup>49</sup> He concluded: “To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.”<sup>50</sup>

## II. The Questions

The purpose of this lesson is to use *Roper* to illustrate some basic legal concepts. The discussion should focus on these basic objectives:

- To recognize the Constitution as a basic source of law
- To understand the importance of federalism and our dual system of laws
- To review some basic principles about our court systems
- To appreciate that our laws evolve as society changes
- To explore the increasing role played by international law

*Roper* provides a fertile backdrop for discussion of these topics. I will pose a series of questions that will lead to conversation of these various issues.

1. How can the Supreme Court override laws passed by the legislative bodies of several states? How does the Supreme Court interpret a Constitutional right?
2. Why did federal law prevail over state law?
3. How did the Supreme Court end up reviewing a state court decision? How important were the Court’s previous decisions? What about the future?
4. Why did the Supreme Court overrule a decision it had just made 15 years earlier?
5. What role should international law play in determining U. S. law?

## III. The Answers

### ***1. How can the Supreme Court override laws passed by the legislative bodies of several states? How does the Supreme Court interpret a Constitutional right?***

#### *A. The Constitution as a Basic Source of Law*

##### 1. Structure of Government

The two most important functions of the United States Constitution are to provide the framework for the structure of the federal government and to guarantee

<sup>49</sup> *Id.* at 624-28.

<sup>50</sup> *Id.* at 627.

individual rights and freedoms.<sup>51</sup> The first three articles of the Constitution define the legislative, executive and judiciary branches.<sup>52</sup> This separation of powers, with its concomitant theory of checks and balances, is vital to any understanding of our legal system.<sup>53</sup>

In *Roper*, this was one of the most hotly contested issues. The Court, in effect, eliminated the authority of state legislatures to decide whether or not a state can execute a defendant whose crime was committed while under the age of 18. While the laws of twenty states had permitted the execution of 16- or 17-year-olds, this decision put an end to that practice.<sup>54</sup> This judicial removal of legislative power is one of the main issues addressed by both dissenting opinions.

Justice O'Connor, who had been a state legislator, said that in that position she might be inclined to support a minimum age of 18, but that as a judge, she was reluctant to take that choice away from the legislature absent a genuine national consensus.<sup>55</sup> Justice Scalia was more critical, reiterating a position that he has taken before: that the opinion of nine judges should not be used to substitute for legislative determinations made by duly elected state legislatures.<sup>56</sup>

*Roper* provides a "real life" example of an important and recurrent separation of powers issue. While our legal system certainly attempts to delineate the powers of the three branches, there will always be gray areas. This case demonstrates that there is not always a bright line to distinguish these powers and that there can be and are differences of opinion as to how those powers should be distributed.

## 2. The Bill of Rights

*Roper* also provides an opportunity to introduce or review the importance of the individual rights and freedoms guaranteed by the Bill of Rights. The case focuses on the interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."<sup>57</sup> The role of the Supreme Court in interpreting the breadth and scope

<sup>51</sup> See J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687 (2004); David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtable 161 (1995).

<sup>52</sup> U.S. Const, art. I-III.

<sup>53</sup> Virtually all legal environment and business law textbooks discuss the importance of separation of powers and checks and balances. See, e.g., CONSTANCE E. BAGLEY & DIANE W. SAVAGE, *MANAGERS and the Legal Environment* 51-53 (5th ed. 2005); Henry R. Cheeseman, *The Legal Environment of Business and Online Commerce* 63-64 (4th ed. 2005); Roger LeRoy Miller & Frank B. Cross, *The Legal and E-Commerce Environment Today* 139-140 (4th ed. 2005); Roger LeRoy Miller & Gaylord A. Jentz, *Business Law Today*, Standard Edition 37 (7th ed. 2005).

<sup>54</sup> For a list of the twenty states that permitted execution of 16- or 17-year-olds, see *supra* note 22.

<sup>55</sup> See *supra* notes 33-39 and accompanying text.

<sup>56</sup> See *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) (in which Justice Scalia, in a case in which the Court refused to overturn a state's adoption of a clear and convincing proof standard in a "right to die" case, stated that the point at which life becomes "worthless" is "neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory"). See *supra* notes 40-50 and accompanying text.

<sup>57</sup> U.S. CONST, amend. VIII. See *supra* note 8.

of these rights has long been the subject of debate.<sup>58</sup> *Roper* affords the opportunity to compare the different approaches taken by a “strict interpretation” and an “expansive interpretation” of the Constitution - as contrasted in the opinions written by Scalia and Stevens.<sup>59</sup>

In his dissenting opinion, Scalia stated that “[b]ecause I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court ... I dissent.”<sup>60</sup> His basic position is that the members of the Supreme Court should not add anything to the original meaning of the Constitution.<sup>61</sup>

<sup>58</sup> “Indeed, one simply cannot decide, at least properly so, how the Supreme Court should interpret the Bill of Rights until after one has considered the questions of the proper role of the judiciary in the American constitutional design . . . and of the proper scope and constitutional limits of the judicial power.” Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 KY. L.J. 387, 397 (2001). It has been stated that one of the effects of the “Rehnquist Court’s” judicial philosophy is that the “Court’s federalism and separation of powers jurisprudence is forcing a long overdue reexamination of important, but largely unsupported assumptions about the nature and allocation of political jurisdiction under the United States Constitution.” Robert A. Destro, *Is the Supreme Court Undoing the New Deal: The Impact of the Rehnquist Court’s New Federalism: Federalism, Human Rights, and the Realpolitik of Footnote Four*, 12 WIDENER L.J. 373,374 (2003).

<sup>59</sup> It is difficult to even classify these “schools” of interpretation. “Strict interpretation” often includes “originalist,” “minimalist,” or “conservative,” while “expansive interpretation” often includes “activist,” “maximalist,” or “liberal.” “The terms that constitute the bulk of this rhetoric—‘conservative,’ ‘liberal,’ ‘judicial activist,’ ‘judicial usurpation,’ and ‘judicial restraint’—have been fixtures in the lexicon of judicial critique throughout the past one hundred years.” Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & Mary Bill OF RTS. J. 585, 586- 87 (2002).

A more useful characterization of the terms “liberal” and “conservative” would be to describe whether judges have supported or struck down programs and policies commonly associated with or reflecting “conservative” or “liberal” politics. Hence, the justices most commonly regarded as “conservative” in the 1930s were the “Four Horsemen”—Justices McReynolds, Butler, Sutherland, and Van Devanter—who were widely regarded as “activists” because they voted to strike down laws reflecting “liberal” values, while the “liberal” justices of the era were Harlan Fiske Stone, Oliver Wendell Holmes, and Louis Brandeis because they deferred to such legislation.

*Id.* at 588. “The terms remain the same, while their referents have changed. Neither judicial activism nor restraint has ever been a fixed ‘liberal’ or ‘conservative’ notion, but rather, depend on the political authorities who control ‘the central interests’ at stake in constitutional adjudication at a given moment in our history.” *Id.* at 644. See Nowlin, *supra* note 58, at 394-96 (categorizing Justices Rehnquist, Scalia and others as “judicial minimalists” and Justices Earl Warren, William Brennan and others as judicial maximalists”); Robert A. Destro, *Is the Supreme Court Undoing the New Deal: The Impact of the Rehnquist Court’s New Federalism: Federalism, Human Rights, and the Realpolitik of Footnote Four*, 12 WIDENER L.J. 373, 400-01 (2003) (categorizing Justice Scalia as a “judicial conservative” and Justices Warren and Brennan as “judicial liberals”).

<sup>60</sup> *Roper*, *supra* note 1, at 608 (Scalia, J., dissenting).

<sup>61</sup> See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. Rev. 849 (1989); David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 Emory L.J. 1377 (1999); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 Geo. L.J. 569 (1998); Autumn Fox & Stephen R. McAllister, *An Eagle Soaring: The Jurisprudence Of Justice Antonin Scalia*, 19 CAMPBELL L. Rev. 223 (1997). For an interesting discussion of Justice Scaha’s

In contrast, in his concurring opinion, Stevens discussed the evolutionary nature of Constitutional interpretation: “Perhaps even more important than our specific holding today is our reaffirmation of the basic 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.”<sup>62</sup> Stevens continued: “that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day - Alexander Hamilton, for example - were sitting with us today, I would expect them to join” in the Court’s opinion.<sup>63</sup>

*Roper* provides a clear contrast of these two basic judicial philosophies. Because the Supreme Court today is often asked to define the breadth and scope of Constitutional protections, students need to understand the importance of the judicial interpretation views of the individual justices.<sup>64</sup>

## 2. Why did federal law prevail over state law?

### B. Federalism

Another basic legal principle vital to an understanding of our legal system is that of federalism. Students must understand that there are federal laws and state laws to which we are subject and that there are rules that determine how they coexist. While federal law will often preempt state law, the federal law must generally be derived from an enumerated source of authority.<sup>65</sup> Thus, while federal law is often viewed as “supreme,” students should not underestimate the importance of state law. The vast majority of law that affects us on a daily basis is state law.<sup>66</sup>

*Roper* provides an opportunity to examine the interaction between state and federal law. It illustrates how laws can and regularly do vary greatly among many of the 50 states.<sup>67</sup> It is a good example of a situation in which a federal Constitutional

originalist approach to interpreting the “cruel and unusual punishments” clause of the Eighth Amendment, see Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1182-88 (1993).

<sup>62</sup> *Roper*, *supra* note 1, at 587 (Stevens, J., concurring).

<sup>63</sup> *Id.* It is amusing to see the battle of rhetoric between Justices Stevens and Scalia for the soul of, or at least the blessing of, Alexander Hamilton. What *would* Alexander Hamilton have done in this case? For an article that discusses how both Stevens and Scalia have interpreted the writings of Alexander Hamilton, see David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 Minn. L. Rev. 755 (2000).

<sup>64</sup> This will continue to be of interest as we watch the emergence of the “Roberts Court.” See the section on “Supreme Court Watching,” *infra* notes 79-82 and accompanying text.

<sup>65</sup> Article I, Section 8 of the Constitution enumerates the powers of Congress. This is an important source of legal authority to discuss in any Legal Environment or Business Law course, and is addressed by most of the textbooks. See, e.g., BAGLEY & SAVAGE, *supra* note 53, at 53; CHEESEMAN, *supra* note 53, at 63.

<sup>66</sup> Contract law, property law, tort and product liability law, agency law, employment law, and family law are all derived largely from state law.

<sup>67</sup> *Roper* discussed not only the different age requirements that states have for capital punishment, see *supra* note 22, but also included appendices for the different age requirements states have for jury service, and for marriage without parental or judicial consent. *Roper*, *supra* note 1, at 581 -86.

right supersedes state legislation. It also provides a great opportunity to compare the instant case with the steady stream of prominent cases that inevitably involve the boundaries of federal and state law.

For example, in the much-publicized *Schiavo* cases,<sup>68</sup> much attention focused on the federal review of a state law issue. The courts determined that state law should prevail. This situation provides an excellent contrast to *Roper*. Students should understand why federal law prevailed over state law in *Roper*, but why state law prevailed over federal law in *Schiavo*.

**3. How did the Supreme Court end up reviewing a state court decision? How important were the Court's previous decisions? What about the future?**

C. Court Systems

1. Judicial Review

While *Roper* is certainly not unique in this regard, its procedural history provides an opportunity to introduce or review the basic structure of court systems. The case originated in a state trial court with a jury. The jury found the defendant guilty and recommended the death penalty. The trial judge accepted the recommendation and sentenced the defendant to death. The defendant's motion to set aside the conviction and sentence was denied. On appeal, the Missouri Supreme Court affirmed the conviction and sentence.<sup>69</sup> After the United States Supreme Court handed down its decision in *Atkins*,<sup>70</sup> banning the execution of the mentally retarded, the defendant claimed that his sentence, too, violated the Eighth Amendment. The Missouri Supreme Court agreed.<sup>71</sup>

That the United States Supreme Court agreed to hear the case presents two more topics for discussion. First, one can review the appellate process in which the Court grants certiorari in so very few cases.<sup>72</sup> Second, one can discuss why some

<sup>68</sup> These cases involved the highly volatile and controversial issue of whether and when the life support of a person in a persistent vegetative state can be removed. A fifteen-year battle between the husband and the parents of a comatose woman finally ended after unusual forays into state executive powers, the Congress, and the federal court system (including three separate decisions by the Supreme Court within one week denying requests for injunctive relief or certiorari). Ultimately, the federal courts refused to overturn a matter involving state law. A good collection of materials in this case, including links to all the legislative, executive and judicial actions, is available at <http://news.findlaw.com/legalnews/lit/schiavo/index.html>. The issues of physician-assisted suicide and the right to die provide excellent material for discussion of basic legal principles. See Jordan M. Blanke, *Using the Issue of Physician-Assisted Suicide to Teach Basic Legal Principles*, 16 J. LEGAL STUD. EDUC. 315 (1998).

<sup>69</sup> *State v. Simmons*, 944 S.W.2d 165, cert. denied, 522 U.S. 953 (1997). A petition for a writ of habeas corpus was denied. *Simmons v. Bowersox*, 235 F.3d 1124 (8th Cir.), cert. denied, 534 U.S. 924 (2001).

<sup>70</sup> *Supra* note 6.

<sup>71</sup> *State ex rel. Simmons v. Roper*, 112 S. W. 3d 397 (2003).

<sup>72</sup> According to information posted at the official web site of the Supreme Court of the United States, "[t]he Court's caseload has increased steadily to a current total of more than 7,000 cases on the docket per Term. ... Plenary review, with oral arguments by attorneys, is granted in about 100 cases per Term.

state supreme court cases are reviewable and some are not. Because the Missouri case involved an alleged infringement of a federally protected right and because the Supreme Court wanted to review the issue, the Court granted certiorari.<sup>73</sup>

## 2. Precedent

In discussing the very nature of a judicial decision in a common law legal system, one must address the notion and importance of precedent.<sup>74</sup> General principles teach that lower courts are typically bound by the decisions of higher courts.<sup>75</sup>

In *Roper*, Justice Scalia's dissent chastised the Court for not admonishing the Missouri Supreme Court's "flagrant disregard of our precedent in *Stanford*."<sup>16</sup> Scalia stated that it is the Supreme Court, and not any other court, that has the prerogative to overrule a precedent, and concluded, that to "allow lower courts to behave as we do, 'updating' the Eighth Amendment as needed, destroys stability and makes our case law an unreliable basis for the designing of laws."<sup>77</sup>

This backdrop provides an excellent starting point for a discussion about the necessity of a legal system that is both predictable and flexible. While students often approach this concept with skepticism - believing that these two attributes are contradictory - they usually accept the notion when presented with a situation like this, where social values may have changed over time.<sup>78</sup> While it is important for the law to be predictable, it must also be flexible enough to adjust in order to accommodate social change. This adjustment itself is, arguably, predictable.

Formal written opinions are delivered in 80-90 cases," at [http://www.supremecourtus.gov/about/jus\\_ticcaseload.pdf](http://www.supremecourtus.gov/about/jus_ticcaseload.pdf).

<sup>73</sup> Under the so-called "Rule of Four," the Supreme Court will agree to review any case that it is authorized to review when four or more of its nine justices so decide. In *Roper*, at least four of the justices decided to review the Missouri decision. For a discussion of the "Rule of Four," see Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. Q. 389 (2004); David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J. L. & POLITICS 779 (1997); Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067 (1988).

<sup>74</sup> Any lecture addressing the various sources of law inevitably includes a discussion of the history and evolution of the common law and its reliance on precedent. Most Legal Environment and Business Law textbooks address this. See, e.g., BAGLEY & SAVAGE, *supra* note 53, at 107; CHEESEMAN, *supra* note 53, at 9-10; MILLER & Cross, *supra* note 53, at 10; MILLER & JENTZ, *supra* note 53, at 10-11, 18. For an article that discusses and compares two different theories about the significance of precedent on the Supreme Court, see Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903 (2005).

<sup>75</sup> The doctrine of *stare decisis* is another important basic legal principle that is routinely covered by Legal Environment and Business Law textbooks. See, e.g., BAGLEY & SAVAGE, *supra* note 53, at 107-10; CHEESEMAN, *supra* note 53, at 14-17; MILLER & CROSS, *supra* note 53, at 10-12; MILLER & JENTZ, *supra* note 53, at 11-13. For an article tracing the history of the doctrine and focusing on its application by the Supreme Court, see Robert Barnhart, Note, *Principled Pragmatic Stare Decisis in Constitutional Cases*, 80 NOTRE DAME L. REV. 1911 (2005).

<sup>76</sup> *Roper*, *supra* note 1, at 628-29 (Scalia, J., dissenting).

<sup>77</sup> *Id.* at 630.

<sup>78</sup> See *infra* notes 83-87 and accompanying text.

### 3. “Supreme Court Watching”

Like any other 5-4 Supreme Court decision, this case presents an opportunity to examine the perceived “alignment” of the justices. This case is fairly typical in its split. On one side, there are the four justices often described as being left of center - Stevens, Souter, Breyer and Ginsburg. On the other side, there is the very consistent block of the three most conservative justices - Rehnquist, Scalia and Thomas. It is only a minor surprise that it is Justice Kennedy who joins the former group to comprise the majority, rather than Justice O’Connor, who has most often been the “swing” vote in 5-4 decisions.<sup>79</sup>

Justice Kennedy has often been described as a strong proponent of First Amendment rights, and thus it probably should not be too surprising to see him align with the more liberal judges in this case.<sup>80</sup> It may be that Kennedy is becoming a staunch defender of Bill of Rights protections in general, rather than just those found in the First Amendment. Also not surprising is Justice O’Connor’s strong position regarding legislative versus judiciary powers. As a former legislator, she has always vehemently defended the delineation of those two branches.<sup>81</sup>

Finally, as is always true when discussing a 5-4 decision, one needs to emphasize the tenuous nature of such a ruling.<sup>82</sup> In all cases with this closest of

<sup>79</sup> The *Harvard Law Review* prepared a comprehensive statistical analysis of the voting patterns of the nine Supreme Court Justices, who, after the 2003 Term, were the first group of nine ever to preside over the Court together for a full decade. *Statistical Retrospective: Nine Justices, Ten Years: A Statistical Retrospective*, 118 HARV. L. REV. 510 (2004). During the ten-year period from 1994-2003, the Court handed down 175 5-4 decisions. Justice O’Connor was among the majority 136 times, or 78% of the time. *Id.* at 521, Table V. If you consider the Court to comprise a three-member “arch-conservative” block (Rehnquist, Scalia and Thomas) and a four-member “liberal” block (Stevens, Souter, Ginsburg, and Breyer), then the two “moderate-conservative” members (O’Connor and Kennedy) truly become the “swing votes.” In 82 of the 175 5-4 decisions (47%), O’Connor and Kennedy joined the “archconservative” block to form the “conservative” majority. O’Connor “swung” to join the “liberal” block, forming a majority in 28 cases (16%), while Kennedy “swung” to join the “liberal” majority (instead of O’Connor) in 14 cases (8%). No other combination of five justices appeared together more than 3 times in those 175 5-4 decisions. *See also* Thomas W. Merrill, *Childress Lecture: The Making of the Second Rehnquist Court. A Preliminary Analysis*, 47 ST. LOUIS L.J. 569, 569-70 (2003), wherein the author comes to the same statistical conclusions as in the Harvard study, referring to the same time period as the “second Rehnquist Court.” “Moreover, note that the percentage of 5-4 cases gradually increased in the late 1990s, reaching an all-time high of 31% in the 2000 Term, with the dominant conservative coalition responsible for 17% of all decided cases in that year. This provides some evidence that the conservative majority is, in fact, becoming stronger and is controlling an increasing percentage of the decisions on the Court’s docket.” *Id.* at 588-89.

<sup>80</sup> “Justice Kennedy has also been characterized as a ‘swing vote,’ particularly in the Court’s First Amendment and religious freedom jurisprudence.” *Statistical Retrospective*, 118 Harv. L. Rev. at 512 n. 10. *See also* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 1009 (2003), in which the author refers to the possibility of winning “over a swing vote, such as Justice O’Connor or Justice Kennedy.”

<sup>81</sup> In *Roper*, Justice O’Connor stated that as a legislator, she would probably support legislation setting a minimum age of 18 for execution, but that as a jurist, she was reluctant to override the judgment of elected legislatures. *Roper*, *supra* note 1, at 607 (O’Connor, J., dissenting).

<sup>82</sup> Because of the inherent vulnerability of a 5-4 decision, one commentator suggests the following rule: “The Supreme Court may not declare an act of Congress unconstitutional without a two-thirds majority. Shugerman, *supra* note 80, at 894.

possible margins, it takes only one justice to change his or her opinion, or one justice to be replaced on the court, to completely reverse the holding. Certainly with two new justices on the Supreme Court, there will be much speculation as to the direction that the Court will take on many of these close issues.

4. ***Why did the Supreme Court overrule a decision it had just made 15 years earlier?***

D. *Evolution of the Law*

The law must and does evolve as needed to reflect changes in societal values, mores and principles.<sup>83</sup> There is not a more important lesson to be learned in the study of the law. And it is this notion that dominates the discussion in *Roper*.

At the very core of the decision is the Court's discussion of "the evolving standards of decency that mark the progress of a maturing society."<sup>84</sup> The Court examined an issue that has been and continues to be the subject of much controversy.<sup>85</sup> It discussed a series of relatively recent cases - *Thompson, Stanford, Penry* and *Adkins* - that ultimately culminated in a reversal of opinion, based largely on evolving societal values.<sup>86</sup>

*Roper* presents an opportunity to examine an issue where undeniably there has been a trend - elimination of the juvenile death penalty - but where there may be some question about whether it had yet reached the status of a "national consensus." At what point in time does a change in moral values dictate a change in the law, and should that be determined by the legislative branch or the judiciary branch?<sup>87</sup> These questions are certainly at the heart of a discussion on the evolution of the law.

<sup>83</sup> A good illustration of how the law changes over time to reflect changes in societal values is *Plessy v. Ferguson*, 163 U.S. 537 (1897) (where the Court enunciated the "separate but equal" doctrine in order to justify legally a segregated railway system) and *Brown v. Board of Education*, 347 U.S. 483 (1954) (where the Court was no longer able to ignore changes in societal values and mores and declared a segregated school system to be in violation of the equal protection clause/

<sup>84</sup> *Roper*, *supra* note 1, at 561.

<sup>85</sup> The issue of whether or not there should be a death penalty remains controversial. In our relatively recent history, we have seen the death penalty banned and then resurrected. In 1972, the Supreme Court declared the death penalty to be cruel and unusual punishment as it was then being applied. *Furman v. Georgia*, 408 U.S. 238 (1972). Four years later, the Court held that the death penalty was not per se unconstitutional. *Gregg v. Georgia*, 428 U.S. 153 (1976). For a good history of the death penalty in America, see Symposium, *The Honorable James J. Gilvary Symposium on Law, Religion, and Social Justice: Evolving Standards of Decency in 2003: Is the Death Penalty on Life Support?: The Death Penalty Experiment: The Facts Behind the Conclusions*, 29 DAYTON L. Rev. 223, 223-32 (2004). Some states have a death penalty and some do not. The 12 states that have completely abolished the death penalty are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin. See *supra* note 9.

<sup>86</sup> See *supra* notes 11-25 and accompanying text.

<sup>87</sup> For a discussion on how judges can respond to changes in society, see Aileen Kavanagh, *The Idea of a Living Constitution*, 16 CAN. J.L. & JURIS. 55,79-86 (2003).

### 5. *What role should international law play in determining U. S. law?*

#### E. *International Law*

Another issue addressed by both the majority opinion and Scalia's dissent is the role that international opinion should play in deciding whether the United States should categorically prohibit the execution of those committing crimes while minors. The Court discussed the fact that the United States was one of the last countries to ban the practice of executing juvenile offenders and one of only two that had not ratified the relevant United Nations convention.<sup>88</sup> The majority concluded that "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty.... The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation of our own conclusion."<sup>89</sup>

Scalia disagreed with this position, stating that "the basic premise of the Court's argument - that American law should conform to the laws of the rest of the world - ought to be rejected out of hand."<sup>90</sup> He does not believe that the Court's interpretation of law, particularly Constitutional law, should be guided, or even influenced, by international law.<sup>91</sup>

Once again, the issues raised by these two positions are unavoidable in our ever-smaller global community. As international laws become more common and more important, there will be an ever-increasing number of conflicts between American law and the laws of other countries.<sup>92</sup> We and our students will see this issue evolve greatly over the coming decades.

<sup>88</sup> See *supra* notes 26-30 and accompanying text.

<sup>89</sup> *Roper*, *supra* note 1, at 578.

<sup>90</sup> *Id.* at 624 (Scalia, J., dissenting).

<sup>91</sup> In her dissent, Justice O'Connor stated that she believed that it is appropriate for the Court to consider international law: "I disagree with Justice Scalia's contention . . . that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency." *Id.* at 604 (O'Connor, J., dissenting). In *Roper*, however, regardless of whether or not there was an international consensus, she did not see a "genuine American consensus." *Id.* at 605 (O'Connor, J., dissenting).

<sup>92</sup> One of the more prominent of the recent cases is the Yahoo! France case, in which U.S. courts are trying to figure out how to treat a French judgment that, if enforced, would basically strip away a good amount of First Amendment protection of speech on the World Wide Web. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004), *vacated, reh'g granted*, 2005 U.S. App. LEXIS 2166 (9th Cir., Feb. 10, 2005).